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## Hermeneutics Role in Traditional and Modern Approaches of Legal Interpretation

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### ABSTRACT

**Background:** Texts are different from other human beings artifacts, so interpretation is different from its applications in other human beings artifacts when it is used in texts. **Objective:** A correct interpretation is one that can discover what the speaker said; however it may not reach to all his meanings; therefore we have a complete and more complete interpretation and we can have a wide range of interpretations. We also said about interpretation approaches that literal interpretations related to some legal rules that are in the form of expressions and words. **Results:** Therefore, this approach is utilized in interpreting laws, votes and precedents. In explaining a legal approach, we said that in this method it cannot find a special basis for each legal case but a set of integrated legal cases are usually based on a common base. **Conclusion:** Discovering this common base can help the regulator in finding the truth of laws and the regulator's aim.

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## INTRODUCTION

In this study, our discussion is hermeneutics and text comprehension. Hermeneutics guarantees some concepts such as expression, speaking, explaining and translation and has been used in decoding and interpretation of the sacred in its early roots. Later, it was used to interpret literature; hermeneutics knowledge experiences some changes over the time and its early stages, which only would seek scriptures, trend to other textual fields such as literature, social and philosophic texts. So, religious, literary and philosophic hermeneutics can be introduced. In this study, it is tried to explain philosophic hermeneutics knowledge and its role in the process of legal texts interpretation and how it is used will be pointed out after a complete introduction.

The term, hermeneutics, is a Greek word and was derived from the verb **Hermeneueen** which means gloss, interpret and explain and also means translate lecture to an explicit language which make perception process possible (Ahmadi *et al.*, 1998).

Hermeneutics is the art of reaching a complete perception of written and spoken expressions. FeredrikAgust Wolf in his lectures in 1785 – 1807 about “Classic studies encyclopedia” defined hermeneutics as: “the science of some rules that signs meanings are understood with its aid”.(Ahmadi *et al.*, 1998).

Wilehlim Dilty (1833-1911) knows hermeneutics as a knowledge that is responsible for providing human sciences methodology. The main objective of his hermeneutic effort was enhancing the credit and value of human sciences and aligning it with experimental sciences.

#### Objective:

Hermeneutics in classical thoughts

The origin of classical hermeneutics must be sought in Homer’s allegoricalinterpretations in 6<sup>th</sup> century B.C as well as in the interpretations Rabbis have made of Talmud and Mytrashym.

Christian hermeneutics which is affected by both these older interpretations is generally originated by Philo Judaeus in the first century AD. The interpretation of Mand Philo’s method of the scripture not only affected Arigin, Agustin and many others before religion reformation, but also influenced on Dilty and Betti many years ago.

So, beginning of hermeneutics is by interpreting religious, spiritual texts as well as Homeric epics. Even today, hermeneutics does not completely neglect the goal which is the motivation of all interpretations of scriptures and the goal is nothing but revealing truth and not only the mere fact.

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*Romantic hermeneutics:*

In this hermeneutics; each person's interpretation way reflects a wider cultural feeling or mood, although it is unique. A true interpretation is not only requires the perception of the writer's own cultural and historical texture but also needs receiving of a particular mentality.

**MATERIAL AND METHODS**

The main founder of the phenomenological movement is Edmund Husserl, a student of Brantano. He attended in Brantano's courses after gaining PhD in mathematics in Wayne and Brantano's influence on his led he turned to philosophy. He then became a philosophy university professor in Gottingen and then taught philosophy in Fryborg where Martin Heidegger was one of his students.

The point which Husserl emphasized on (and is an element of phenomenology) is hanging sentences or avoiding it to a statue or relational ontology or relationship of moments. Accordingly, the existing of what was emerged on human awareness is placed in parentheses.

Although the application of methodology, Husserl's sentence acceptance do not match with associated idealism, step action toward believing idea by Husserl's efforts to derive awareness from the sublime "self" and associate it to the world fact. Nothing can be imagined, or it is an essence for awareness. So, this is awareness which forms the essence. Husserl's phenomenology opened a new way for perception ontology which then was proposed by Heidegger. According to this evolution, epistemology of interpretation was replaced by perception ontology. From this point of view, perception is no more an aspect of recognition but it is an aspect of existence. This is a thought which was proposed in the final period of Husserl's life. Hence, it is known as recent Husserl. What he proposed in the early period of his life was a challenge against objectivism and yet an idealist overlay, because the real world has been detracted to the mind or the mean, but Husserl finally ignored his early plan and turned to perception ontology from sense phenomenology, that is, he acceded to discovery of an alive being (perception) whose horizon of all destinations is the real world, not general natures or abstract mental meanings.

In Heidegger's hermeneutic philosophy, each object is translated through the human's worldview, or in the better word, the human sees objects through his world and human's world is seen as a default without being seen and environment is accounted for everything, so it is always present and missing (Palmer, 1998, 147).

Why Heidegger explained his hermeneutic philosophy with so complicated and unfamiliar words maybe refers to his belief that the background which is humans' perception bed cannot be represented and that is why one cannot use the terms in today language to describe it (Rahbari, 2003, 20).

In Heidegger's hermeneutics, assumptions based perception is some concepts and expectations which are based on experiences before anything else (Rahbari, 2003, 20).

Interpretations are proposed during activities and thereby are jointed to them. Humans give an interpretation during activities which is naturally based on the interpretator's previous knowledge (Ahmadi, 1999, 89).

One should say about Gadamer's votes that firstly, he does not try to establish a system by the interpretation rules, either but he wants to explain general perception conditions. Secondly, he like Heidegger knows the effect of the defaults in the interpretation process as an unavoidable one (Coleman et. al., 2003). And it comes from the word that in "truth and method" says: two elements have a core importance, first explaining the default thought and the effect of past and tradition in perception and second, explaining the concept of conversation. He clearly states that perception is only obtained by "verstandigung" (Coleman et. al., 2003). He explains that in dealing with texts, different votes and views and various biological experiences stand against each other and provide some beds for conversation and we can involve our own defaults in the game and empower our opinions during the conversation process. Also, in another place, Gadamer states that conversation between two horizon lyrics and interpretator requires the merger of two past horizons (that is writer and lyrics) and the present horizon (commentator and interpretation) (Jafari, 2002, 123).

With this regard, one can say that Gadamer caused to the trend of relativism by changing the goal of interpretation in modern hermeneutics and avoiding the writer's intention as well as involving defaults in the interpretation in an extreme way; as Heidegger's votes resulted nothing but the same ones (Vaezi, 2001).

*Post-modern hermeneutics:*

According to post-modern conceptions, destructive methods should be used in reading, perception and interpretation of texts and dealing with topics.

The most important representative of this thought is Jacques Derrida. In his point of view, breaking structures does not belong to a certain age or period of time and it may reflects the characteristics of post-modernism or modernism but in breaking structures, the main focus is on the transformation of cultural performances and foundation. The breaking structures which Derrida interested in, does not negate the meaning but doubts in its common demonstration. In Derrida's point of view, breaking structures includes a positive motivation, leads to action and joints the action to desires, involvements, responsibilities and commitments. Thus, breaking structures has moral and political burden (Ghashghaie, 2002).

It may seem revolutionary but Derrida doubts it; revolutionary thought is teleological, starts from an origin and goes towards a goal: it is a meta-physical method and its goal is overthrowing the political system, it may be acceptable and defensible but Derrida's original thought and interest trends to replacement rather than overthrow (Ghashghaie, 2002).

#### *Discussion:*

##### *First discussion: traditional approaches:*

##### *Conflict between natural rights and realization rights:*

Two schools, natural rights and realization rights, have formed against each other. The school of realization rights opens the way to ignoring human rights, and the school of natural rights tries to enforce justice and avoid cruelty.

The school of natural rights says what makes obeying the legal rules is justice and its reason is not command of governor or legislator and the reason of being faithful to a law is its fairness, and as the human nature is justice-bound and humans obey it.

##### *Thomas Aquinas' natural rights:*

Aquinas distinguishes between two kinds of the autonomic functions: first, natural and basic trends and an emotional approach to a subject which is evaluated according to the justice, peace, purely good, desirable beings.

Most of the studies on ethical theories, categorizes Aquinas' morality as natural rights theory. He describes the natural rights as intellectual contributions in infinite rights of God and states that all humans have an adequate cognition to recognize what is morally accounted as a right thing to be able to adjust their actions.

##### *Realization school of John Austin:*

Realization school's fans especially in the field of civil rights try to make a government to change and cancel racist laws. In their point of view, the laws which state racial discrimination were not fair and could not be a part of one country's law. Their reasoning was so that it was known as "philosophy of legal positivism". In positivism's point of view, the duty of "analytic jurisprudence" is to recognition of the nature of country laws, irrespective to whether it is matched with moral criteria. Analytic jurisprudence is a science which studies the laws and legal institutions of a society.

John Austin, the 9<sup>th</sup> century British rights philosopher, is a famous theorist of legal positivism. He defines laws as "ruler command" and command as "order with threat". Accordingly, each law which is passed by a government must be enforced irrespective to its nature of being good or bad.

##### *Hans Kelsen's realization school:*

The pure theory of rights forms the most important part of Kelsen's legal thoughts which proposed it in the form of a book with the same title. In his point of view, this science should be separated from other sciences to recognize the nature of rights fully; because some sciences such as sociology, psychology, ethics and politics which surround the rights are not the part of this discipline nature and just hold us to figure out the real nature (Katouzian, 2001, 227).

In Kelsen's point of view, rights cannot be measured based on values because it is based on force and power; values cannot be considered as a guiding principle; justice is also a misleading measure because it has a meta-physical concept and is far from human perception.

In his point of view, in every country, only one legal system governs and the head of which is constitution, and ordinary laws, contracts and courts decisions must be in its direction and take their credit from it.

Kelsen interpreted the categorization of rules in the form of pyramid to "the principle of creating laws order in degrees". One of his followers called it "laws step structure". It may be stated that the pyramid proposed by Kelsen is focused on a written basic rights system but Kelsen has generalized it to an unwritten constitution.

##### *Second discussion: modern approaches in methodology of science of laws:*

##### *Lan Fuller's natural rights:*

Fuller disagreed with lining between rights and ethics. Fuller describes rights as a system which regularizes citizens' behavior under the rules and knows laws as a form to guide people which is differ from other guidance practices such as managerial orders: "laws is a special means to reach a certain destination, a kind of certain tool".

Fuller provided an analysis based on inner morality of laws rather than legal positivism analysis of laws based on "power, orders and obedience". He like theorists of traditional natural rights defines a threshold through which a thing must pass correctly to be called as "law". But unlike theorists of traditional natural rights, fuller's test to recognize laws had been designed based on the special task of laws more than a pure moral content. As it will be pointed out, in Fuller's point of view the test had a moral concept. "Internal morality of

laws” persists on a set of conditions which a rule must include them to be called as “law”. At the same time, Fuller introduces some systems which were legal to different extents. He stated that a system has his requirements “to some extent” but not fully, is legal “to some extent”.

*Ronald Dworkin's interpretative approach:*

Dworkin criticized a special version of legal positivism in his early books (taking rights seriously – 1968), an opinion which knows rights equal to laws and allows judges to utilize their own judicial discretion if there was no law.

Dworkin argues that legal systems include some principles in addition to rules. Legal principles like laws do not act as the “all or nothing” approach, they have this capacity that lead judgeship to different results and they often can provide contrasting responses for a single legal problem. The legal principles that Dworkin was interested in are some propositions with a moral content which relay on previous official actions (for example, legal literature, judicial decisions, or legal institutions). In this theory, there is still a kind of separation between rights and morality because the judges are asked to make decision by referring a set of legal different and maybe conflicting principles – the principles that have passed from the official canals implicitly and explicitly - not based on the moral principles requirements.

Dworkin introduced another theory in his recent books (Law's Empire – 1978) and called it "interpretive approach to rights". Although he talked about the relationship among his recent books and previous ones, his recent works can be considered as a recounting of his previous books which has been offered inside of the more detailed philosophic interpretations. He argues that each judicial decision is an interpretive judgment; hence it is a combination of pre and post elements.

In Dworkin's point of view, the best way to understand laws is "constructive interpretation". He knows the constructive interpretation as a proper way in artistic and literary works, either and has compared a judge procedure with a literary critic in his books.

*Ripert's realization rights:*

Georges Ripert (1880 – 1958) should be considered among the number of juristic who emphasizes his own search basis besides describing and interpreting laws and judicial procedures.

He stated his opinions about denying natural rights in some books such as "moral rules in civil commitments of democracy system and new civil rights of legal faces' the new capitalism", "downgrade rights" and finally "constructive forces of rights". He criticized the social realization schools in terms of they consider rights made by human groups and based on social customs. In his opinion, rights results from humans' thoughtful and voluntary efforts, and legislation should be considered as the art of choosing the best rules while sociology can only confirm the current situations.

Ripert commits the main hypothesis of positivism, separation of rights from morality. In his point of view, rights just require obeying laws and public officials guarantee the law enforcement and do not deal with the reasons and aspects of this obedience; the legal order must be separated from moral and religious concepts. Of course, people have the right to be judgmental of being good or bad of laws in their conscience while they obey them (Katouzian, 2001, 394).

Ripert focuses on the point that government political forces impose rules of law on people and each person who likes to live in a society must obey them but he added that using this power by governors is legitimate if it is used to reach some goals that are the basis of assigning power. They should establish regularity by bringing justice and if they do not do this duty, rights will be detracted and continuous mutiny will destroy the power of laws (Malori, 2004, 400).

In his opinion: "juristic should not be only a skilled artisan who utilizes all his measures to regulate and justify the spirit of legal literacy. He must effort to diffuse moral ideas in rights . . ." (Malori, 2004, 400).

*H. L. Hunt's realization rights:*

Hunt (1907 – 1993) refused the definition of rights as "the power command" by John Austin and Jeremy Bentham and provided a different version of legal positivism. In Hunt's point of view, law is a special organized set of social rules (Rouledge, 2000, 333).

In general, one can say that Hunt and other positivists are ready to accept the variety of legal requirements, what they emphasize on is that the credit of each legal requirement is confirmed by an identification rule. By showing this easiness, they indeed try to add to the number of legal binding standards to minimize the situations in which a judge has to utilize his judicial discretion in the lack of legal rules. On the other word, they hope to minimize the need of using illegal standards by accepting some moral principles in the scope of rights. But the point is that moral principles and some concepts such as justice are usually some disputed matters. Therefore, the increase of legal binding standards through entering dispute principles of morality in the scope of laws cannot decrease the range of judicial discretion activities like what positivists hope. This preparation increase

ambiguous and disputing issues of laws as much as increase the legal attributable standards (Coleman, 2003, 130).

Some issues that overcoming them requires applying judicial discretion. The result is that the role of judicial discretion and a judge's innovations in judgeship is always kept.

*Conclusion:*

Texts interpretation is a text epistemology issue and the most common problem in which interpretation is introduced, is text and literacy. Texts are different from other human beings artifacts, so interpretation is different from its applications in other human beings artifacts when it is used in texts.

A correct interpretation is one that can discover what the speaker said; however it may not reach to all his meanings; therefore we have a complete and more complete interpretation and we can have a wide range of interpretations that each of them is incomplete while it is correct; especially in the science of law which is the universe of credit or meanings of words, so wide and huge that we utilize them as much as I can.

We also said about interpretation approaches that literal interpretations related to some legal rules that are in the form of expressions and words. Therefore, this approach is utilized in interpreting laws, votes and precedents. In explaining a legal approach, we said that in this method it cannot find a special basis for each legal case but a set of integrated legal cases are usually based on a common base. Discovering this common base can help the regulator in finding the truth of laws and the regulator's aim.

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