Resumen

La importancia del pensamiento de Wittgenstein radica en que propone una revelación de verdades a partir de una especie de escepticismo que conlleva a un análisis global y sistemático de las situaciones de la vida a través del estudio del lenguaje. Por esta razón, estudiar el derecho a partir de concebirlo como un fenómeno del lenguaje es una posibilidad enriquecedora.

Entre otras cuestiones, el análisis del lenguaje que realiza Wittgenstein supone la eliminación de una narrativa "misteriosa" y dotada de una efusividad y emotividad perturbadora, algo así como una "teoría pura del lenguaje" -parafraseando a Kelsen-; es decir, una teoría que permita explicar fenómenos del lenguaje para entender las estructuras del pensamiento a partir del "ver" y el "oír" sin interpretaciones ni misterios. La teoría de Wittgenstein, así concebida, parece reforzar la idea de una necesidad de interpretar, pero a su vez conlleva la exigencia de una hermenéutica rigurosa que, desde el punto de vista analítico, elimine las falacias y misterios de un lenguaje ambiguo.

Palabras Clave

Wittgenstein, Derecho, Lenguaje, Interpretación, Hermenéutica, Filosofía del derecho.

Abstract

The importance of Wittgenstein's thought lies on the idea that he proposes a revelation of truth from a kind of skepticism that leads to a comprehensive and systematic analysis of the situations of life through the study of language. For this reason, studying Law, see it as a phenomenon of language is an enriching opportunity.

Among other issues, the analysis of language that Wittgenstein makes involves the removal of a narrative "mysterious" and endowed with a heartiness and disturbing emotion, something like a "pure theory of language", to paraphrase Kelsen, that means a theory that accounts of language phenomena for understanding the structures of thought from "seeing" and "hear" without interpretation or mysteries. Wittgenstein's theory, so conceived, appears to reinforce the idea of a need to interpret, but in turn leads to the requirement of a rigorous hermeneutics, from the analytical point of view, delete the fallacies and mysteries of ambiguous language.

Key words

Wittgenstein, Law, Language, Interpretation, Hermeneutics, Law Philosophy.

Wittgenstein and the law:
toward a claim for correction to language

Wittgenstein y la ley: hacia una demanda
para la corrección del lenguaje

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Wittgenstein's intention was not different on the philosophy that the discussion of issues such as esthetics, history and the story of a successful linguistic form. In this way, communication between science and philosophy would be the language itself by obeying the power of the new positivism of the Vienna Circle. For this it has to consider that language as an expression of thought, must obey the rules of logic and guide the discussions in science and philosophy extending through the language games.

This text appears once again and as usual lately, a series of stimulating discussions, (sometimes passionate), with Professor Jaime Gutierrez Ribero. And though no doubt our discussions about the language and its functions are not as neat and precise as those held by letters among Wittgenstein, Russell, Moore and Keynes, we revive an unstoppable desire to debate and self-knowledge of the early ages and minds tirelessly seeking wonder. I hope that the outcome of this trial may shed some light as well as with the beginning of a reflection, the picture of analytic philosophy in the Law (little or no treaty issue in our context). Professor Jaime Gutiérrez Ribero, teacher and friend, I hope to overcome many of the objections are valid and reasonable (holed several times in the logical rigor and argumentative of Bertrand Russell) to my position, clearly close to Wittgenstein work, and delete it the warnings on them.

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A brief introduction

The importance of Wittgenstein's thought is that it proposes a revelation of truth from a kind of skepticism that leads to a comprehensive and systematic analysis of the situations of life through the study of language: *"Until now philosophers have told us only nonsense, but what happens is that they did not realize they used the same word in completely different ways* [Wittgenstein, 1987: p. 49].

Among other issues, the analysis of language that Wittgenstein makes involves the removal of a "mysterious" narrative and endowed with a heartiness and disturbing emotion, something like a "pure theory of language", to paraphrase Kelsen, this means a theory that could explain phenomena of language to understand the structures of thought from "seeing" and "hear" without interpretation or mysteries.

In the Wittgenstein critique to *The Golden Bough"* by James G. Frazer, the latter illustrates that the Beltane Festival[1] in Scotland were caused by ignorance of primitive man who believed in the virtue of purifying fire, and we must purify all for life to continue to reward us. Wittgenstein questioned Frazer hard for positions he held, so hysterical and frantic, trying to give a value to the mysterious and mythic narratives rather than reduce them to obvious questions. Wittgenstein on one of his critics would say: *"No phenomenon is in itself particularly mysterious, but anyone can become one for us, and the characteristic of aurora spirit of man is that a phenomenon is significant.* [Wittgenstein, 1992: p. 57]

Wittgenstein presents a philosophy *through* language. The study of language is not a substitute but a method to arrive at knowledge of reality. As he would say in a letter to Bertrand Russell, criticizing some misunderstand to her philosophy:

> *"Now, I'm afraid I have not really grasped assertion that the whole question of logical propositions is only a corollary. The main point is the theory of what can be expressed by the propositions, that is, by language (and what comes to the same thing, which can be thought), and what cannot be expressed by propositions but only shown, this I think, is the cardinal problem of philosophy."* [Wittgenstein, 1979: p. 49]

The influence that the publication of the Tractatus Logico-Philosophicus (TLP) has had on twentieth century thought is enormous, to the extent

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1 Beltane Fire Festival is inspired by the ancient Gaelic festival of Beltane which began on the evening before May 1st and marked the beginning of summer (when astrology with the sun at 15 º Taurus), being the time when the Goddess is united with God Horned, Bel, to celebrate the Divine pleasures on Earth, marking the return of vitality, passion and hope consummated. In Scotland its particularity is that it was intended to track the trail of human sacrifices made by the Druids (Celtic priests).

that it has been called the *"linguistic revolution"* in philosophy. The task of the TLP is to clarify the nature and function of the propositions is not an end in itself but a means to shed light on other issues, by illuminating the nature of language. The aim of the *Tractatus* is to draw a limit the expression of thoughts, not the thought itself (as to draw a limit to thought we would be able to think both sides of this limit).

In Wittgenstein TLP, He centralizes the cardinal problem of philosophy at the boundary between the speakable and the unspeakable, unthinkable, unthinkable. After making a whole new structure combining logic and linguistics, the author kept a special place for the unspeakable, finding a proposal that emphasized its identity with the ethics and other previously linked the central concepts of both areas. In the TLP is not nothing about aesthetic experience, it is a book of ethics in principle *"only the application of ineffable and transcendent character, and his confinement, along with the ethical and religious, in the area displayable existence of the mystical.* [Wittgenstein, 1987: prop. 6.522]

As we see, the importance of this Austrian thinker in science is undeniable, not only in exact sciences as mathematics. The contribution in the social field is unquestionable to the point of being considered a revolutionary. *"Some aspects of Wittgenstein's philosophy have made him one of the most important mystics of the twentieth century."* [Baum. 1988: p. 89]

For Wittgenstein, rationality is needed in the language and it leads thousand games and different contexts, with different rules for each. Any meaning and any sense emanating from the language is always on, the rest are just ghosts. His conception of the meaning of language does not lead to a new theory but, instead, to the exclusion of all of them. Then, this philosophy free of the complications that generate ill-posed problems that trouble the human spirit and attempting, through logical arguments and extremely streamlined and closed at that level does not really mean nothing or are solvable problems and their approaches, resolutions to be useless.

For Wittgenstein, language is a thousand games; daily use of words generates all and any sense in the world. Any significance and meaning of things is always relative. In the words of philosopher: *"Philosophy is an analytical and critical praxis of language, lifestyle and thinking, not a doctrine."* [Wittgenstein, 1998, p: 339-369] For the above first condition Wittgenstein believes that to philosophize is distrust in the grammar as coincidentally Nietzsche put it: *"Ah, reason, that old female liar. Not liberate us from God as long as we believe in grammar."*[2]

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2   The death of God dissolves old duality between being and appearance. Individual beings, finite, are gone in the phenomenon. Not hidden essences stable and permanent. The death of *Summum Ens* of the entities involved. Nietzsche poses a major prob-

[Nietzsche, 1998: p. 184]. In this case the grammar suggests only a sense of language, ignoring others.

We must distinguish between two stages of the philosophy of Wittgenstein (turning to what he says Russell). In his first book describes a theory of figurative representation of the sign, as something that serves as something else. The multiplicity of languages is due, according to the author, that the signs are mere conventions instead of thoughts and things. But how to explain that there are many things that cannot be spoken by a cognitive communication and that can only be show, for example the logical structure of propositions. The logic cannot get out of itself.

The later Wittgenstein completely changes this and breaks the *"theory of representation".* Wittgenstein argued here that there are several language games. It then addresses the existence of different logics, breaking the paradigm of classical Aristotelian logic as a classic reference. For this reason finding a certainty, as a mental state on "the truth", is impossible. The language is much more than name, and cannot replace things. What makes the language is its use and use practices in the various games, such as giving orders, reporting, etc. People learn to talk about seeing others with the practices and lifestyles that cannot be described.

Wittgenstein gives enough importance to concepts such as "see", "interpret" and "represent", all with extensive list on the mind and human will: one would say that the world of representation is neither good nor bad, but just what is the subject of will [Wittgenstein, 1961]. What is clear from the text just quoted is, to say the title of a work of Schopenhauer, which together with the world *as representation* must also take into account *World as Will;* it would be just the consideration of the world where ethics comes into play thus enhancing the tendency of Wittgenstein to decouple the values as facts.

The man as subject of will, could equally be said that he has feelings that describe and rate their emotions as this would be only one capable of being happy or unhappy, where happiness and misery are the subjects being discussed in ethics, ethics that Wittgenstein, would address the "sense of life"*,* which determines that the conceived in close relationship or kinship with religion, which traditionally has run over an attempt to answer to that issue.

In his *"Conference on Ethics"* Wittgenstein proposed the metaphor of a cup of tea. This metaphor indicates that the cup cannot be filled beyond

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lem here in his speech. The language itself is no longer a valid tool for philosophical inquiry. It is not possible without concepts discursive inquiry. And these are just the still image and dissected the bodies.

its capacity; the same is true about propositions that can withstand a certain load or contents before overflow. Any attempt in the opposite direction is doomed to failure. Wittgenstein always recognized ethics as something natural in human beings and this trend is manifested by lashing out against the language, but when the ethics takes the form of natural science attitude is intolerant and destructive. *"Ethics cannot be science ... does not increase our knowledge in any sense."* [Wittgenstein, 1989: p. 43]

"All propositions are equal" [Wittgenstein, 1987, prop. 6, 4] as descriptions of possible events, all of which are equally contingent (may or may not happen) and between which there is some precedence, then there is no hierarchy or difference in value between the propositions (a somewhat utilitarian vision here). The facts make up the world and everything is as it is and happens as it is, therefore, there is no value in it. The latter is a paradoxical to assert that consider the value as part of the world amounts to make it done and diminish its value condition. The world is simply, when it happens and all the facts have to be measured by the same pattern. All propositions are equal. The world is but all the facts possible.

Summing up so far, the field of language, Wittgenstein, the world is understood as the totality of the facts that compose it. There is a kind of internal point of view of language and it consists of all its component propositions (propositions that emerge from a process of perception and representation), then the correlation between world and language is the correlation between the total facts and all the propositions. Hence, a subject to be more successful in its arguments in the greater ability to describe facts with true propositions is able to articulate.

Wittgenstein aims to study the language from a logical point of view as I announced to drive the text. But language has its own logic and by implication most philosophical questions that must be precisely understood the logic of language, therefore we must understand this logic and analyze it carefully.

Language is the expression of thought. The thought is, in turn, the logical picture of the world (and should not be confused with the concept of reality). Wittgenstein defines a proposition as the sign by which we express the thought in its projective relation with the world. Of these concepts, the central and the most problematic is the relation between figure and content (figurativeness), since Wittgenstein speaks of the relationship between world and language in terms of representation: *"We do figures of facts."* [Wittgenstein, 1987: prop. 2, 1] It could say that the key point of his theory is the essence of this relationship and how we "see" these signs and give them a name, the problem arises when all "see" the same, but we give different names. Is the sign clear? And if it is: Why with the same image (sign) we launch separate concepts?

Problem

The contributions of Wittgenstein's philosophy are enormous, but I intend to use them in this trial according to law, more specifically what I call a discursive legal paradigm is understood as the one that focuses law on a basis of discussion and debate under rules language and that rehabilitation is a practical reason to make real change through judicial decisions that put an end to disputes.

But the language-law relationship, far from being peaceful has a number of difficulties which make fertile the introduction of the Austrian author's thinking to understand these phenomena.

On the one hand we have the problem of legal interpretation and the vague language as the genesis of this problem. A second difficulty is the legal interpretation and illuminating its limited capacity, due in large part to a "self-shielding" and tangled thorny development. Third is a claim for correction through the language rights, exacerbated by an interpretation by way of authority "prefabricated" legal language and comes to the metaphor of Humpty Dumpty (illustrated by Lewis Carroll in his book *"Alice through the Looking Glass* ").

The ideas raised by Wittgenstein can certainly clarify the murky outlook for the current relationship between law and language, to be misinterpreted and misapplied obscures what in principle is transparent and uncomplicated.

Language, interpretation and adjudication

In 1972 Allan Janik and Stephen Toulmin published the book *"Wittgenstein's Vienna"* in which he advocates a very different idea of interpretation to which they had previously. It illustrates how the young Wittgenstein manages an idea of interpretation "ethics" as a result of opposition to rationalize or theorize the concept.

Janik and Toulmin For the relationship between logic and ethics in the TLP would be summarized as follows: *"The logic (Frege and Russell) just fulfills the role of providing formal tools and techniques to make a critique of language and thus, through its application, to comply with the ethical purpose of the book*." [Janik & Toulmin, 1973: p. 196]

But Wittgenstein also problematic logic that can be resolved by the critique of language, so they have been, most probably less important to him than his ethical purpose. Then there is no opposition between the logic "formal" and logic "ethics."

But in addition to the distinction raised above, Wittgenstein addresses the phenomenon of clouding the interpretation of standards or ru-

les that results from the indeterminacy of legal language represented in so-called "indeterminate legal concepts, that means concepts that have not been defined and its core concept is vague either peripheral or central

> "Our paradox was this: a rule could not determine any course of action because any course of action may be brought into line with the rule. The answer was: if everything can be done consistent with the rule, then you too can be disagreeing. Where there would be no agreement or disagreement." [Wittgenstein, 1988: p. 203]

This can become skepticism, as Kripke argues [Kripke: 1982, p. 60]. This skepticism has caused a great effect on philosophy because it seems that tends to a relativity of the concepts thus creating a mess in interpretative activity that ultimately will not have correct positions, ending, as we shall see, in an imposition of interpretation through authority. Those with this view "skeptical" say the law is radically indeterminate and that the legal phenomenon, ultimately, is not a standard of fairness in applying rules, but the impact that a community in different ways exercise of authority and power, in this case through interpretation. The problem then focuses on the interpretation of rules or regulations and the connection with your application, something like a tension between legitimacy and effectiveness.

There is a serious disagreement about the nature of this connection between rules and cases that it regulates, it suffices to recall the words of Gény the matter: *"The written law does not provide all the solutions that requires practice and logic of the law"* [Gény, 1954: p. 207], that points that the evolution of society and its changing realities create a gap between what the standard prescribes and hypothetical factual situations that can be generated. In part, these disputes are caused by the different role that is attributed to the consensus and agreements of the members of a community, in this case what is considered "right" or "wrong."

Wittgenstein believes that a rule governing cases are not identified by the rule but must be "produced" or "built". This would treat Malcolm with what he calls *"the difficult question"* [Norman, 1995: p. 148]: What decides whether a step taken in one direction, if a certain application, or not agree with the rule, what happens if the actions of different individuals acting according to a rule do not agree? The question is quite interesting because it is a primary application of Wittgenstein's language games: How is it possible that before a rule or policy has different behaviors? How is it possible that with a single standard or rule interpretation and application varies? No doubt about the above is one of the central themes of contemporary legal philosophy. The "difficult question" arises only when it assumes a certain standard, but we found discrepancies in their interpretation and application instances.

Law then takes a linguistic aspect in which the propositions create legal language:

> *"The legal rules are expressed through language. The decisions of the courts applying the standards in practice are language. Even if sometimes it is uncertain what is written in the law, all interpretive material, such as legislative debates (preparatory work) is also embodied in written language. Thus, the language is interpreted by language and the result is expressed through language."* [Aarnio, 2000: p. 12]

This language in turn has several functions: policies, evaluative, expository, informative and performative. But being the law a language product is subjected to the same problems of it. The question becomes interesting when the interpretation and application of law is reflected in different solutions to the same case based on varying interpretations Are you In which lies an instance is altered perception and decision on the same case with respect to another which received and decided differently? offer apologies if the question is bland, but for me is critical, nothing more and nothing less we talk about a problem interpretation that we know through language.

If we analyze this situation in front of the so-called "hard cases" (those with some controversy and require an outline and justification of innovative solutions and away from formal logic) the scenario is much more productive for the debate: the judge's discretion is more and responsibility is reflected in changing reality through interpretations and justifications expressed through language. Highly controversial legal, social and economic in Colombia have been solved by a series of innovative and inland justifications of authority in jurisprudence memorable for its brilliant either construction or by their infamous inconsistency, but ultimately all revolving around language and forms to perceive realities and their corresponding descriptions mediated by subjective elements. You can even consider language as a desuperheater or modulator of emotions.

Defining hermenutics

What is hermeneutics? Without a doubt a very complex question that many have tried to answer, and without much success if we take into account not yet have enough clarity about what is or what it does after years of work. With a humorous but accurate way, and using it as an illustration, Flaubert, in the *"Dictionary of Accepted Ideas"*, [Flaubert: 1966] defined "law" in these words: *"No one knows what it is."* Well, the same answer can be used to define "hermeneutics", It is not known what it is.

The problems related with hermeneutics, first by the lack of speech in academia. Just consider whether members of an academic community have heard the term, many students and even professionals are not familiar with it. Secondly I think it is an ambiguous word, which means if its spread is small, it is paradoxical as the definition is broad: all think they know what is, or in the worst-case "an idea" of what is and different uses for each situation. For some it is interpretation, for others it is but it goes to it and thus continues to draw a line unreadable. And thirdly, because the same hermeneutic not help in clarifying the meaning and shielding itself generating a clear conceptual disorder.

Hermeneutic could have been responsible for the twist on its own analysis. Now in its evolution of its object of study has changed, thanks to its content similar to the hermetic, to that which is revealed to him only a few, not to mention that there is no clear dividing line between hermeneutics and interpretation. There conceptual precision about what is hermeneutics. This is a fairly well known. In part because of what Gadamer called it "prejudices" and that we have all.

The source of this bias is generally a problem of language theory. For example the formation of words, as Wittgenstein explained by citing the "confessions" of St. Augustine, "is the object which is the word." Then in the formation of language, at least two swords: one auditory and visual, hence the words mean something to us because we associate them with a sound.

One who teaches the language learner teaches certain things. This is perceived in a way, mainly visual. At the same time that you are receiving, who teaches broadcast words, like articulate sounds. Thus the learner does not only see certain things but at the same time hear certain sounds. From the above is a partnership process where the sound and visuals combine to give origin to the word, this phenomenon ultimately will be the basis of language. The words, then, would link with pictures and sounds. As, St. Augustine said: *"The words of the language name objects. In this figure of speech we find the roots of the idea: every word has meaning. This meaning is coordinated with the word, is the object which is the word."* [St. Agustin, 2000: Book, I, Chap. VIII]

But leaving this discussion of the origin of prejudice must be clear that the legal academic community there is a clear concept of what is hermeneutics and if it is synonymous with interpretation.

I will make an entry distinction: hermeneutics is a method that uses the interpretation, however, the interpretation then becomes an implication, a way of proceeding that has consequences. In this sense the interpretation comes to hermeneutics. In short, hermeneutics is a method of explaining texts, and its success will depend on the consequences arising from the possible interpretations.

To better understand the concept of hermeneutics we need two different stages of it: a classical hermeneutics answered the question "What is hermeneutics? And the answer is arguing that understanding. And philosophical hermeneutics stage called into question what is understood?

Classical Hermeneutics of cover in three periods: ancient Greece, the Fathers and the Protestant Reformation. Philosophical hermeneutics with three authors: Schleiermacher, Dilthey and Heidegger. Then conclude with Hans Georg Gadamer.

In *ancient Greece* hermeneutics had great symbolic and mythological. Remember that the Greek words have multiple meanings. Hermeneutics refers to the god Hermes, the messenger of the Gods "and the message it brings, one basic message. The role is to understand what is in principle unintelligible, hence the importance of the god Hermes he is going to be a "mediator" between the language of the gods and humans. We begin to see here then some basic features of hermeneutics: the mediation of a person to "translate" what some people do not understand, plus the importance of the message is significant, because it is not "any information", but something truly important. Thus hermeneutics for the Greeks was a translation exercise, intended to clarify a message "in a language other than" through a mediator.

In the phase of the *Fathers* (phase in the history of the organization and theology), it goes in the sense that there is a sacred text to interpret (the Greeks did not have a sacred text in non exercisers on texts) in this case is the Bible. The Fathers of the Church come to allegory as a form of interpretation, with the goal of *"going beyond."* Of course the allegory is totally opposed to the literal interpretation of a text. The Allegories sought to reconcile the Old and New Testaments. They were obvious differences between the two texts appearing and shortcomings, which should be filled by the Fathers of the Church through the figures above. While retaining the fundamental nature and divine message, as in Greece, in this era is dawning methodology because there is already a sacred text, and the mediator would be the Church. We present here what we call a *"strong hermeneutics"* as the problem of interpreting the message is crucial, crucial for the life of the people.

During the *Protestant Reformation* is to break with the Church Fathers. The reformers are opposed to allegory as a form of explanation, as they say the Bible has no "gaps" and therefore do not require a "mediator" to understand God's message. Therefore indicated return to *sola scriptura,* that is to understand the message as written in the text (remember that Luther translated the Bible from Latin into vernacular German with the idea that all people know the word directly God). It keeps the idea of a sacred text, as in the Fathers, but changing the concept of allegory by the dogma of the literal to be a key to understanding the sacred text.

Philosophical Hermeneutics discuss in the following authors: Schleier-macher, Dilthey and Heidegger. At this stage the question arises what is understood? Leaving aside the one about what is hermeneutics?

Friedrich Schleiermacher (a nineteenth century clergyman, considered by many the father of hermeneutics), tells us that the interpretation would be "to get into the head and thoughts of the author." In this case only rules are proposed to understand, but also raises the question of what is to understand itself. Schleiermacher says: *"understanding the language and understand the speaker."*

Schleiermacher's conception is romantic, and under this idea is formed, this means, the notion that any work sublime comes from a great subject, and the idea is to achieve a merger with the mind of the creative subject, a "merger congenial" order to understand what he wanted to convey, something almost intuitive divination. So what the performer to achieve is to identify the ideas of the creator or author, which involved a high degree of empathy, almost "being at the same level of who produced the play"

Wilhelm Dilthey, for its part does not raise the idea of merging with the author's mind, but the idea of analyzing in context according to the experiences of it. Dilthey holds that nature can be explained by rules (applying the ideas of positivism). But then, not everything can be clarified with natural laws, as there are areas such as law, poetry and history are themselves acts of man and deserve a special explanation.

These sciences "human" or "spirit" cannot explain something general, explains something unique, and so instead of explaining (natural sciences) must understand (science "human". Understanding *[Verstehen]* draws on the experiences *[erleben]* and among them there is a connection *[Zusammenhang]* in order to reach the same experience.

Directly in psychology Dilthey sees an advantage over natural knowledge, because their purpose is not a given phenomenon in the senses, but is presented as a connection from within internally lived and not as a mere reflection in the consciousness of external reality. Then the paradigm of internal apperception is, without doubt, the experience *[erleben]* that could be characterized by these points: **a)** The living is a reality that presents itself as such an immediate way, we realize the inside without cutting any not given nor intended. The experience is demarcated from other because it constitutes a whole; **b)** the experience is a distinct characteristic way in which reality is there for me and **c)** The experience is there for us, the thought is when then becomes an object.

If Schleiermacher raised "get into the author's head," Dilthey will raise the idea of "getting into the context of the author." Schleiermacher's hermeneutics philological interpretation is not only external, but that interpretation is *"building a discourse within a context of life."* [Dilthey,

1978: p. 337] This idea took Schleiermacher and Dilthey also bring into question other (Gadamer).

Martin Heidegger poses a methodological shift from the ontological. Hermeneutics is then an exercise in revelation of "exposing" something that is hidden. Dilthey If the subject was the life and experiences in Heidegger is no longer the case method, but is what we ourselves are, that is what is called an ontological turn in hermeneutics.

Heidegger asks what it means to **_be_** human. And that word "being" means "being something", "be there." We shall then this idea of "being there" is a possibility is given for nothing in existence, our life is not given, is a constant evolution. Then, the human has the characteristic of "not being given," so it must go through a process, a constant self-projection of where the man goes and in which situations are displayed. This is the concept of "understanding" for Heidegger, is projecting a sense that is not given, because if it was already given, we would not understand a text or action.

Understand then, from the perspective of Heidegger, would be to assess whether the direction in which a man projects are successful or not, change the projection if necessary. Heidegger tells us: *"This is a bad past."* History does not have it, but we are.

> *"Well, calling hermeneutic research continues, we are not using the word in its modern sense, nor to the meaning a theory of interpretation, taken so broadly. [In our context] the term, connecting with its original meaning, means more is going to mean good or rather, a certain unity in the implementation of hermeneuein, that means the implementation of the report, the state, like the implementation of an interpretation of facticity."* [Heidegger, 1973]

For its part maintains that *Hans Georg Gadamer* "understand" not a subjective (in attack on Schleiermacher) or something historical (in attack on Dilthey).

Gadamer claims that are part of a dialogue, a conversation, or contact with another:

> *"The basic model of any consensus is dialogue; conversation. The conversation is not possible if one of the participants believed in a thesis absolutely superior to others, to say that has a previous knowledge about the prejudices that plague other. The same is implied as well in their own prejudices. Dialogical consensus is impossible in principle if one of the partners is not actually released in the conversation. Such is the case, for example, when someone does a psychologist or psychoanalyst in social intercourse and does not take seriously the statements of another in their*

> *own sense, but rather to understand the psychoanalytic mode. In such a case is destroyed the fellowship, which is the basis of social life."* [Gadamer, 1996: p. 95-212].

This dialogue is of course mutual recognition between the parties t also an agreement between the subject under discussion (questions that expose below Habermas and Alexy).

That is the point then what we are trying to understand, that issue is something from the human conception, such as reading a book of the past. When we read works of the past, as in the example above, we do just out of curiosity, but we really care what the author tells us, and more specifically, it tells us about something, and that "something" interest.

Then in that dialog when trying to understand someone says about something that involves me, too. Here come into play our prejudices or preconceptions that ultimately will be preserved or modified.

You can then say that someone intends or tries to say something, but the response of the other party (a reader for example) will get something that sometimes is not expected, causing them to modify the views.

Gadamer gives great importance to the concept of authority because it lies on the issue, not a person. This is recognized when a person's ability to speak on the subject property.

Also argues that every understanding is an application (for one side "I applied myself something," and another "as I take something off the tradition and values imposed.")

In the case of legal interpretation, the cases are unique, each case is a "unique case" and not a generality, therefore each case must be solved in particular, is to resolve "that" possibly by means of laws needed and selected some of the laws.

Because of this legal interpretation for Gadamer is paradigmatic, as we have laws and you can also mediate to discover its meaning. When understood (not in the sense of "get into the head of the legislator") the law can solve a case through the contents of a statutory provision, it also is effective and current law, away from historical and subjective concepts (finally in clear agreement with positivism). Gadamer says:

> *"You cannot deny, in any case that hermeneutics is a normative discipline and holds the legal dogmatic complementation. It serves as such an essential task, because it has to bridge the gap between the generality of the duty imposed and the fulfillment of the individual case."* [Gadamer, 1996: p. 102]

The development of hermeneutics itself lives up to its meaning, somewhat hermetic. What can we expect from something tight? We can find complex evolution, language games, dark passages of understanding revealed only by a few, but the main characteristic of hermeneutic will be what the criterion of correctness of the understanding is?

Back to our main author, language games Wittgenstein open the possibility of a hermeneutic narrative [Terricabras, 1983: p. 26] (meaning that the narrative is also a language game) that evaluates the context in which they develop certain events being ultimately the reader or listener who interprets one way or another and all for a plural experience of the senses, placing in the background experiences of the authors. Under this situation, Wittgenstein gives more importance to the interpreter's prior experience with the particular historical situations and creators. In this sense, hermeneutics is a transcendental philosophy (as indicated by Arthur Kaufmann).

As Professor Paul Quintanilla says:

> "*In the case of Wittgenstein, his sharpest intuitions about understanding are made when he discusses the nature of religious belief. Indeed, a particularly extreme case of misunderstanding seems to be where the non-believer tries to understand the believer, for the first prayers have a different meaning for the second, as belonging to language games and different lifestyles. For example, when a believer says that God exists and denies the unbeliever are not really contradicting each as different meanings attributed to the words "God" and "believe." The unbeliever evaluates the meaning of that statement is a sentence assuming synthetic liable to truth and falsehood, that seeks to describe a fact of reality. The believer cannot assume anything like that. For him, that prayer can have a basically moral meaning and not metaphysical or factual. In fact, it was probably in this sense that Wittgenstein understood the religion. Therefore, the non-believer to believer can understand only if we share some of the language game and the lifestyle behind the statements of your correspondent*.*" [Quintanilla, 2008]

Law as a claim for correction to language

How should we consider the legal arguments? Should they be still a "discourse ethics" being explicit? Or Turning to the strategy and recognizing political and economic reasons deliberately hide in the shadows of the arguments? These questions will no doubt help us to solve this last part of the paper.

Aulis Aarnio says:

> *"The legal norms manifested through language. The decisions of the courts applying the standards in practice are language. Even if sometimes it is uncertain what is written in the law, all interpretive material, such as legislative debates (preparatory work) is also embodied in written language. Thus, the language is interpreted by language and the result is expressed through language."* [Aulio, 2000: p. 12]

But this language is multifaceted, vague and mutable per se to the end, most in the legal field; this is similar to Wittgenstein arguments in his opinions on Golden Bough.

> *"You might think, for example, in the subject "legislator" who uses language to express the law. But it could also think of the subject "judge" that uses language to interpret and apply the law. And it would be the case of the subject "teacher" that uses language to interpret and teach the law. And even could be accepted if the subject "citizen" who uses language to know and abide by the law. These distinctions are often referred to as different "levels of language concerning the law."* [Aguirre, 2008: p.145]

Let me start with two concerns: Does hermeneutic provide a solid factual basis? And how do you value the outcome of a hermeneutic process?

To resolve the first question I will manage two theories: the first is set by Oswald Ducrot and Gilles Deleuze will call the *implicit/explorative theories* and on the other hand the theories of Stephen Toulmin and Ludwig Wittgenstein, I will call *analytic/explicit theories.*

For Ducrot, it states that any act of argumentation necessarily implies an act of interpretation, and ultimately re resort to the field of hermeneutics. Ducrot raised when a proposal is issued, it is only the conclusion of an argument. The remainder, this means the premises, are hidden either by *linguistic utility* or just strategy, but both in a subjective way. Thus when we argue we only present a part of our argument, reserving the remainder for some particular reason. For example, when you say: *"José: is 10 o'clock"* This proposition would be the conclusion of an argument whose premises are large and omitted. Then the premises **could be** that it is time to leave a certain place, or it's too late, or that a request for action agreed at that time, or simply indicate that it is too late (or early). If in our example José, answers *"so what?"* This expression would be an invitation to the other party his entire argument explicit, for example to indicate it launches this statement: *"Jose is the 10 o'clock. So what? -Answers José-. Well it's time to leave; otherwise we will arrive home late and have problems with our wives, unless we prove to work late in the night.* As we can see the

when we explain the full argument its structure is clearly present (as we shall see later with Toulmin and Wittgenstein).

The basic notion of Ducrot says that there is not a clear separation between descriptive and argumentative levels of language: there is no descriptive content neutral; any description or designation and is a time of some scheme argumentative, descriptive predicates themselves are, ultimately, argumentative gestures reified. This attack relies on *topoi* argumentative, in "common places". A successful argument presupposes the invisibility of the mechanisms that regulate its effectiveness. [Ducrot, 1998]

Every speech act (even if it's written) is part of a discourse, so the argumentative and persuasive ability is the main function of speech, even more than the informative function. His proposal focuses on emphasizing how the underlying linguistic structure of any information bearing on the construction of meaning from it. Therefore, the argumentative value of a statement is wholly or partly within the meaning of it, so it is by internal concatenation of utterances, which implies the presence of a structure of argumentation, which can investigate how it is constructed a speech at the fringe of informational value to contribute their content. [Ducrot, 1988: p.49]

In the case of Deleuze, his theory (I only took a part for this theme) is much more radical in arguing that language is always used as an instrument of power "*is not about ideology but economics and organization of power.*"

Who gives an argument always has the intention to achieve action by the recipient, even from so simple and routine orders as" *sit down* "," what time is it", "*please* "etc. Even more elaborate speeches performances involving more ambitious as legitimizing political discourse and history is littered with those examples: the Nazi phenomenon, including the current status of many Latin American countries like Venezuela, Ecuador or Colombia. In this theory, which is hidden behind the argument is an attempt to impose domination and power, underpinned by an ideology of course. This is a phenomenon of post-modern societies:

> "*We are in a generalized crisis of all places of confinement: prison, hospital, factory, school, family. The family is an "interior" in crisis like all the interiors, schools, professionals, etc. The ministers concerned have not stopped announcing supposedly necessary reforms. School reform, reform the industry, hospital, military, and prison: but they all know that these institutions are finished, more or less short term. It's all about managing your agony and people take to the installation of the new forces that are hitting the door. They control companies which are replacing disciplinary societies.*" [Rajchmann, 2004: 181]

The previous position of Deleuze is more palpable in *"Empiricism and subjectivity."* This suggests that society demands from each of its members and expects them, the exercise of constant reactions, the presence of passions able to provide mobile and purposes, character groups or individuals that would transform the language of power in half. [Deleuze, 1991]

In the case of the law could apply to the *Critical Legal Studies* (CLS) or critical theory of law to argue that the judge is not neutral and that their decisions intentionally concealed a shrewd political ideologies and functionality should not be explicit [Deleuze, 1981]

However, contrary to the theories of Ducrot and Deleuze appear Stephen Toulmin and Ludwig Wittgenstein reflections. The first one in his famous work *The Uses of Argument* resumed classical Aristotelian argument but altered the meaning of explicit inference and their backs, in other words, it makes explicit all the procedural structure of the argument.

For Toulmin, an argument must specify all its elements (six according to his theory) and not just stay at the premises and conclusion, but the inference must be explicit (warrant), support this warranty and the premises or evidence (backing), using a modal qualifier or nuance to avoid hasty generalizations (qualifier), and finally submit qualifications, which would cancel in the event of the conclusion (Rebuttal). With an example we can explain: An argument "linear" and reaching out to the theories of Deleuze Ducrot and would be "this Sunday there will be elections, so there will be fraud." Toulmin would see things this way "This Sunday there will be elections so it is very likely to be fraud, unless the UN sends a serious commitment and hard. If fraud has been done before why not now? According to political scientist in his text "X" And, the dynasties in power seek to perpetuate it by any means, also a report of the authorities shows that in the last 20 years the number of persons convicted of crimes against this kind of crimes –vote- grew by 60%. "

As you can see the difference is remarkable. Well, for Toulmin *"argument is like a living organism"* [Toulmin, 2003: p. 87] and to make it work properly requires some care.

Similar position is that of Wittgenstein (see the quote that begins this writing) in the sense of explaining analytically the language for clarity in science and philosophy. Wittgenstein's position in this section will be presented in the conclusion.

The *"discourse ethics"*

It should be noted that the theories discussed by Toulmin and Wittgenstein, would be more appropriate for a theory of "Discourse Ethics"

as they allow their assumptions for "ideal speech" (in the words of Habermas). Jürgen Habermas in his theory of communicative rationality attempts to illustrate the conditions under which it must take place a rational discussion. But the aim of this essay is to try to indicate whether there may be a link between this theory and law (viewed from one perspective then argumentative). I think, by way of argument, that Habermas's theory could be applied to a field of legal argumentation.

By exchanging information people assume that they have satisfied the "*normal verbal communication*" [Feteris, 2007: p. 106], this means, the assumption of semantic and syntactic intelligibility of discursive action aimed at a purpose. From this it follows that the claim of validity of the speech was how the subjectivity of the participants, so that validity refers not to the topic of discussion but the information that each one considers as true from the lifeworld shared. Of course, this world of life forms, among others, by the accepted rules of communication.

To question this validity claim, we can turn to several resources: 1. Understanding and questioning the content of the proposals, 2. Challenge the truth of these propositions, 3. Questioning the speaker's intentions (discourse ethics), or 4. Questioning the rules of communicative action. From the above is a speech [*Diskurs*] looking for a rational consensus through rational arguments (an idea later taken by Alexy) and thus find the truth of the allegations: the truth emerges from a consensus or "consensual truth."

This rational consensus can be achieved only through his grounding in an ideal speech [*Ideale Sprechsituation*] posed a situation in which external factors or power not excluded from the participation of individuals, something like a principle of democracy "on which later built a" discourse ethics. "Something similar occurs in the theory of justice of John Rawls and his "*overlapping consensus*"": It is rational negotiation between individuals is equally rational and conditions of equity and freedom for all participants:

> "*The acceptance of the concept policy [of justice] is not a compromise between those who hold different points of view [above all on individual or collective struggle], but is based on the totality of reasons specified in the comprehensive doctrine professed by every citizen.*" [Rawls, 1995: p. 169]

However, the ideal speech situation must meet the following conditions:

1. Anyone who can speak can participate in the discourse.
2. Anyone can question any assertion
3. Everyone can make statements in the speech.

4. Everyone can express their attitudes, desires and needs.
5. You cannot prevent someone from exercising any rights under any type of internal or external coercion.

Of course the above situations lead us to a central discussion in the text: Is the speech something you can effectively build or just stay in a utopian ideal? But this issue I take it as merely illustrative and his answer will be a subsequent letter to complement this.

Conclusion

Wittgenstein said: "*What can even be said, can be said clearly, and what cannot speak one must be silent*", this seems to be the guiding principle that guides my conclusion.

First, this analytical position, like discourse ethics, could not be applied to law as a global process (at this point completely I diverge completely with Professor Gutierrez Ribero), but whether it would be useful in two events that are important parts of law and its adjudication process:

1. In the process of legal reasoning as conceived narrowly as Alexy sets. For Alexy, in particular, legal discourse is a special address in the general rational practical discourse, which specializes in finding the correction in the issuance of policy statements through the legal argument. Central to the quest for procedural correctness. As a discourse, Alexy explained as follows:"... *In the legal discourses of justification is a special case of normative propositions, judicial decisions ...* " [Alexy, 1989: p. 213], in this case the legal argument would be a special case practical argumentation (Ducrot Theories, Deleuze, Wittgenstein, Toulmin, etc.) but focused on the justification of judicial decisions against "*hard cases*." [Alexy, 2002: p. 37]
2. In the stage of legal interpretation (hermeneutics to assimilate to finding no clear dividing line) and attribution of meaning and significance as a bridge between the "real" and legal.

In Wittgenstein's critic to Frazer's "Golden Bough", he explained something that could be applied to the Law; also Kelsen illustrated this in his pure theory.
A stitch is what is captured through the senses, and quite another to what we think of what has been captured, and another, which is interpreted to be captured that:

> "*Something like a watch, a hearing A touching, etc.., not necessarily neutral or conditioned against the way they describe them, or feed, or they are expressed, or the interpreter. This would justify such statements as we all see the same thing, understand or conceive so different.*" [Castañeda, 2001: p. 131]

The above discussion illustrates a simple case and real but is not challenged by the academic legal community in a serious way: different decisions (product of the exercise of resources) to the same facts, something like a need for interpretation with or without reason according with Wittgenstein's ideas: It is characteristic for the dreams that often seem to require an interpretation of the dreamer. But dreams seem to have in themselves something enigmatic, something interesting in some way, so that we would like be performed (they were often seen as messages).

But: how to establish the proper interpretation and argumentation to this phenomenon by the judges? It becomes then a matter of auditorium (the community who receive the decision) and internal reasoning of the judge:

> *"If Moore says he knows that the Earth has existed ... etc., The Most of us gives the reason [...] and also believe when he says he is convinced. But is also good reason for his conviction? Because if it does not, after all do not know."* [Wittgenstein, 1996: p. 120]

Here we see Wittgenstein's contribution to a theory of argumentation, later perfected the legal world by Alexy.

Wittgenstein's analytic philosophy would be a useful tool in a discursive paradigm of law, not to mention the argumentative strength and the logical rigor that could print on law students and applicants. I hope then, that this letter be the beginning of a debate on this matter. Finally, we read:

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