HERMENEUTICS AND JUDICIAL INTERPRETATION

fernando armando ribeiro
Hermeneutics and judicial interpretation

1 Introduction; 2 The role of the judge: some reflections; 3 The evolution of hermeneutics; 4 Gadamer’s philosophical hermeneutics; 5 The new meaning of language; What can law learn from traditions?; 7 Analyzing some cases; 8 The adversarial legal system and the importance of argumentation; 9 Conclusion; 10 Bibliography.

1 Introduction

The study of law is a constant search. Jurists search for the meaning of the Constitution and for Justice. The search itself is often not certain of its own aims and possibilities. It is often done considering only the silence of the text, as if it could know everything and could have all the answers.

However, the law is not only what is contained in the texts of statutes and precedents. The legal texts only bring abstract commandments, able to regulate interpersonal relations. Therefore, the search for law in the legal texts is fruitless, if it does not consider the role of the interpreter and the plurality of all the other norms – by themselves product of interpretation – which composes the legal system.

Modern hermeneutics teaches us that everything that is perceived and represented by the interpreter refers to a process of interpretation, and that the world comes to mind through language. If the language is already a form of interpretation, hermeneutics is inseparable from human life and, therefore, inseparable from Law.

Therefore, Law depends on the hermeneutic mediation. Without hermeneutics there is no law, only normative texts. Only through the discourse can Law express the valid and invalid, the reasonable and unreasonable, and the dialectical affirmation of human freedom.

To investigate and reflect the application of law in a democracy and in the context of pluralism requires the recognition of the inevitability of critical interpretation of texts. In this sense, Gadamer's philosophical hermeneutics can be considered indispensable to the study of Law. It demonstrates its critical and reflective dimension when understood as a dialogue with tradition.

Making use of Gadamer's philosophical hermeneutics, this paper investigates the limits and possibilities of judicial interpretation of law. Therefore, from a
comparative analysis, it tries to point out the ways of using history and tradition in legal interpretation, in both Common Law and Civil Law systems. We will try to problematize some themes of great importance in the American contemporary debate, such as the so called originalism, judicial activism and legitimacy in Law. A study of cases will draw conclusions about how hermeneutics can promote democracy and strengthen the legitimacy of Law.

2 The role of the judge: some reflections

In the Civil Law system, the modern era had presented the law as an incarnation of the State, which would find the very meaning of its sovereignty through the statutes. To the judge understood as a simple instrument of the State rested the simple role of applying the law according to the model of syllogistic application. Member of a power of reduced importance, the Constitution would lie beyond its reach, considering that the concept of law didn´t cover the normative force of the Constitution, considered as a dimension able to establish the public space. When the legal positivism came to its peak, with its concerning about the abstract system of Law, judicial interpretation was also separated from the force of tradition, as well as from the possibility of rescuing the fundamental principles of the legal system itself.

This formalist facet was present not only in the Civil Law tradition. As a characteristic of the 19th and early 20th century legal experience, it also influenced the Common Law. Analyzing the behavior of two 19th century judges, Roger Berkowitz offers a reflexive understanding of how the victory of positivism made judges leave behind the duty to truth and justice. Berkowitz makes a deep and interesting study about the similarities shared by the fictional figure of Captain Vere and the honorable American Supreme Court Justice Oliver Wendell Holmer, Jr. The first, Captain Vere was a character of Herman Melville’s mythic tragedy Billy Budd – Sailor (an inner narrative). The second, Oliver Holmes, one of the most distinguished American Justices and legal thinker. Among other similarities, neither of them understood themselves, as judges, to be serving in a just cause or contributing to the truth or justice. They served to the state, considering law as a formal instrument to guarantee State’s maintenance. Vere despair the absence of a natural law and the impossibility of justice, and only recognizes that order must be guaranteed “less by an amoral positive law, than through a radical recollection of form”, what denotes his intrinsically moral relativism. Holmes by the other side declaring, “I hate justice. Justice is not my job. My job is to play the game according to the rules”. He refused justice as a standard of judgment, serving as a judge

---


“with a soldierly blind faith in the necessity of the Weberian state monopoly of violence”.3

A proper sum of this kind of understanding that tears moral debates from law is presented by Berkowitz when he shows how Holmes philosophical position that “man’s destiny is to fight” and that “life is action and passion” leaded him to devote his life to the commitment of duty. His duty was not to fight for any specific political position, but for a heroic way of life. The duty is to sacrifice ourselves in the hope that our lives will be meaningful for some greater and external end.4

Those perspectives can be explained by different reasons. Among them, with prominent evidence, is the historical evolution of the law which led it through the medieval times until the modern age. It is a process that came from a pluralistic view of the sources of Law, predominant in the Middle Age and supported by the idea of territory, until its overcoming by the idea of nation, held in the uniformity and formalization of Law. As described by Laurent Mayali, “the Code Civil allay the concerns (of the new citizens), by giving to the national identity a legal content that local laws now discredited were unable to provide”.5 The Code represents a symbol of the formalization movement that started with the idea of the Modern State. It could be seen as a concretization of all the human values and rights that had been struggling throughout history. If the people is now the new sovereign, and it speaks through legislation, laws and statues should be seen as his voice. And the more systematic and precise is the legislation, the more restrict is the interpretation, more respected will be the self government principle, so as the will of the people.

Law’s interpretation could then be reduced to a subsumption process. This used to be a Cicero’s aphorism6, who in De legibus (III, I) said the magistrate is the spoken law; and the law, the mute magistrate. Much later it was incorporated to the ideology of the Liberal Modern State, that can be understood by Montesquieu’s words, written in the Le sprit des lois, according to whom the judge should be merely seen as “la bouche de la loi”, the law’s mouth, responsible only to pronounce what was already contained in legal statutes.7

However, the tragic events happened under the totalitarian states of the twentieth century demonstrated with strong force, that the rationality of the Law shouldn’t be separate from the normative order of morals. The search for justice, reborn in contemporary law meant, in first place, that Law depends on principles, and second, that before making the law positive, it needs to be legitimated. And we can never forget

---

the importance of the contribution brought by the philosophical hermeneutics to the Law. The new concept of language and its role in our understanding – the so called “linguistic turn” should never be forgotten by the contemporary jurists.

3 The evolution of hermeneutics

Historically hermeneutics has come gradually to the field of human sciences, and in the modern age acquired different meanings. According to Richard Palmer the field of hermeneutics has been interpreted as a) a theory of Bible exegesis; b) a philological methodology, generally speaking; c) a science of all linguistic understanding; d) the methodological basis of the so called *geistwissenschaftern;* e) a phenomology of the existence and of the existence understanding; f) interpretative and iconoclastic systems used by men in order to achieve the meaning underlying myths and symbols. They are all different perspectives by which hermeneutics have been understood.\(^8\)

The model of hermeneutics, since the scholastics until the historic-evolutionary system consist in the study of the processes used to establish the meaning and the reach of language’s expressions. However, since Heidegger, hermeneutics studies cannot be conceived as a mere instrument to make understandable the subject of study. To the German philosopher, the proper understanding of the concept depends on a view of its ancient meaning. Hermeneutics comes from the Greek word *hermeneuein*, which derives from Hermes, the god’s messenger. Hermes was connected to a function of transmutation, that is, he transformed those symbols that human understanding could not reach in something that human understanding could properly apprehend. But in this process something was always subtracted. To translate to the human language what was said by the gods Hermes always put something that was not already included, in order to give more proper meaning to the statement. That’s why the translating process, as a model of hermeneutics in action, brings inevitably an assignment of meaning. And it cannot be considered as a problem but a condition of possibility. The comprehension is part of the previous structure of meaning.

However, we can realize a certain resistance to incorporate these new contributions to the field of Law. One of the reasons could be the almost natural resistance usually opposed to new ideas. The other could be seen as the traditional examination of legislation that supports the incorporation of classical notions of qualitative division of powers. According to this only the legislature could hold a volitional act of nature, bequeathing to the magistrate merely to discover the will of the law or the legislature’s will.

In the Civil Law system, it is worth to remember the lesson of Dalmo Dallari according to whom the use of various methods of interpretation gives the interpreter a sense of relief in the face of the injustices eventually resulting from the law. And it can

---

be somehow comfortable. Moreover, it is a common thought, came from the positivist school, that the use of interpretative methods brings more security, reducing the impact of subjectivity.  

4 Gadamer’s philosophical hermeneutics

Hans-Georg Gadamer conceived hermeneutics very differently. Following the path of his master Heidegger, Gadamer says, "being that can be understood is language". The language in the context of Gadamer's Philosophical Hermeneutics is the total mediation of the experience of being. And, in these terms, the limit is imposed to all hermeneutical experience of meaning. For Gadamer, being can never be understood in its totality, because for everything that triggers a language, it always refers beyond the statement as such. The self cannot be understood in its entirety and cannot therefore claim to be a complete interpretation. It is noteworthy that, in the preface to the 2nd edition of Truth and Method Hans-Georg Gadamer states that “if there are any practical consequences of the present investigation, it certainly has nothing to do with an unscientific ‘commitment’; instead, it is concerned with the scientific integrity of acknowledging the commitment involved in all understanding”.

For Gadamer, if the experience of art proves that the truth rests beyond the sphere of methodical knowledge, something similar is true for all the sciences of spirit (Geisteswissenschaften) in which the historical tradition is transformed into an object of research. It is true that the experience of historical tradition goes basically by what is searchable. However, Truth and Method is proposed to expose the truth as happening, which is always an actualization, but already steeped into the tradition. In this sense, Gadamer brings some important contributions that should be noted.

The historical horizon is the possible range of view from a particular point in history, i.e., the result of the dialectical contrast of past and present. In the words of Gadamer, "the interpreter’s own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and possibility that one brings into play and puts at risk, and that helps one truly to make one’s own what the text says”.

The historic experience shows that man's access to the world comes from the point of view of his hermeneutical situation, which is his specific position in front of the phenomena. The hermeneutic situation is tied to the set of experiences gathered in history that constitutes our range of vision and shape our interactions with phenomena.

---

The prejudices would be an advance and diffuse prior meaning of the text influenced by the tradition in which situates the interpreter. In other words, it is the product of the intersubjective relationship the interpreter keeps with the world. The prejudice – or pre-understanding – is a part of the understanding itself. In sum, it ontologically constitutes the comprehension.

The understanding is formed through the pre-understandings. According to Gadamer, “there is undoubtedly no understanding that is free of all prejudices, however much the will of our knowledge must be directed toward escaping their thrall”.\(^{15}\)

Therefore, the hermeneutic situation of human beings leads them to an object with a certain view. The phenomenon is always seen in a mediated way, is always represented. We do not know something in its integrity, but always something as something. Every phenomenon that confronts human mind is never shown in its purity, objective and ahistorical form, as if isolated and ready to explore in its raw state. But it appears tinted in the colored spectrum which constitutes the ray of sight of the observer. This does not mean the impossibility of knowledge of things, but only that things can only be known in a mediated way.

Gadamer points out that the historical horizon does not mean enclosure, but opening. Tontti observes that awareness of the historical horizon allows a better glimpse of it towards a more correct standard.\(^ {16}\) The concept of historical perspective comes to the consciousness of the plurality of meanings in which there is a constant shifting of changing meanings according to each period of time.

According to Gadamer, one cannot isolate the interpreter and the object of interpretation. In this sense, the meaning of the text is not waiting for the interpreter. The meaning rests in an event that evolves the text (which is shown and is ahead) to the interpreter, and the interpreter (which enters the language and reveals) to the text. This dual way establishes the distance between the text and the interpreter, knowing that both, even when together, are hidden (hiding) and shown (unveiling).

The understanding that comes through the hermeneutic dialogue involves merging the horizon of the interpreter with the horizon of what is interpreted. And from the inter-relationship of the interpreter's own horizon with the horizon of the text a new one is born. For Gadamer, the fusion of horizons is what takes place in conversation in which something that is not only mine or my author’s, but common, is expressed.\(^ {17}\) The interpreter's understanding is part of an event that stems from the actual text that needs interpretation. In the fusion of horizons rests the idea that the truth of the text is not in unconditional submission to the opinion of the author, and not only to the interpreter’s preconceptions. In the words of Gadamer: “it is important to avoid the error of thinking that the horizon of the present consists of a fixed set of opinions and valuations, and that the otherness of the past can be foregrounded from it as from a fixed ground. In fact the

horizon of the present is continually in the process of being formed because we continually have to test all our prejudices”.

The truth of a text is not in the unconditional submission to the author's opinion, and not only in the prejudices of the interpreter, but in the fusion of the horizons of both. The task of discovering the truth of the object is not at all helpless. When the interpreter focuses on an object is not only the object he sees, but also human action reflected. The interpretation is no longer a reproductive process, it is a productive process, because the interpreter does not perform only a reproductive activity of the text, but he updates it according to the circumstances at the time. Modeling his historical horizon, the interpreter gives rise to a new horizon in the present. This comes to be an evolution of the limited historical horizon to a new and superseded horizon.

It should be noted that the fusion of horizons involves another kind of fusion, that one between understanding, interpretation and application. In a reversal of the classic position, according to which first comes the interpretation and then the understanding, Gadamer shows that something always needs to be understood before being interpreted. For the philosopher we always interpret, and for the interpretation there must be a previous understanding (prejudice or pre-understanding). However, for Gadamer the application is not a third moment in a process of understanding and interpreting. For Gadamer, interpretation is nothing more than to explicit understanding and not a specific moment, distinct from it. The application will not proceed further, but in the very act of understanding.

The principle of history of effect leads us to recognize the influence that history has on human being and that this influence shapes his way of understanding. It means that each time has a peculiar way of understanding a text. Because it is presented in a peculiar manner, as the text is part of the set of a tradition in which every age has an objective interest and which tries to understand itself. The true meaning of a text, as it presents itself to his interpreter, does not depend merely on its author and its public status. For this meaning it is always determined also by the historical situation of the interpreter and, consequently, the whole historical process. The history of effect operates, consciously or not in any understanding, conditioning and controlling the fusion of horizons. The human understanding is endowed with an intrinsic temporality.

The hermeneutic dialogue takes place through the history of effect, which is the reflexive understanding that we should perceive in every text. However, Lopes emphasizes that the interpreter awareness of the text is part of the history of effect of the text itself. That's because all understanding is historical and is incorporated into the historical process, irrespective the interpreter's will.

---

But the authority of tradition does not take away the freedom of the interpreter, as it can be rationally controlled. In the words of Gadamer: “It is not only that historical tradition and the natural order of life constitute the unity of the world in which we live as men; the way we experience one another, the way we experience historical traditions, the way we experience the natural givenness of our existence and of our world, constitute a truly hermeneutic universe, in which we are not imprisoned, as if behind insurmountable barriers, but to which we are opened”.

Therefore, the recognition of the history of effect does not mean the absence of critical sense. The other way, facing a future time when the prejudices originated from the tradition no longer respond, brings the possibility of differentiation between the true prejudices, which make possible our understanding, and those false prejudices that only bring misunderstanding.

The horizon of the interpreter necessarily involves prejudices, and these are constantly faced with new dimensions of understanding. In this confrontation, the prejudice returns to the interpreter already changed. Gadamer calls it the hermeneutic circle. The hermeneutic circle is the moment in which the interpreter, through his prejudices, participates in the construction of the meaning of the object (shaped by such prejudices), whiles the object itself, in the course of the hermeneutical process, changes the understanding of the interpreter.

5 The new meaning of language

Language in Gadamer is thought from a discussion with analytical philosophy and has, as a theoretical background, among others, the theory of speech acts by John Austin. Without considering the specifics of each analytic philosopher, philosophy of language is embodied in the idea that all thought only is possible through the signs. The thought does not occur immediately, but is mediated by signs, and the same happens with the knowledge and access to reality. So the thought becomes intrinsically dialogic rather than focused on individuals, as occurred in the Cartesian tradition.

We can say that there are two very different generations concerning the philosophy of language. For the first generation everyday language is full of problems, ambiguous and imprecise, and it needs to be replaced by a logic and formal language. Therefore, it would remain to the philosophy of language this mission. To the second generation, the role of the philosophy of language is to clarify concepts such as truth, meaning and reference. Austin belongs to this generation.

Austin conceived the Theory of Speech Acts classifying the three types of speech acts as elements of his theory. Locutionary, illocutionary and perlocutionary acts. According to Austin, every act of language starts when you say something. The

---

locutionary act covers every dimension of speech as referred to the presence of syntactic/semantic content.\textsuperscript{23} The illocutionary act, in turn, refers not merely the description, but the creation of a new object. The illocutionary act refers to the manner and direction you use language in particular situations and for a defined context.\textsuperscript{24} Finally, the perlocutionary character concerns the effects that the speech act can cause a person. This effect, unlike the illocutionary act, is conventional and is not related to a context. The effect can be expected or not, just as can be deliberate or not. It is a type of effect on which you cannot have control.\textsuperscript{25}

It is important to emphasize that the separation between locutionary, illocutionary and perlocutionary acts should be seen only from the technical analysis perspective, which was used merely to formulate the Theory of Speech Acts. According to Austin, the three acts of language always occur simultaneously. Therefore, the language is not simply a description of reality, when the man speaks he is acting and creating objects in the world.\textsuperscript{26}

Following the studies of Austin, Gadamer states that "language is the universal medium in which happens the understanding." Only through the language we can understand. And language cannot be understood merely as the description of objects. It is through language that we can create and act in the world.\textsuperscript{27} That will allow Gadamer to interrelate the intrinsic dialectic in the relationship between thought and speech as a conversation. And also the dialectic relation between question and answer is relevant to the interpretation of any text. In this sense, the author comes to say that "the linguisticality of understanding is the concretion of historically effected consciousness".\textsuperscript{28}

Not only tradition, but the very nature of linguistic understanding has a fundamental relationship with linguistics. As Gadamer points, the world itself is the common ground, not trodden by anyone and acknowledged by all, that unites all who speak to each other. All forms of community life are forms of linguistic community, and moreover, are forms of language.\textsuperscript{29} The linguistic worldliness of the world in which we have been always living is the condition for all of our concepts and thoughts. There is no possible perspective outside of history, as there is no history without language. It is understood then the speculative character inherent to language. Words do not copy the entity, but let it come to speech the relationship with the whole being.

\textsuperscript{26} AUSTIN, John L. \textit{How to do things with words}. Cambridge: Harvard University Press, 1975, 85-94.
\textsuperscript{29} GADAMER, Hans-Georg. \textit{Truth and Method}, p. 443.
6 What can Law learn from traditions?

The modern Law was built over some patterns such as predictability and security, and it has been a difficult task for judges and lawyers to face the inevitable open texture of Law. So far, whether in the Common Law or in the Civil Law systems, jurisprudence has tried to cover this inherent “imperfection” using some interpretation tools and patterns in order to limit the level of generality. Among those, the appeal to the original intention has been one of the most important.

The originalism defended, among others, by Justice Antonin Scalia and Robert H. Bork, frequently refers to historical traditions as a source of Law, or as something able to provide meaning to legal texts, or craft the precedents with a special consistency. It would be the only way to really interpret the Constitution. All the other approaches would be trying to change the Constitution, and not to interpret it. But the use of historical traditions suggested by Scalia is very different from that one came from the philosophical hermeneutics. As some scholars have noted, in Scalia’s argument there is an implicit suggestion that historical traditions come equipped with instruction manuals explaining how abstractly they are to be described. If we consider the historical traditions this way, they become subtle to serious manipulations, what compromises the objectivity, strongly advocated by the originalist school. There will always be a question remaining unanswered, which is how can we identify the appropriate time to reject historical traditions, and what should we reject about them? We can find in Scalia a paradoxical answer which strengthen even more the difficulties to understand his coherence, and shows the contradictions of the originalist proposal. Scalia says that “even if it could be demonstrated unequivocally that public flogging and hand-branding practices were not cruel and unusual measures in 1791, these practices would not be sustained by our courts”.

As questioned by Tribe and Dorf, what precisely is the “most specific level at which a relevant tradition “exists? Are positive laws more or less specific than social attitudes? Are social attitudes about one subject, say gender, more or less specific than social attitudes about another, such as religion? That’s why the originalism cannot escape from the hermeneutical approach. Only through hermeneutics and argumentation one can answer the questions came before the historical search for intentions. As put by Sortirios Barber, originalism “assumes the theorist have done their philosophic work successfully – assume they’ve shown who ought to count as framers, what should count as evidence of their intentions, how to deal with disagreements among leading framers, and so forth. Intentionalist theorists still would face the question – a philosophic

---


question – of what kind of interpretation their judges should seek: *abstract intentions or concrete intentions*?"34

The use of traditions is a form to make contextualization or to limit constitutional rights. The risk brought by the originalist approach is to flatten human language, action and comprehension. It can lead to a distortion of history in history’s name.35 A provocative insight about the constitutional interpretation and its reflexive dimension was conceived by Michel Rosenfeld, in his article “The identity of the constitutional subject”36. In an analysis of the deconstructive discourse Rosenfeld shows how the interpretation can forge the constitutional identity, and how the traditions can be used by the law. The fact, presupposed by Rosenfeld is in accordance with the hermeneutic conception, and it departs from the inherent incompleteness of the constitutional text. As he explains:

“A written constitutional text is inevitably incomplete and subject to multiple plausible interpretations. It is incomplete not only because it does not cover all subjects that it ought ideally to address, but also because it cannot exhaustively address all conceivable issues arising under the subjects that it does encompass. Moreover, precisely because of the incompleteness of the constitutional text, constitutions must remain open to interpretation; and that, in most cases, means open to conflicting interpretations that appear to be equally defensible.”37

To Rosenfeld, the interpretation issue must never be put apart from the problem of understanding and integrating traditions. That’s because the constitutional interpretation depends on a reflexive comprehension of the constitutional identity. And the constitutional identity is inevitably related with other identities such as the national, the ethnics, religious and cultural identities which are always in tension under the pluralistic dimension of contemporary constitutionalism. As said by Rosenfeld, “constitutional interpreters cannot be completely stripped of their national or cultural identity. Accordingly, the key question becomes how constitutional identity can distance itself sufficiently from the relevant identities against which it needs to forge its own image while, at the same time, incorporating enough elements from these identities to remain viable within its own sociopolitical environment.”38

According to Rosenfeld, the tools for the reconstruction are the negation, the metaphor and the metonymy. He recours to Hegel in order to explain the negation. The

way to conform the so called identity of the constitutional subject is reflexive and hermeneutical. It evolves three stages. At the first stage, the relation with the tradition is one of negation. There is a search for a different identity. An identity different from the one came from the pre-constitutional one. The features of this first stage are the repudiation of the pre-revolutionary past, the rejection of the traditional identities and the exclusion of the aggressive and anti-pluralist traditions.39 The second stage is characterized by the selective incorporation of the traditions left behind and not by a mere return to them. The traditions are evoked as long as they are compatible with the interests of the constitutionalism. At this moment we have a negation of the negation, i.e. the pluralism must reincorporate the conceptions of good previously denied, adopting an activist profile, knowing that the resulting tradition came from its own work.

The use of the metaphor corresponds to the Freudian concept of condensation. To combine and organize complex and multifaceted elements in terms of similarities it becomes possible to better apprehend the identities. To Rosenfeld, the metaphor plays a fundamental role in the legal rhetoric as well as in legal interpretation. An example could be found in the American dictum that “the Constitution is colorblind”. It should be seen as a metaphor to emphasize the similarities among the races, or in other words, what they share in spite of their differences.40

The dissenting opinions in Bowers v. Hardwick did not consider the homosexuality among different cultures in history. They focused at the similarities between homosexuals and heterosexuals through the individual view, considering that they both have “the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome”.41

The metonymy goes in an opposite direction of that one adopted by the metaphor. While the last one points to the similarities, the metonymy leads to a larger contextualization. And concerning constitutional rights, the use of the metonymy can lead both to its enlargement as well as to its restriction. It can be well illustrated by the majority opinions in Bowers v. Hardwick. The Supreme Court's majority refusal to extend intimate association privacy rights to protect consensual homosexual sex, was considered to be justified by traditional repudiation through criminalization of homosexual acts and by hostility towards homosexuality rooted in the Judeo-Christian religious tradition. The idea of the autonomous individual left alone to decide about his or her intimate associations was denied by the Justices in the majority in Bowers. The idea of the autonomous individual had to be contextualized with the historical traditions

and the precedents, in order to show the inapplicability of Griswold, which was considered to involve the right of privacy in the context of the marital relationship.

The process of interpretation is a process of reconstruction. But it does not mean that law should be seen as if really were a mirror for the readers. Even if it was possible to return to the original intention of the authors, as of the Framers – and, as Gadamer shows, it is not possible – this would be no guarantee for a proper interpretation. We must take the text seriously, because without text we don’t have norms. Or, in Gadamer’s lesson: who wants to understand a text must, first of all, let the text tell him something. The best way to interpretation is to search for the meaning in the dialectical interplay between the text and the attribution of meaning.

Law requires a perennial interpretation considering that the words of the law are not unequivocal. As Dworkin has shown, the reflexive (or philosophic) approach is the only interpretive dimension which is coherent to a written Constitution. It continues the tradition, but it will be a tradition of cultivating citizens who can think critically for themselves about the meaning of the common and shared lives, as well as their duties and commitments. The interpretative process of law does not mean the discovery of unequivocal or right direction, but, instead, means a productive interpretation originated from a process of understanding. In this process, the hermeneutic situation of the jurist merges with the legal text expressing something that is not only the prejudices of the interpreter, and not only the text. It is something that comes from the inherent difference between them, and appears as something new.

An interpretation can only be improved on a given context, and therefore, the concrete case becomes important. The case reflects a new situation in which the interpreter (the judge is primarily an interpreter) has to renew the effectiveness of the norm. Such effectiveness is not achieved by simply trying to reconstruct the original intent of the legislature. It is an attempt doomed to failure whereas the interpreter's pre-understanding takes part of the interpretive process. Renewing the effectiveness of the norm means to create a new meaning for the norm applied to a case. The horizon of the interpreter, with all his pre-understandings (his life experiences, study and knowledge of law) merges with the horizon of the legal case. From the inter-relationship of the horizon of the interpreter himself with the horizon of the case, a new meaning is born. This meaning needs to be deepened by the interpreter. Otherwise there will certainly be misconceptions and inauthentic preconceptions. Thus, the norm's text is only the beginning of a whole process of interpretation, since understanding is not a simple act of reproduction of the original meaning of the text.

Justice Stephen Bryer has said very appropriately that “as history has made clear, the original Constitution was insufficient. It did not include a majority of the nation within its ‘democratic community’. It took a civil war and eighty years of racial

---

segregation before the slaves and their descendants could begin to think of the Constitution as theirs. Nor did women receive the right to vote until 1920”.

It is valid to remember, with Justice Cardozo, that a legal principle, once enunciated, will tend to expand its logical limit, occupying fields for which it was not crafted. The danger, also noticed by the renowned Justice is that, in striving for a coherent and consistent body of law, we might so exalt abstract principles that we would lose sight of the commonsense of justice. But if a legal text – and a precedent is also a text – could cover all the hypotheses of application, then it would be a “perfect norm”. It would be as if we could draw a map that was perfectly set accordingly to the earth. But then, what advantages could we take from it? As said by Lenio Streck, if the reality could be transmitted as it is, we would be facing a paradox. And paradoxes are things about which we cannot decide. Law always demands decision. Therefore, it has to deal directly with the problem of interpretation, with all its difficulties, conflicts and problems.

7 Analyzing some cases

As we have seen, it is an interpretation fallacy that one that tends to read a normative text only in its semantic and literal meaning. It presents dangerous effects which come from disregarding the historical and pragmatic dimensions of language, and for not taking seriously the intrinsic systematic meaning of Law. The so called dis-integration effect can present good examples of the necessity of a broader view in legal interpretation. In the United States, the doctrine of the “reserved powers” is a good field to explore the effects of a dis-integrative interpretation. Historically, some used to say that some powers that are delegated to the Congress by the Constitution violate the reserved powers of the States. In some important decisions the Supreme Court has affirmed that this interpretation is not appropriate, because there is a linguistic impossibility in the constitutional text, which says that all “powers not delegated to the US by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. And it seems logic the argument that if a power is “delegated to the US – to the Congress by Article I – then the power in question cannot be reserved to the States. Tribe and Dorf propose a different interpretation of the subject, considering not just the Tenth Amendment alone. They argue that the Tenth Amendment should not be considered without a proper comprehension of the Seventh Amendment, ratified in 1913. The reason is that before 1913, the Senators were chosen

47 Streck, Lênio. Interpretando a constituição: Sisifo e a tarefa da hermenêutica, 2007, XXXIV.
by the Legislature, which certainly could give more support to the idea sustained by the Supreme Court decision. However, after the Seventh Amendment, when the Senators start being elected by the people directly, the conclusions should be changed.

In Brazil, we can also find a very important example of dis-integrative interpretation, and the discussions and reactions to it. The writ of habeas corpus 82.424-2, decided by the Brazilian Supreme Court (Supremo Tribunal Federal) became an emblematic decision, a leading case not only about “hate speech” and “freedom of speech”, but also for the important discussion about the limits of judicial interpretation concerning legal concepts. In this case, the Brazilian Supreme Court was judging a writ of habeas corpus concerning the possibility of freeing Siegfried Ellwanger, charged and imprisoned for having committed the crime of racism. His crime, typified by law, consisted of having edited, distributed and sold anti-Semitic books, as a writer and editor in chief of the private Press called Revisão Editora Limitada. According to the prosecution, the books contain and support anti-Semitic, racist and discriminatory messages. They intend thereby to induce and incite racial discrimination, sowing in their readers feelings of hatred, contempt and prejudice against people of Jewish origin. The other side, the defense, although recognizing the discriminatory effects of the publications, argued that the Jewish are a people and not a race. Therefore, Ellwanger could not have committed the crime of racism, which is non-bailable and imprescritible according to the Brazilian Constitution (Article 5, Clause XLII).

The main discussion was opened by the Justice Moreira Alves, who did not recognize the crime of racism. His opinion was for the concession of the habeas corpus. In his analysis, the historical element is fundamental for the constitutional interpretation. And it shows that, when there is no sufficient time for a significant change in the use of the concepts, the use of the word must be considered in its most common meaning. According to the Justice, in the case, the word “racism” is designated to protect the historically persecuted races in Brazil, or, in other words, the black people. The Jews are not properly a race, and then it cannot be considered racism the crime committed by Siegfried Ellwanger.

We can see in Justice Moreira Alves opinion the problems which came from the semantic use of language. In a passage of the opinion, the Justice used some dictionary and encyclopedia definitions of the term. At the end, his vision of race tended to be limited by a biological meaning combined with a certain traditional use in the past. This was the main critique that came from the opinion of Justice Mauricio Corrêa. Inaugurating the divergence, Justice Corrêa emphasized that we cannot use the concept of race in a mere biological meaning. We should never limit our interpretation to the literal meaning of the term. We must combine it with its sociological and

---

In a very important moment, the Justice points that, nowadays, the science doesn’t give support for a definition of human races. Biologically speaking, there’s no human race because all human beings are biologically equals. Then he concludes: “Although we cannot recognize anymore, under a strict scientific perspective, any division of human races, the racism still exists as a social phenomenon. And that leads us to say that the existence of different races comes from historical, political and social conceptions, which must be considered in law’s application. It is this social aspect, and not the biological one, which inspires the normative regulation of the crime, with its imprescriptibility established by the Clause XLII, Article 5 of the Constitution”.

There was also an argument that cannot be forgotten. It said that the original intention of the Constitution was to consider racism only the crime committed against black people. Here we can clearly see the potential danger to consider the effects of a strict originalist approach in legal interpretation. There was really a predominance of references about black people during the constitutional debates. But we should never forget that this award granted to the black people in the constitutional debates could have come from the natural indebtedness of the Brazilian society with the black community. This conscience predominated during the debates, but it never meant to lose sight of the broader coverage of the normative innovation that was being formulated by our new and democratic Constitution.

Therefore, to take the tradition as a parameter to legal interpretation requests from the interpreter never forget the intrinsically open nature of traditions, in their constant and dialectical evolution. As Gadamer taught, the “hermeneutical horizon” is not the horizon of the past, but the fusion of present, past and future in an open and continued construction.

As we can see, the discussion rests on the problem of the level of generality of law. Laurence Tribe and Michael Dorf concluded that the claim that there is a unique body of law applicable to each situation if false both as a descriptive and as a normative matter. As we saw, the originalism tries to limit the level of generality drawing on historical analysis and the original intent. However, the Ellwanger case shows with great clarity the problems of this method. Treating normative concepts such as race, by mere reference to the intention of its creators, can lead to the exclusion of minorities, or even of majorities, from a fundamental right protection. Then, the extent of rights becomes dependent of the narrow limits of time, space and knowledge which shaped the legislative process and debates. Should the racial protected group of the twenty first century Brazil be considered only the black community? Why should we not consider the largest Japanese community outside Japan, living in São Paulo and struggling to

53 TRIBE, Laurence; DORF, Michael. On reading the constitution, 1991, p. 79.
keep fidelity to their traditions? Should we forget the Arabic people, or the Italian and German communities in the South Brazil? And last but not least, should we once more forget the Indians, the first inhabitants of the country, fighting hard to preserve the integrity of their diverse communities?

If we look at the problem by this veil, it becomes almost self evident that the answer can only be a reverberating no. We cannot interpret race literally, because the other way, it would lead racism to become an impossible crime, for absolute lack of subject. After all, if there is no other human race than the human race itself, the crime of racism lost its purpose and meaning. We cannot also interpret race according to the original intents, because the concepts in Law must always be conceived as a web of concepts and practices, and, as Gadamer demonstrates, the conceptual content can never be separated from the other concepts and pre-concepts (prejudices) that conform our world view and understanding. Reality is linguistically conformed, and, acquiring its dynamic in the context of history, conforms all our comprehension and possibility of understanding.

The same truth seems to be also demonstrated in the Anglo-Saxon philosophic tradition. From the work of the American pragmatist philosopher Robert Brandom, we can extract a lesson about the “discursive commitment”, according to which, “utterances and states are propositionally contentful just insofar as they stand in inferential relations to one another: insofar as they can both serve as and stand in need for reasons. Conceptual contents are functional inferential roles. The inferences that articulate conceptual contents are in the first instance material, rather than logical ones, however (…) To be rational is to be a producer and consumer of reasons; things that can play the role of both premises and conclusions of inferences”\(^{54}\). Therefore, we can never think that concepts can have an isolated and singular meaning. The concept that is applied is always involved in a web of other concepts and material elements that make all its use an inferential use.

8 The adversarial legal system and the importance of argumentation

Considering the hermeneutic turn operated by Gadamer, we can say that the interpreter is the product of language that involves the social prejudices stemming from the tradition. As a result of social language, the judge has all his preconceptions from his most remote experiences (conscious or not), his human and legal background, until the evidences that occurred in the regular course of the proceedings, the parties' arguments etc. Judge’s understanding is not found in solitude, alone with his conscience and only from it. We shall never disregard that judge's understanding comes always from a case in Court, which is shaped through the values of contradictory and full defense. Both the author and the defendant demonstrate their reasons through the

adversarial process, involving the symmetric parity of arguments. Then we can say that all of them contribute to the final decision of the judge.

Tribe and Dorf teach us that “the undeniably plural and internally divided nature of the Constitution is not a sad reality; it may well be among the Constitution’s greatest strengths”55. And the divided nature of the constitution bequeaths to the lawyers the duty of constructing the only possible truth in law: the one came from the discursive and dialectical arguments used in the course of judicial process. The process is an instrument created by law in order to make possible the exercise of the judicial power, when it is called to solve the conflicts. But it is also the instrument through which the State submits itself to the Law that the nation has created, as reminded by the Brazilian professor Aroldo P. Golçalves56.

The adversarial system becomes a fundamental part of the democratic system, if we conceive that the main activity of the Judicial Power depends on the proper use and respect for the adversarial system itself. In the Italian legal doctrine, the essence of the system is identified as “the symmetric parity of participation in acts that prepare the judicial decision of those who are interested in it because, as their recipients, will suffer its effects”57. It comes from the Roman principle of “audiatur et altera pars”, “audita altera parte”, “audi alteram partem”, but it acquires a more dense and diverse meaning in modern legal systems. Nowadays, the concept has evolved to express the guarantee of participation of the parties of the lawsuit in equal conditions. In other words, it will mean justice internal to the process, when the same opportunities are distributed to the parties in the process. In the United States, as said by Robert Kagan, adversarial system gives the country a respected Judiciary and is the responsible for the most responsive court system of the world. It “makes the judiciary and lawyers more fully part of the governing process and more fully democratic in character”58. Examining the reforms done in Alabama’s correctional system, implemented by the Justice system, Robert Kagan shows that in the adversarial system “even the lowest and most despised of citizens, convicted felons, feel entitled to petition a court for relief. Adversarial legalism, in Samuel Johnson’s phrase, gives the ordinary individual ‘adventitious strength’. It encourages Americans, more than the residents of other democracies, to regard themselves as rights-bearing citizens”59.

This system reaffirms the capability of law to transform reality. A provocative and empirical research about this subject was made by Charles Epp, in his book “Making rights real”. Epp’s thesis proves the importance of liability and litigation in the development of democracy in America, making possible the distinctive contribution of

55 TRIBE, Laurence; DORF, Michael. On reading the constitution, 1991, p. 25.
different groups to the values and ideas of the society. That is the most important side of the adversarial litigation – and also perhaps of Law - as an instrument of transformation of the society. It sustains a perspective that views law as emerging out of social relationships, bottom up rather than imposed from above. Epp proves the importance of judicial discussion for the transformation of society. In a remarkable passage, he affirms: “Nuclear power seemed unstoppable – until it was. In policing, unfettered officer discretion, even discretion to beat and harass people on the street, seemed to its critics a permanent feature of American life – until official discretion lost legitimacy as if overnight and was replaced by ruled-based regulation. In each case, the conditions for disruption of entrenched patterns lie in the conditions for those patterns, that is to say, the assumptions that make the reigning model “obviously” correct.”

We shall never forget Madison’s statement which says that, in America, the Constitution is a “charter… of power… granted by liberty” differently from Europe, where it was “a charter of liberty… granted by power”. This liberty, in a democracy, finds in the legal process a special place for being exercised. If we conceive democracy as the space of common dialog and perennial discussion, we shall see the Judiciary as an arena for the conflicts that historically craft the democratic system. Hermeneutics teaches us that it is not possible to find the airtight proof of correct interpretation, but it does not mean that all interpretations are equally acceptable.

The court system of oversight can exercise also a fundamental role in the democratic construction. It imposes a constant possibility of a fully public airing of individual wills through the mechanisms of law – especially the lawsuit – and then can become one of the most powerful elements for reform and constant evolution. At the time of the court's decision, the parties arguments, shaped through the adversarial and contradictory system, already bring to the court a series of pre-understandings, which gives density to the possibility of normative meaning far beyond the supposed normative frame. It is a way by which we can prevent the pervasive consequences of the majority rule. Not only the dominance and oppression of some minority groups, but the other subtle but also strong risk, well aimed by Cass Sunstein, that, “above all, it is important to avoid a situation in which people are exposed only to softer and louder echoes of their own voices. In diverse society, this form of self-insulation can create serious deliberative trouble, in the form of mutual incomprehension or much worse (...) What is necessary is to design approaches ensuring that heterogeneity, far from being a source of social fragmentation, will operate as a creative force, helping to identify problems and even solutions that might otherwise escape notice”. 

---

9 Conclusion

The adoption of the reflexive model of hermeneutics in law brings the judges to the cast of the policy makers, but as representative of one of the dimensions of the society’s “public reason”. This dimension is the one of the “rule of law”. So, if we add to this the democratic vector as a key element in the architecture of the system, we will understand how the judicial process can take a fundamental part of the concept of the right to freedom. It will be a freedom that acquires a more concrete dimension, so far as it can catalyze a new concept of political representation. This will come not only through the abstract voice of the legal statutes, but from the “we the people actually speak”, so conceived by Ackerman.\(^\text{64}\)

The courts mission will be to become a policy agent, in the sense that the judges will act as representatives of the people, and in behalf of the people, to prevent and control the abuses eventually perpetrated by the pattern of the so called “normal politics” (Ackerman). These abuses will be not only those contrary to the majority’s will institutionalized through the law. But also those abuses committed against the procedurals of the minority’s will. Courts major function will be to create the conditions of reliability and trust that these fundamental legal edges will not be overcome.

Its legitimacy, however, rests not in the rescue of the goals and purposes established in the past and formally institutionalized, but in the architecture of the reasons that densify and pervade these constructions from the past. There, in the continuum process of making present the norms from the past, according to the parameters of the judicial process and the contributions brought by the parties, in adversarial position, rests the proper field where all judicial interpretation and application must take place. Therefore, this model of democracy leads the Judiciary to become an instrument of society, and not merely of the State.

We will then be able to find the true meaning of the judicial application of law. It will mean here the wide perspective of the possibility to enforce the parameter of legitimacy of the rule of law itself, or, in other words, the Constitution. The constitutional enforcement, for its turn, depends on the control and commitment to certain presuppositions of self identification of each with some elements of his political community, ensuring the universality of the principle of self-government in the lawmaking process.\(^\text{65}\)

10 Bibliography


