

## SOME DEBATES OF HERMENEUTIC AND LEGAL INTERPRETATION: CRITICAL ANALYSIS OF HANS-GEORG GADAMER PHILOSOPHICAL HERMENEUTICS

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### ***Abstract***

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*Gadamer's philosophical hermeneutics is rooted in the idea that interpretation, understanding, or meaning cannot take place outside of historical and social contexts. This approach challenges the traditional view of law as an autonomous and rational discourse, emphasizing the importance of dialogue and ethical deliberation in legal interpretation. Gadamer's insights provide a unique perspective on legal hermeneutics, offering necessary protocols for determining, giving meaning, and emphasizing the historical and social embeddedness of legal practice. While some describe legal interpretivism as a hybrid between legal positivism and natural law theory, Gadamer's hermeneutics offers an alternative approach to legal meaning, focusing on the historical and social contexts that shape interpretive activities. This approach provides a nuanced understanding of legal interpretation, emphasizing the concretization of the law through dialogue and ethical deliberation.*

**Keywords:** *Hans-Georg Gadamer, Legal Interpretation, Philosophical Hermeneutics.*

### ***Intisari***

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Hermeneutika filosofis Gadamer didasarkan pada asumsi bahwa penafsiran, pemahaman, atau makna tidak dapat muncul di luar konteks sejarah dan sosial. Pendekatan ini menantang pandangan tradisional tentang hukum sebagai wacana yang otonom dan rasional serta menyoroti pentingnya dialog dan pertimbangan etis dalam penafsiran hukum. Gagasan Gadamer memberikan perspektif unik mengenai hermeneutika hukum dengan menyarankan protokol yang diperlukan untuk menentukan makna dan menyoroti interkoneksi historis dan sosial dari praktik hukum. Meskipun ada yang menggambarkan interpretasi hukum sebagai kombinasi positivisme hukum dan teori hukum kodrat, hermeneutika Gadamer menawarkan pendekatan alternatif terhadap makna hukum dengan berfokus pada konteks sejarah dan sosial yang membentuk aktivitas hukum. Pendekatan ini memungkinkan adanya pemahaman yang berbeda mengenai penafsiran hukum dengan penekanan pada penerapan hukum melalui dialog dan pertimbangan etis.

**Kata Kunci:** *Hans-Georg Gadamer, Interpretasi Hukum, Hermeneutik Filosofis.*

## A. Introduction

Text is the main reason that attracted Gadamer's attention in carrying out his hermeneutic project. For Gadamer, the problems of hermeneutics is not only limited to the justification of a language arrangement or text interpretation, but also seek to introduce a concept of understanding text into context, not in the context of the text.<sup>1</sup> Gadamer's intention is intended as a contribution to achieving consensus on an understanding. The understanding (*verstehen*) pioneered by Hans-Georg Gadamer, emphasizes the importance of understanding the historical and social context in which legal texts are created and interpreted. Gadamer argues that understanding is a shared process between the text and the reader, where the interpreter's own experiences and background influence their interpretation of the text. This approach, associated with H.L.A. Hart, focuses on the interpretation of law according to the original meaning of the text. Hart's method involves identifying the rules, principles, and policies that can be derived from the language of the statute, as well as the surrounding circumstances of its enactment. It is more concerned with determining the correct interpretation of the law, rather than exploring the broader hermeneutical process.

Hermeneutics has been helping to see the foundation of judgment as a critical examination. This examination is put to be the term open to several possible interpretations and as a way of widening the horizons, especially in the law. Gadamer's hermeneutical contribution is not to develop a set of rules or procedures for the interpretation of texts.<sup>2</sup> It also provides that the consensus understanding presupposes the positions in discourse can be disseminated through commensurable communication patterns.<sup>3</sup> This tendency formulates the notion that being rational or being human means agreeing on collective principles.<sup>4</sup> It takes a creative census to find an extreme relativism that rejects

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1 Alfred Jules Ayer, *Language, Truth, and Logic*, London: Oxford University Press, 1935, 29.

2 Gregory Leyh, *Legal Hermeneutics: History, Theory, and Practice* (Berkeley: University of California Press, 1992), xii.

3 Simon Honeyball and James Walter, *Integrity, Community, and Interpretation: A Critical Analysis of Ronald Dworkin's Theory of Law* (New York: Dartmouth and Ashgate Publishing, 1998), 14.

4 Scott Davidson and Marc-Antoine Vallée, *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, (Switzerland: Springer International Publishing, 2016) 200.

any universal framework.<sup>5</sup>

Even though Gadamer's hermeneutic thinking was inspired by his teacher, Martin Heidegger, Gadamer has his own characteristics compared to his predecessors.<sup>6</sup> Gadamer's reflection on Dilthey's hermeneutic thinking emphasizes the importance of the reader's historical and social context in understanding legal texts. There can be intersections between these two approaches, such as incorporating the original meaning of the text while also considering the historical and social context in which it was created and interpreted.<sup>7</sup> For Gadamer, it has nothing to do with the intention of the reader and the intention of the author of the text; instead, the so-called meaning of the law is not an abstract, it is acquired through the diverse concrete cases in which it has been applied.<sup>8</sup> Understanding as a goal to be achieved in Gadamer's hermeneutic thought seeks to direct issues of shared life to the text in an epistemic manner, for example, it can advance an interpretation of a statute correctly due to it represents the legislator's ideal intention would have had had enacted the statute.<sup>9</sup>

The contribution of Hans-Georg Gadamer's thought which is to be accompanied in this article places, that in the central concept, his thinking focuses on the *fusion of horizon* and *Wirkungsgeschichte*.<sup>10</sup> The concept of understanding embodied by Gadamer is inseparable from Heidegger's thinking which pivots on an understanding of phenomenology.<sup>11</sup> From Heidegger's book, *Being and Time* Gadamer saw from very early on a continuity in both his interpretation of Heidegger and his own philosophy, he still saw that

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5 Scott Davidson and Marc-Antoine Vallée, *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, 200.

6 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts," *Journal of Dialogue Studies* 7 (2016), 74.

7 Urbanus Ura Weruin, Dwi Andayani B, and St. Atalim, "Legal Hermeneutics: Principles and Rules of Legal Interpretation," *Jurnal Konstitusi* Vol.13 No.1 (March 2016): 100.

8 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts," 73.

9 Gregory Leyh, *Legal Hermeneutics: History, Theory, and Practice*, xii.

10 Scott Davidson and Marc-Antoine Vallée, *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, xiii.

11 Hans-Georg Gadamer, *Truth, and Method*, (London and New York: Continuum, 1975) 214.

Heidegger's thought had traced the hermeneutics of facticity.<sup>12</sup> This means a new positivity and must be understood as the ontological character of *Dasein*, the human being who is aware of his being-in-the-world means to fulfill this facticity, because hermeneutics, according to Heidegger, is understood as a way of gaining access to facticity.<sup>13</sup> In Gadamer's understanding, he focuses more on his hermeneutics as part of research in the human sciences. For Gadamer in understanding humans, people must care and be able to interpret these humans in their context.<sup>14</sup> Gadamer wants to depict understanding, interpretation, and application not as separate but as constitutive moments of a unified process, it means application does not simply come after but is rather the cornerstone of understanding.<sup>15</sup>

As Hans-Georg Gadamer explains, particularly if we accord epistemic authority to someone and assume that this person's instructions are correct and true, the epistemic significance the directive holds for us is controlled in part by our prejudices and prior knowledge about what is right and proper.<sup>16</sup> The epistemic significance of an authoritative directive cannot be identified solely based on the 'objective' meaning of the directive, nor can it be revealed only by reference to the interpreter's intentions.<sup>17</sup> Rather, the effect the directive has on the practical reasoning of its addressees is partly determined by their additional knowledge and background beliefs (i.e., their 'prejudices'). The acknowledgment of authority is always connected with the idea that what the authority says is in principle discovered to be true and not irrational.

Objectivity does not mean convergence of opinion either of universal or of well-informed opinion. Such convergence or consensus is no more than a symptom, and certainly no guarantee of objectivity. Objectivity here

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12 Martin Heidegger, *Being and Time A Translation of Sein und Zeit* by John MacQuarrie and Edward Robinson (New Jersey: Blackwell Publishers Ltd, 1962), 194.

13 Donatella Di Cesare, *Gadamer A Philosophical Portrait* (Indiana: Indiana University Press, 2007), 79.

14 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts," 80.

15 Hans-Georg Gadamer, *Philosophical Hermeneutics* (Berkeley, Los Angeles, and London: University of California Press), 1976, 45.

16 Hans-Georg Gadamer, *Truth, and Method*, 284.

17 Steve Coutinho, "Philosophy as Hermeneutics: Reflections on Roger Amer." *Muhlenberg College Special Collections and Archives* (1963): 70.

means mind independence, that the answer is right or wrong independently of any opinion. The judge can be seen as the decision maker who should not decide the case according to law if there is no single decision required by law<sup>18</sup> and if more than one is legally possible and it seems that there are gaps in the law and the gaps must be filled by the judge.<sup>19</sup> Based on positivism, thought is basically derived from a philosophical stream that borrows the views, methods, and techniques of natural sciences in understanding reality. It affects the existing consideration of legal positivism deals with concrete things. According to this position, the value of justice and morality is abstract and cannot be called science but rather metaphysical.

Judge can give their supplemental legal knowledge and expertise with their own moral perceptions and have a free hand to refer to their own instincts for justice and equity.<sup>20</sup> The decision can be legal as it follows the rules, but never be just.<sup>21</sup> In the contrast and tension of the letter and spirit of law, based on Jacques Derrida, is buried by judicial language which states the opposition between the general rules and norms of precedent and the unique particularity of individual cases and decisions by judges.

## **B. Hans Georg Gadamer and His Hermeneutic Project**

Hans-Georg Gadamer, born in Marburg on February 11, 1900 has studied Philosophy and has contributed to hermeneutical thinking in philosophy and the human sciences. Based upon Gadamer's book titled *Philosophical Hermeneutics* Gadamer tries to offer and illustrate how philosophical hermeneutics can be applied in the scope of legal practice. There is no theory introduced by Gadamer regarding hermeneutics in the field of law. Gadamer is more inclined to be a philosopher than a lawyer, although it occurred to Gadamer to review legal hermeneutics. It is just that Gadamer's concept of hermeneutics does not lie in the existence of law but rather at the ontological

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18 Ken Kress, "The Interpretive Turn," *Ethics* Vol.97 No.4 (July 1987): 836.

19 Ken Kress, "The Interpretive Turn," 836.

20 Craig Green, "What Does Richard Posner Know about How Judges Think?" *California Law Review* Vol.98 No.2 (April 2010): 659.

21 Adam M. Samaha, "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* Vol.108 No.3 (April 2008): 676.

level.<sup>22</sup> Gadamer magnum opus of *Truth and Method* Gadamer develops the independent of the consciousness of those who interpret through philosophical hermeneutic by means of a phenomenological examination.<sup>23</sup> Philosophical hermeneutics shows how to develop a reasonable and constrained law interpretation and facilitate its implementation without engaging in theoretical overreaching.<sup>24</sup>

Gadamer's thinking is inseparable from his teacher, Martin Heidegger, who has an interest in ancient texts by placing understanding in the context of human from the existential viewpoint.<sup>25</sup> Heidegger concept about the fore structure of understanding which put any interpretation is contributing to understanding and must have understood what is to be interpreted are accepted by Gadamer. The hermeneutic main task is to get the meanings of the text through the fore understanding of meanings recovered into our own meaning ultimately. The critical insight contributed by Heidegger to Gadamer implicitly has the goal of liberating the mind from the tyranny of the concepts of "totality" and "essence" which are entrenched in philosophical discourse.<sup>26</sup> There are claims centered on the form of abstract concepts that must be understood that an absolute text can be relative to other texts (intertextuality).<sup>27</sup> This condition triggered Gadamer through his thought on returning the meaning of the text as part of the process of understanding.<sup>28</sup>

In the Introduction to *Truth and Method*, Gadamer writes that the phenomenon understanding and the correct interpretation of what has been understood is not a problem specific to the methodology of the human sciences alone and furtherly appeared that the hermeneutic problem is basically not a problem of method at all. The hermeneutic contribution found in Gadamer's

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22 Hans-Georg Gadamer, *Truth, and Method*, 120.

23 Francis J.Mootz III, *Gadamer and Law*, (USA: Routledge Publishing, 2007), 38-39.

24 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, (New York: Ashgate Publishing), 2010,xi.i

25 Hans Lindahl, "Gadamer, Kelsen, and the Limits of Legal Interpretation," *Phänomenologische Forschungen* (2002): 28.

26 Daniel R.Herbert, "The Will to Believe and the Will to Learn: James, Pierce, and Anti Evidentialism," *William James Studies* Vol.18 No.1 (Spring 2023): 64.

27 Daniel Matthews, "From Jurisdiction to Juriswriting: At the Expressive Limits of the Law," *Law, Culture, and the Humanities* Vol.13 (3) (2017): 433.

28 Hans Lindahl, "Gadamer, Kelsen, and the Limits of Legal Interpretation," 28.

*Truth and Method* also leads to retrospection of legal texts.<sup>29</sup> Texts in the context of legal practice are inherent from tradition and authority.<sup>30</sup> Tradition and authority in law can be interpreted as something that should not cause tension.<sup>31</sup> Thus, legal interpretation in practice does not contain tension between familiarity and foreignness in the text, but rather should be seen as a process of understanding the text in a context that is constantly moving and changing.<sup>32</sup> It suggests that according to Gadamer's hermeneutics is aimed at achieving consensus and creating tension between familiar and unfamiliar elements within the text.<sup>33</sup>

Gadamer sees the nature behind every legal existence based on the empirical experience of prospective jurists studying law. It becomes interesting when Gadamer seeks a link between interpretation and application of legal hermeneutics that adapts to legal epistemology. Legal epistemology is divided into legal theory which is dogmatic in nature and legal philosophy which is reflective-critical in nature.<sup>34</sup> Interpretation in the perspective of legal hermeneutics is a method of interpretation carried out within the framework of the interrelationship between text, context, and contextualization regarding understanding or understanding something, or in other words a method of interpretation of the text.<sup>35</sup> Overall, Gadamer's hermeneutics emphasizes the importance of understanding the historical and social context in which legal texts are created and interpreted, while also recognizing the role of tradition and the interpreter's own experiences and background in the hermeneutical process.

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29 Ralf Poscher, "The Hermeneutics of Law: An Analytical Model for a Complex General Account," published in Michael Forster/Kristin Gjesdal (eds.), *The Cambridge Companion to Hermeneutics*, 2.

30 Scott Davidson and Marc-Antoine Vallée. *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, 27.

31 Deniz Coskun, *Law as Symbolic Form: Ernst Cassirer and the Anthropocentric View of Law*, Netherlands: Springer International Publishing, 2006, 19.

32 Joseph Vining, "Generalization in Interpretive Theory," *Representations* No.30 (Spring, 1990): 7.

33 Alfred Jules Ayer, *Language, Truth, and Logic*, 117.

34 F.Budi Hardiman, *Seni Memahami: Hermeneutik dari Schleiermacher sampai Derrida*, (Yogyakarta: Kanisius, 2015), 58.

35 Francis J Mootz III, "The New Legal Hermeneutics," *Scholarly Works William S. Boyd School of Law* (1994), 118.



### C. The Philosophical Hermeneutic and Legal Interpretation Overview

The philosophical hermeneutics introduced by Gadamer at that time was only a universal understanding and he did not specifically mention that there was a special hermeneutics in the scope of law. The nature of analysis and interpretation known in the science of law is dogmatic in nature.<sup>36</sup> Legal interpretation generally tries to avoid human phenomenology and tends to refer only to legal texts.<sup>37</sup> There is a tendency for immediate acceptance, meaning that philosophical hermeneutics as the basis for introducing Gadamer's hermeneutics has been taken for granted by jurists.<sup>38</sup>

Gadamer also stated that there are two main elements in phenomenology, namely firstly, *phenomenons* which are interpreted by what appears on something are different from what is the same and what appears. And secondly, *logos*, which cannot be interpreted as limited to reason but allows what is seen from itself in the same way as it shows itself. Phenomenology in this case focuses on how to approach the phenomenon, this is exactly like Heidegger's teachings as Gadamer's hermeneutic teacher who greatly influenced Gadamer's philosophical hermeneutic perspective.<sup>39</sup>

Within the scope of constitutional law as public law originating from the constitution, the interpretation of the constitution is still in a conventional way.<sup>40</sup> This is seen from the interpretation of human rights into the constitution which is still done through the old model of interpretation.<sup>41</sup> This old model interprets legal texts authoritatively and treats them as if they were sacred and legal.<sup>42</sup> The epistemology of legal knowledge in Gadamer's philosophical project on hermeneutics is implicitly confirmed, it can be interpreted that humans are in a hermeneutical relationship that reveals their existence as

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36 Mark Tebbit, *Philosophy of Law: An Introduction*, (London & New York: Routledge, 2002), 23.

37 Joseph Vining, "Generalization in Interpretive Theory" 2.

38 Francis J. Mootz III, *Gadamer and Law*, 26.

39 Hans-Georg Gadamer, *Truth, and Method*, 214.

40 Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory Third Edition*, Oxford: Oxford University Press, 2012, 25.

41 Jabbar Sabil, "Kerancuan Paradigma dalam Penelitian Hukum Empiris: Analisis Matriks Disipliner menurut Aulis Aarno." *Mimbar Hukum Universitas Gadjah Mada* Vol.35 No.1 (2023):134.

42 Ralf Poscher, "The Hermeneutics of Law: An Analytical Model for a Complex General Account," 5.



messengers. Humans can connect the “*hidden being*” and “*revealed*” as well as “*non-existence*” and “*existence*”, thus allowing humans to open themselves to various possibilities from the presence of reality.

Gadamer states the inseparability of the elements of understanding with the text and the senses in concrete moments require interpretation.<sup>43</sup> For Gadamer, law cannot be understood historically, instead requires interpretation until it is valid. The possibility that legal texts will occur can only be understood in a concrete situational way that is always new and different. Gadamer imagines that law is not a technical matter because the application of the law has an ambiguity problem so that its application cannot be rigid.

The focus of the connectedness component of language analysis in this paper positions the objective of legal interpretation both subjectively and objectively and the discretion of law enforcement holistically, which cannot be separated from the possibility of language (*semantics*) from the formulation of the text of laws and regulations that are formulated, compiled until they are approved by the legislator.<sup>44</sup> The construction of articles that are accommodated in the form of regulatory language to be applied generally and fundamentally is the starting point in carrying out an interpretation of the existence of the law itself. In addition, the formulated formulation aims to explore the meaning of law which is included in a series of processes to the practice of enforcing the rule of law in society, especially the relationship between legal language in the practice of legal interpretation.

#### **D. Critics and Comments on Hans Georg Gadamer’s Philosophical Hermeneutic**

One of Gadamer’s commentators, namely Gregory Leyh, who focused on legal hermeneutics, says that law is not a single or dogmatic conception within the scope of hermeneutical studies.<sup>45</sup> Hermeneutics is more oriented towards criticizing the formalistic view of law. Of course, in this case, there

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43 Oliver Ramsbotham, “Hans-Georg Gadamer’s Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts,” 74.

44 Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, (Oxford: Oxford University Press, 2006), 45.

45 Francis J Mootz III, “The New Legal Hermeneutics,” 118.

is a significant difference between dogmatic law and dogmatic hermeneutics, both dogmatics should not be associated with the legal hermeneutics that Gadamer is trying to formulate.

The basic problem approached by hermeneutical philosophy in this paper is based on the problem of methodical foundations (*geisteswissenschaften*) in humanities disciplines.<sup>46</sup> The focus of legal hermeneutics is centered on how law should be hermeneutically understood or appreciated. Practical handling of everyday legal issues means interpretive handling. Legislative texts are diagrammatic schemes or routes that show the subject of the interpreter the place where the interpretation starts and in which direction it should move.<sup>47</sup> Here, statutory rules are nothing more than a set of propositions that provide a scheme or diagram that aims to create new legal rules, namely the actual legal rules (*in concreto*).

The comments, which are built in Gadamer's view of philosophical hermeneutic thought, intuitively want to emphasize the existence of an ontological basis for the nature of law and humanity, not just on legal practice which is limited to focusing on technical issues. This problem raises a critical attitude that the methods introduced in pragmatic legal science are only intended to achieve technical interests. Such conditions serve as evidence of prejudice in Gadamer's view. Prejudice, according to Gadamer, is the basis for understanding and it cannot be separated from tradition. According to Gadamer, our prejudices are the basis for our knowledge and are essential for opening us up to what is to be understood.<sup>48</sup> There is an integration of past and present to create an understanding. Understanding means concretizing the law, which underlines how the law involves its application.

From this brief explanation of Gadamer's hermeneutic thinking, the function of hermeneutics is to fill legal dogmatic gaps. Legal hermeneutics, according to Gadamer's view, looks for the broader hermeneutical

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46 I Ketut Wisarja, "Hermeneutika sebagai Metode Ilmu Kemanusiaan: Perspektif Hermeneutika Wilhelm Dilthey," *Jurnal Filsafat* Jilid 35 No.3 (December 2003): 205.

47 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts," 75.

48 James Donato, "Dworkin and Subjectivity in Legal Interpretation," *Stanford Law Review* Vol.40 No.6 (July, 1988): 1536.

framework which suggests the involvement of an ontological aspect behind legal texts and is aimed at representing a constructive enterprise. There is a fundamental difference between Gadamer's legal hermeneutics which seems very philosophical to identify what happens to us over and above our wanting and doing relating to what we ought to do in interpretation.<sup>49</sup> Gadamer's hermeneutics thought sets for itself an ontological task that firstly allows for the occurrence of understanding. In legal practice, the method of interpretation used is more dogmatic in nature and does not emphasize human experience. As Leyh mentioned in his comment, Gadamer explores and views legal practice as an exemplary form of interpretive acts that reveals a great deal about how knowledge is acquired.<sup>50</sup> Leyh notes that legal hermeneutics involves and attempts to put the question towards authority.<sup>51</sup> This includes at least fulfilling some of the prerequisites that Gadamer had thought of, such as being based on tradition, history, and prejudice.<sup>52</sup>

Each legal text contains certain imperative messages from the legal system regarding the rights and responsibilities of legal subjects which have the core of imperative messages in the form of things that are prohibited, ordered, permitted, and permissible to legal subjects. Legal hermeneutics emphasizes on the importance of dialogue and ethical deliberation in legal interpretation, recognizing that interpretation is always situated and as an answer to some unique question that needs deciding. It also provides the necessary protocols for determining meaning, privileging no particular methodology or theory of law. Instead, legal hermeneutics calls the interpreter of legal texts to recognize the historical and social contexts that shape interpretive activities.

Legal facts in this case are events that already contain legal norms and have a normative dimension.<sup>53</sup> This means that legal facts are not necessarily the same as objective or empirical facts. In the legal field, facts are often

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49 Gregory Leyh, "Toward a Constitutional Hermeneutics," *American Journal of Political Science* Vol.32 No.2 (May 1988), 372.

50 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, 5.

51 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, 5.

52 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited: On the Very Idea of a Fusion of Horizons in Intense, Asymmetric and Intractable Conflicts," 75.

53 Gary Minda, "Jurisprudence at Century's End," *Journal of Legal Education* Vol.43 No.1 (March 1993): 51.

understood as propositions that are known to be true in a philosophical sense and need to be supported by evidence.<sup>54</sup> However, legal facts are not necessarily objective or empirical facts and they may be shaped by practical, material, and contextual-dependent factors such as power, social relations, and other contingent considerations.<sup>55</sup> Social facts are social realities with multiple insights that contain norms and value systems.<sup>56</sup> Social facts are not single facts and tend to be perceived. The fact-testing room and the norms-testing room are two different things. Both two test rooms are related to factuality and legal normativity.<sup>57</sup>

In the end, the most important thing is that hermeneutics must be used as a method of interpretation which is not a justification for a specific method of legal interpretation, it also includes efforts to understand the ontological aspects of legal philosophy as a branch of knowledge known in the epistemological structure of law. Gadamer's contention should not turn his hermeneutic project into the exclusion of the interpreter's point of view which always seems to be tinged subjectively by the interpreter's perspectives.

#### **E. Reflecting The Legal Interpretation Based on The Analysis of Legal Hermeneutic Orientation**

Legal scholars exploring hermeneutics aim to rethink traditional jurisprudential debates and to reveal more faithfully the phenomenology of legal practice.<sup>58</sup> It also reveals a commitment to act, deliberate, judge, understand, or even experience through interpreting all understanding, even natural scientific understanding despite the now discredited positive pretension. Gadamer can only make these strong claims for understanding and interpreting because he rejects older notions of hermeneutics and understanding. According to Gadamer, he radically conditioned the interpreter to fit their conditions in

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54 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited,"75.

55 Oliver Ramsbotham, "Hans-Georg Gadamer's Truth and Method Revisited,"75.

56 Gary Minda, "Jurisprudence at Century's End," 51.

57 Francis J. Mootz III, *Law, Hermeneutics and Rhetoric*, London and New York: Routledge Taylor and Francis Group, 2016, 19.

58 Jeff Malpas, "Introduction: Hermeneutics and Philosophy," An Article Chapter published in Jeff Malpas and Hans-Helmuth Gander, *The Routledge Companion to Hermeneutics*, (New York: Routledge, 2015) 4.

history which is not at all possible to return to the perspective of past authors and actors.

The interpretation of legal texts is the product of past socio-political contexts in which our legal tradition developed and the ongoing process of reinterpreting. Secondly, legal hermeneutics is the practical interpretive act that is historically defined to be no less than our theoretical self-understanding. Every interpretation is a historical event because an existing text is redefined in the context of the present.<sup>59</sup> Gadamer mentioned that historical thinking always involves establishing a connection between those ideals and one's own thinking. Gadamer's hermeneutics project is decidedly past-oriented, stressing the power of the past and the value of tradition.<sup>60</sup> It also concerns Dilthey's hermeneutic project about the intrinsic validity of culture's past and present and his hermeneutic approach to the study of man and his products.<sup>61</sup>

Gregory Leyh's comment on legal hermeneutic essay argued that hermeneutics is oriented toward fostering the development of practitioners who have acquired an understanding of law and the constitutive connections between the law and wider culture.<sup>62</sup> Leyh also emphasizes on the deep interconnections of legal discourse and the socio-political community, in which the intellectual and political life of the community seeks a renewed understanding when working with the law.<sup>63</sup> Instead of putting the legal hermeneutics as the multidisciplinary approach has been treated. law is understood as another voice in the larger community's conversation to promote a more just and humane politics.<sup>64</sup> Leyh's work is a bridge between the works of Gadamer and Habermas, showing how their ideas can be applied in a legal context. This approach will help demonstrate the relevance of Gadamer's and Habermas's ideas for legal scholars and practitioners, ultimately making the paper more appealing to the target audience.

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59 Deniz Coskun, *Law as Symbolic Form: Ernst Cassirer and the Anthropocentric View of Law*, 37.

60 Francis J Mootz III, *Law, Hermeneutics and Rhetoric*, 14.

61 Ilse N. Bulhof, *Wilhelm Dilthey: A Hermeneutic Approach to the Study of History and Culture*, US, and Canada: Martinus Nijhoff Publishers, 1980, 4.

62 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, 26.

63 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, 26.

64 Tom D.Campbell, *Collected Essays in Law Series: Law, Hermeneutics, and Rhetoric*, 28.

Gadamer's hermeneutic thoughts not only received comments but also criticism from other thinkers. One of them was Jürgen Habermas. Habermas is a German philosopher, born in the small town of *Gummersbach* on June 18, 1929. Habermas shows that there are fundamental methodological differences between the natural sciences and the humanities.<sup>65</sup> The natural sciences endeavor to explain every phenomenon, while the humanities sciences endeavor to understand each phenomenon by understanding human intentions.

Habermas focuses his attention on hermeneutic problems that are scattered in communication problems.<sup>66</sup> Habermas's emphasis is on the context of everyday language. Habermas learned a lot from Gadamer's magnum opus which was written in *Truth and Method (Wahrheit und Methode)*, in the initial formulation of his social theory.<sup>67</sup> Gadamer and Habermas's philosophical project stemmed from their mutual interest in Dilthey's thought. The connection between Gadamer's thought and Dilthey's thought which are focused on the historical world structure is not based on facts taken from experience but acquired from the value relation on the inner historicity that belongs to experience itself. The experience is a living historical process and a peculiar fusion of memory and expectation.<sup>68</sup> In contrast to the orientation of Habermas's philosophical thought which is oriented and focused on hermeneutical significance that provides a critical base from which to put an action-oriented understanding,<sup>69</sup> Habermas criticized Gadamer's understanding of normative principle from outside the cultural stream through establishing meaning and abandoning a rational foundation for the critical review in practice.<sup>70</sup>

The debate between Habermas and Gadamer began after Habermas finished his book, *Zur Logik der Sozialwissenschaften (On the Logic of Social Sciences)*, which argues and endorses the notion of hermeneutic experience

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65 Conrado M. Cornelius, "Menafsirkan Pancasila: Wewenang Pemerintah atau Peran Warga Negara? Suatu Telaah dari Perspektif Hermeneutika Kritis Habermasian," *Mimbar Hukum Universitas Gadjah Mada* Vol.33 No.2 (2021):336.

66 Conrado M. Cornelius, "Menafsirkan Pancasila: Wewenang Pemerintah atau Peran Warga Negara? Suatu Telaah dari Perspektif Hermeneutika Kritis Habermasian," 333.

67 Scott Davidson and Marc-Antoine Vallée, *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, 27.

68 Hans-Georg Gadamer, *Truth, and Method*, 217.

69 Gregory Leyh, *Legal Hermeneutics: History, Theory, and Practice*, 114.

70 Gregory Leyh, *Legal Hermeneutics: History, Theory, and Practice*, 114-115.

as a countermove to the linguistics of particular languages and how the reason transcends.<sup>71</sup> Habermas critically highlights two hermeneutical issues that are not questioned by Gadamer, namely the problem of relativism in understanding or feeling the actions or feelings of other individuals which is related to morals.<sup>72</sup> In this case, according to Habermas, there are two scopes of problems, namely interpretation issues related to epistemology and moral issues related to the justification of normative statements. Habermas and Gadamer's hermeneutic thinking debate positions raise the discussion of prejudice and validity as having power over an individual's behavior, because without that power, how could an individual accept a norm as valid?<sup>73</sup> Then, to say that someone has complied with a valid norm requires a kind of belief, which makes him obey.

In Gadamer's hermeneutics, the process of understanding (*verstehen*)<sup>74</sup> cannot be separated from prejudice, meaning that prejudice is not always bad. In *Zur Logik der Sozialwissenschaften*, Habermas emphasizes his critique on Gadamer's power of reflection which still fails in *verstehen*, mainly in recognizing critical reflection in tradition and authority. Gadamer focuses too much on understanding processes and ignores the fact that understanding is controlled by power processes.<sup>75</sup> Understanding involves what Gadamer calls a *fusion of horizons* of past and present.<sup>76</sup> The horizon is the range of vision that includes everything that can be seen from a particular vantage point.<sup>77</sup>

In that way, the interpretation of text enriches and changes history at the same time.<sup>78</sup> Gadamer's emphasis on the fusion of horizons can be related to linguistic pragmatism<sup>79</sup>, which focuses on the use of language in legal

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71 Karl Simms *Hans Georg Gadamer*, New York: Taylor and Francis Books, 2015, 112.

72 Francis J. Mootz III, *Law, Hermeneutics and Rhetoric*, xiii.

73 Laura Carrier, "Making Moral Theory Work for Law," *Columbia Law Review* Vol.99 No.4 (May, 1999): 1043.

74 I Ketut Wisarja, "Hermeneutika sebagai Metode Ilmu Kemanusiaan: Perspektif Hermeneutika Wilhelm Dilthey," 206.

75 Hans-Georg Gadamer, *Truth, and Method*, 33.

76 Hans-Georg Gadamer, *Truth, and Method*, xv-xvi.

77 Hans-Georg Gadamer, *Truth, and Method*, 301.

78 Daniel R. Herbert, "The Will to Believe and the Will to Learn: James, Pierce, and Anti Evidentialism," 78.

79 Daniel R. Herbert, "The Will to Believe and the Will to Learn: James, Pierce, and Anti Evidentialism," 78.



decision-making. A Gadamerian reading would consider how the language used in the statute might be understood in light of the broader social and legal context, rather than relying solely on the original meaning.<sup>80</sup> Gadamer sees something similar applying to texts and events from the past. This is why he claims that the dimension of hermeneutics is wider than previously held. It means that the canon of construction can provide a more comprehensive and nuanced understanding of its application in legal decision-making by considering the fusion of horizons, power dynamics and vested interests, and linguistic pragmatism. This approach can help legal scholars become more interested in Gadamer as a guide to legal hermeneutics.

Habermas's criticism of Gadamer's philosophical hermeneutics surfaced when critical ethical reflection emerged which was based on dialogue or discourse. This dialogue or discourse presupposes communicative correlation between more than two subjects, meaning that it is necessary to accept intersubjective validity claims based on consensual basis.<sup>81</sup> Normative truth claims and propositional truth claims do not lead to action in the same way.

A truth claim propositionally exists only in a speech act, while the strength of a normative claim does not depend on a speech act.<sup>82</sup> Claims for inherent normative validity in norms are defined by norms. Statements about objective reality rationally can be determined clearly whether they are true or not, meaning that the moral norms held by society do not have a definite validity that stipulates that these norms are truly norms.<sup>83</sup>

There are no guidelines in the approval of a norm by a subject with a value norm. Two possibilities may position norms as the basis for constructing illegitimate validity claims while legitimate norms may not be socially successful. The projection of this research is based on analysis to review power in the form of legal authority by constitutional judges in interpreting the constitutionality of norms against constitutional content.<sup>84</sup> This projection

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80 Urbanus Ura Weruin, Dwi Andayani B, and St. Atalim, "Legal Hermeneutics: Principles and Rules of Legal Interpretation," 102.

81 Steve Coutinho, "Philosophy as Hermeneutics: Reflections on Roger Amer," 70.

82 Adam M. Samaha, "Dead Hand Arguments and Constitutional Interpretation," 680.

83 Laura Carrier, "Making Moral Theory Work for Law," 1063.

84 Hans Lindahl, "Gadamer, Kelsen, and the Limits of Legal Interpretation," 48.

cannot be separated from the power process.

The process of power can be seen from the use of language that justifies power relations.<sup>85</sup> According to Habermas, the use of language is closely related to realizing the importance of meanings of the terms according to the subjective understandings of their users and the circumstances of their use. The idea of Habermas's critique is centered on his comments on Gadamer's hermeneutics articulation which is linked to an action-orienting self-understanding that all human knowledge and understanding are dependent on the interpretations structure.<sup>86</sup> Gadamer, who questions the method in the face of the truth of knowledge for Habermas, can be mediated by hermeneutical awareness of reflection on the use of everyday language.<sup>87</sup>

Aside from being a critic of Gadamer's hermeneutics, Habermas supports and agrees with Gadamer on the importance of ordinary language and the necessity of developing a historical consciousness that acknowledges that any interpretation is also the invention of a new history and a new present in the future will itself have become history.<sup>88</sup> Various disturbances such as distorted and systematic communication can be suppressed through efforts to understand critically-ideologically.<sup>89</sup> It means that the praxis of liberation from a pseudo-understanding is the result of domination to reach a rational understanding that is free from domination. Through his hermeneutical thinking, Habermas believes that with a rational understanding, the false understanding that appears in authority and tradition can be suppressed.<sup>90</sup>

The continuous feedback between legitimacy theory and legal practice when using the anticipated results in future cases to justify their adherence to a particular interpretive theory about a particular case was described by Gadamer as a way of experience rather than a method of inquiry. The

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85 Gary Minda, "Jurisprudence at Century's End," 50.

86 Karl Simms *Hans Georg Gadamer*, 113.

87 Francis J. Mootz III, *Law, Hermeneutics and Rhetoric*, 13.

88 Josef Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy, and Critique*, (London, Boston, and Henley: Routledge and Kegan Paul, 1980), 3-4.

89 Josef Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy, and Critique*, 4.

90 Scott Davidson and Marc-Antoine Vallée. *Hermeneutics and Phenomenology in Paul Ricoeur: Between Text and Phenomenon*, 27.

highest hermeneutical principle is holding oneself open in a conversation in hermeneutical themes imparted as part of legal education could bring about significant changes in legal practice.

Gadamer's perspective also recognizes the text understanding as dependent on determining some level of generality, which is what the author meant. An account of legal legitimacy as a theoretical matter of the intentions of the text's author should be the focus of interpretation.

Leyh as Gadamer's commentator had been given the renewed understanding and emphasis on the interconnectedness of legal discourse and the socio-political community in which the discourse takes place. Leyh's comments also restate and argue that legal hermeneutics could form the core of a revised curriculum which oriented towards fostering the development of practitioners who have acquired an understanding of law's passed and of the constitutive connections between law and wider culture.

## **F. Conclusion**

Gadamer emphasized the fusion of horizons, suggesting that the interpreter's understanding is influenced by their own historical and cultural context. In the legal context, this means that legal decision-making is not insulated from the broader social context, and understanding is a historical practice with ontological significance. There is the standard rational consensus which constantly balanced against other interventions such as political interests. Habermas, on the other hand, criticized the potential for power dynamics and vested interests to influence legal reasoning. Habermas highlighted the need to uncover and address the concealed relations of power and struggles between vested interests in legal interpretation. He also emphasized the importance of broader human affairs and interactions in legal hermeneutics. These perspectives contribute to the understanding of legal practice as a dynamic and socially embedded activity, where the interpretation of law is influenced by historical, cultural, and social factors, while also being subject to critical examination regarding power dynamics and vested interests.

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