

# The Legal Hermeneutics of Representation

*La hermenéutica jurídica de la representación*

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**Abstract:** The problem of representation is discussed in the context of the hermeneutic turn in legal and political philosophy. In particular, the different outcomes of two differing forms of legal hermeneutics (i.e., nihilistic and ontological connected to the Aristotelian and Thomistic tradition) are presented in relation to the controversial interpretations of “identity politics.” In the end, there is a discussion of a crux problem in order to determine which of the two conflicting traditions is the better candidate for proposing a just way to fulfill the need of radically modifying the myth of representation in the postmodern situation.

**Keywords:** Hermeneutic turn, political representation, legal representation, identity politics, totalitarianism.

**Resumen:** *El problema de la representación se analiza en el contexto del giro hermenéutico en la filosofía jurídica y política. En particular, se hacen presentes dos diferentes resultados de dos formas divergentes de hermenéutica jurídica (i.e., nihilista y ontológica conectada a la tradición aristotélica y tomista), en relación con las interpretaciones controvertidas de las “políticas identitarias.” Al final, se propone una discusión sobre un problema crucial para determinar cuál de las tradiciones en conflicto es mejor candidato para proponer una vía justa ante la necesidad de modificar radicalmente el “mito de la representación” en la situación posmoderna.*

**Palabras clave:** *Giro hermenéutico, representación política, representación jurídica, políticas identitarias, totalitarismos.*

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## I. Introduction

The old controversy on the universality of moral values or their relativity to circumstances of time and place<sup>1</sup> is parallel to the problem of universal “human” rights, as a quality of every human person regardless of race, nationality, culture, etc., contrasted with the “new rights” claimed by different identities (as in “identity politics”). This contrast between universality and particularity is at the core of the political task of mediation between values and their instantiation, and between abstract ends and concrete means, which is central to the most basic function of political authority. The “hermeneutic turn” in the 20th Century<sup>2</sup> makes it clear that the mediation, through authority, between values and policies, between ends and means, etc., is not transparent. For it needs both a hermeneutic procedure and a legitimate form of representation. The law is a key element in the construction of this needed “political representation.” So, I shall call “legal hermeneutics of representation” to this procedure that, at the same time, produces and challenges the purported representation of the whole (the people, civil society, the state, etc.) by one of its parts (the legally established authorities). This paper discusses the problem of representation in this context. To do so, I shall present the “myth of representation” in the context of modern practical philosophy (II). Then I shall concentrate on the more specific realm of the hermeneutic turn in legal and political philosophy (III). After setting the stage, I shall show the modified situation of the “legal hermeneutics of representation”, a radical modification produced by the hermeneutic turn. Two positions are disputing the field, the post-Modern nihilist hermeneutic and the hermeneutic of representation that is moderately ontological with Aristotelian and Thomistic connections (IV). Last, I shall present a crucial problem in order to determine which of the two conflicting traditions is the better candidate for proposing a just way to fulfill the need of radically modifying the myth of represen-

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<sup>1</sup> PLATO, *Thaetetus* (1986), 13-14.

<sup>2</sup> M. HEIDEGGER, *Being and Time*, 52.

tation in the postmodern situation. The problem has to do with the standards that can be used to evaluate the phenomenon of totalitarianism (V).

## II. The myth of representation in modern practical philosophy

Modern legal and political philosophy, rooted in the wide-ranging project of the Enlightenment, created an idea of legal and political representation based upon the epistemology and the metaphysics of modernity. In metaphysics, the existence of individual beings was seen as the uncertain or doubtful external correlate of human thoughts and ideas. The “things” were connected with the “thoughts” by means either of sensations (so in empiricism) or of necessary logical connections or transcendental structures of human thought (so in diverse forms of rationalism and idealism) or in diverse combinations of both ways and routes from the self to the world. Thus, John Locke:

The understanding seems to me not to have the least glimmering of any ideas which it doth not receive from one of these two: external objects furnish the mind with the ideas of sensible qualities, which are all those different perceptions they produce in us; and the mind furnishes the understanding with ideas of its own operations.<sup>3</sup>

And, thus, Immanuel Kant:

For the new point of view enables us to explain how there can be knowledge *a priori*; and, in addition, to furnish satisfactory proofs of the laws which form the *a priori* basis of nature, regarded as the sum of the objects of experience—neither achievement being possible on the procedure hitherto followed.<sup>4</sup>

Therefore, in epistemology, eventually every mental representation (*phenomenon*) took the place of an object whose exact reality (*nous* as different from *phenomenon*), if there was one, was impossible to determine.<sup>5</sup>

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<sup>3</sup> J. LOCKE, *An essay concerning human understanding*, 54.

<sup>4</sup> I. KANT, *Critique of pure reason*, B XVIII-XIX.

<sup>5</sup> See this situation in L. LOEB, *From Descartes to Hume*, 36-75; S. GAUKROGER,

Hence, the development of human thought since the sixteenth Century created the need to ascertain the laws of representation of objects in the humanly constructed world, which are the laws of natural sciences and of those sciences which gain thereafter a similar epistemological status.<sup>6</sup>

These “laws of nature” warranted, in the realm of human thought and action, the dominion over nature and over society, according to the Baconian and Cartesian ideals of practical knowledge. Behind this new human power, it emerges a new ideal of human liberation and adulthood, which is, according to Kant’s classical depiction, the kernel of Enlightenment:

Enlightenment is man’s leaving his self-caused immaturity. Immaturity is the incapacity to use one’s intelligence without the guidance of another. Such immaturity is self-caused if it is not caused by lack of intelligence, but by lack of determination and courage to use one’s intelligence without being guided by another. *Sapere Aude!* Have the courage to use your own intelligence! is therefore the [heraldic] motto [*Wahlspruch*] of the Enlightenment.<sup>7</sup>

As the human mind freed itself from theological myths, from the unexamined impositions of non-rational authorities and from the constraints of an ever-obscure nature, so too the human will of adult individuals should free itself from the constrictions of “heteronomous” rules and powers.

In the explanation of the binding force of moral imperatives and political authority, the autonomy of the will became a cornerstone. The relation of political authority, however, to the autonomy of the will, is perforce problematic or at least indirect. The immediate fact that requires justification in some law stemming from the autonomy of the transcendental will is precisely the heteronomy of political power.

Therefore, a new founding myth was needed for the era of the enlightened liberation of men. This myth was (and to many persons it seems to

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*Knowledge, Evidence and Method*, 39-66; and R. SCRUTON, *Modern Philosophy. An introduction and survey*, 112-120, 331-340.

<sup>6</sup> A paradigmatic case of this can be found in J. S. MILL, *An examination of Sir William Hamilton’s Philosophy*. For a systematic refutation of this kind of reasoning cf. E. HUSSERL, *Prolegomena zur reinen Logik*, particularly §§25-29.

<sup>7</sup> I. KANT, *An Answer to the Question: What is Enlightenment?*, 132.

be still alive) the idea of self-government through the representation of the people in democratic regimes.<sup>8</sup>

Here the concept of representation fills a gap similar to the metaphysical and epistemological ones. The “reality out there” or the “things in themselves” are objects of metaphysics and epistemology not as certainties and much less as truths (as in naïve pre-modern philosophy) but as objects of doubt in comparison to the ideas that stand in their place in the human mind. Precisely this characterization of an idea as a representation, *i.e.* as that which “stands in the place” of other thing which either is absent or inexistent or whose existence is doubtful, amounts to giving ontological and epistemological priority to mental constructions over and above purportedly “objective” external reality. Representation is, then, the presence in the mind of something other than the thing represented. The representation can be taken as the thing although we doubt the very existence of the “thing in itself.”

In this metaphysical and epistemological context, knowledge is above all speculative representation, a “mirror of nature” in Rorty’s words,<sup>9</sup> but without certainty about what exactly there is beyond the light that comes from the mirror, if there is anything at all.

The picture which holds traditional philosophy captive is that of the mind as a great mirror, containing various representations—some accurate, some not—and capable of being studied by pure nonempirical method.<sup>10</sup>

From this representational view of the mind, a sort of “liberation” is produced by a never-ending antifoundationalist hermeneutic.

In the field of law and politics, the sovereignty of the people is the bedrock of democracy and self-government. The empirically existent holders of power, however, are always individual men, who as such are equal to every other man, while at the same time exercise power over their fellow citizens. The “People” as such never presents itself as object of description

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<sup>8</sup> See the attempt to keep the myth alive in some versions of the concept of “deliberative democracy”, such as in J. COHEN, *Deliberative Democracy and Democratic Legitimacy. The Good Polity*, 17-34; J. ELSTER, *Deliberative Democracy*, and C. HENDRIKS, *Integrated Deliberation. Reconciling Civil Society’s Dual Role in Deliberative Democracy. Political Studies*, 486-508.

<sup>9</sup> R. RORTY, *Philosophy and the Mirror of Nature*.

<sup>10</sup> R. RORTY, *Philosophy and the Mirror of Nature*, 12.

or speculation, much less as a “subject” of collective action. The “free” and “autonomous” citizen never presents herself apart from the empirical existence of a limited, enslaved, passion-driven and often less than rational human being. So, the fiction of “free men” (in the 19<sup>th</sup> Century) or of “free persons” (in the 21<sup>st</sup> Century) and “popular sovereignty,” created by modern political philosophy, requires the fiction of representation by officials in the legal and political system.

This “representation” is also the “standing instead of” that we have seen in metaphysics and epistemology. The existence of that which is represented, however, is equally doubtful, so that the legal and political thinker—when alleviated from the weight of democratic ideology—is prone to describe “popular sovereignty” and “autonomy of the will” as mere myths held to be necessary for the legitimization of power, or as necessary postulates of a practical law, or as hypotheses of moral and legal thinking. Accordingly, the very idea of “political representation” is seen as a function of the smooth exercise of power. The smoothness derives from the concealment of power under the garments of the legitimate representation of the sovereign people and the exercise of individual rights by free and equal citizens who, through representation, partake in self-government. As Foucault puts it:

The individual is no doubt the fictitious atom of an “ideological” representation of society; but he is also a reality fabricated by this specific technology of power that I have called “discipline.”<sup>11</sup>

Laclau gives a cogent argument against the idea of pure representation (and thus against the myth of pure “self-government”):

The condition of a good representation is, apparently, that there is perfect or transparent transmission by the representative, of the will of those whom he represents. (...) The transparency of the relation of representation would be threatened if the will of the representative impinged upon the wills of those that he is supposed to represent (...) obviously, that is because the represented are absent from the place in which the representation takes place, and that decisions affecting them are to be taken there.

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<sup>11</sup> M. FOUCAULT, *Discipline & Punish: The Birth of the Prison*, 194.

And these decisions—as any decision—involve negotiations whose result is indeterminate. (...) This means that the role of the representative cannot be neutral, and that he will contribute something to the identities of those he represents. Ergo, the relation of representation will be, for essential logical reasons, constitutively impure.<sup>12</sup>

Perhaps all modern political thinkers have believed in popular sovereignty and in the ideal of the freedom of the people, made actual through the existence of a democratic form of government. Since direct and “real” democracy, as Rousseau<sup>13</sup> rightly asserts, is impossible, we are left with representative democracy.

Representative democracy, being an imperfect approximation to the ideal of self-government, requires legal rules and political practices to secure empirical external liberty and equality, limitation and control of power, the rule of the majority—taken to be the approximation to the will of the people, and respect for the minority—taken to be also part of the people and a potential majority, all of which, taken together, amounts to the standard ideal of a liberal constitutional democracy.

In the context of this ideal, majorities and minorities exist as incompatible or at least rival or competing views and wills about the due content of the law and public policies. They do not exist as groups with natural or pre-politic traits that could define them as specific types of majorities or minorities, e.g., racial, cultural, sexual, religious, or economic ones. The latter, specifically defined sorts of minorities and majorities are *invisible*. Think, for example, in the “liberation” of the indigenous peoples in Latin America, after the national independence of each country. That “liberation” consisted in granting them “equal” rights and citizenship *vis a vis* non-indigenous persons (of European background, mestizos, etc.); i.e., it was a “liberation” by transformation into citizens with full rights of participation and personal freedom of commerce and property rights.<sup>14</sup> This “liberation” of the individual “Indians” by the liberal state from the “oppressive” and

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<sup>12</sup> E. LACLAU, “Deconstruction, Pragmatism, Hegemony”, 47-68, at 48-49. See also E. LACLAU, *Politics, Theory and Contemporary Culture*, 277-296.

<sup>13</sup> J. J. ROUSSEAU, *The Social Contract and other later political writings*, 113-116. See also A. BLOOM, “Jean-Jacques Rousseau”, 543; J. MILLER, *Rousseau, Dreamer of Democracy*, 150-151, 205-207; J. NOONE, *Rousseau's Social Contract*, 63-64; and G. SABINE, *A History of Political Theory*, 586-592.

<sup>14</sup> See N. FERGUSON, “American Revolutions”, 115-140.

“protective” rules that kept them as “minors” in the Spanish and Portuguese “kingdoms” led eventually to the indigenous peoples’ losing all of their properties in legally valid contracts with other equally autonomous and free citizens, who happened to be well-off and “better educated” mestizos, Spaniards, Portuguese, or, later on, Germans and Anglo-Saxons, and all the descendants of them.

The role of legal science in liberal democracies—according to the Enlightened ideal—is to identify the law and to describe it as something objectively established by the will of the people:

The science of law describes the legal norms created by acts of human behavior and is to be applied and obeyed by such acts; and thereby describes the norm-constituted relations between the facts determined by the norms.<sup>15</sup>

The political function of legal science is as invisible as the existence of real peoples and real persons that do not fit into the picture of political representation. This way of conceiving legal science and legal and political philosophy adheres to the view that there are objective rules that ought to be obeyed, which the individual theorist and the individual citizen first know and then follow. There is a clear distinction between knowledge of and obedience to the rules. The different levels of democratic legitimacy, in their turn, require the distinction between law-creation and law-application. This distinction between the functions of creating the rules and that of applying them to the citizens, finally, depends upon the different ways of representing the popular will. And at all levels of the legal system there is a distinction between creation and application of rules:

The problem of the form of government as the question of the method of law creation arises, however, not only at the level of the constitution, hence not only for legislation as the creation of general legal norms, but at all levels of law creation and specially for the various cases of creating individual norms: acts of administration, judicial decisions, and legal transactions.<sup>16</sup>

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<sup>15</sup> H. Kelsen, *Pure Theory of Law*, 71.

<sup>16</sup> *Ibidem*, 280.



In sum, the problem of the myth of representation is tied to the myth of popular sovereignty, and both political myths, despite being the softeners of political dominion in contemporary democracies, are, at the same time, the root of the invisibility of those minorities, and even majorities, which cannot be represented because they have no democratic legitimacy at all.

### III. The hermeneutic turn in legal and political theory

The reactions against liberal democracies, in the antidemocratic ideologies of the late nineteenth and early twentieth centuries, were “justified” in the blindness of the classic democratic ideology towards the radically differing points of view that strived to be recognized in the political community.<sup>17</sup> Marx, Nietzsche and Freud were the key thinkers in the critique of the enlightened project. They gave the strongest form to what Paul Ricoeur labelled the “hermeneutics of suspicion.”

Three masters, seemingly mutually exclusive, dominate the school of suspicion: Marx, Nietzsche and Freud. It is easier to show their common opposition to a phenomenology of the sacred, understood as a propaedeutic to the “revelation” of meaning, than their interrelationship within a single method of demystification.<sup>18</sup>

Behind the supposedly “objective” rationality of enlightened morality there was only will to power. So, Nietzsche:

Viewed properly, the “grounding of morals” (as philosophers called it, as they demanded it of themselves) was only an erudite form of good *faith* in the dominant morality, a new way of *expressing it*.<sup>19</sup>

<sup>17</sup> See W. I. LENIN, „Thesen und Referat W. I. Lenins über bürgerliche Demokratie und Diktatur des Proletariats, vorgetragen und bestätigt auf dem Internationalen Kommunistischen Kongress am 4. März 1919”, 53-68, specially §§ 4-17; C. SCHMITT, *The Concept of the Political*, specially 69-79. See also S. PAYNE, “Fascism and Racism”, 123-130.

<sup>18</sup> P. RICOEUR, *Freud and Philosophy: An Essay On Interpretation*, 32.

<sup>19</sup> F. NIETZSCHE, *Beyond Good and Evil: prelude to a philosophy of the future*, 76.

Behind the classical democratic liberties and rights of men, there was only the economic structure of capitalist dominion over the exploited proletarians. In Karl Marx's words:

In every epoch the ideas of the ruling class are the ruling ideas, that is, the class that is the dominant material power of society is at the same time its dominant intellectual power. (...) The dominant thoughts are, furthermore, nothing but the ideal expression of the dominant material relations; they are dominant material relations conceived as thoughts, in other words, the expression of the social relations which make one class the dominant one, and thus the ideas of its dominance.<sup>20</sup>

And behind the conscious realizations of culture and religion was nothing other than the libido and the repressed pulsations of the unconscious, according to Sigmund Freud.<sup>21</sup>

Under the direct or indirect influx of one or more of these thinkers, a new hermeneutical conscience emerged in general philosophy, going far beyond the hermeneutic of Schleiermacher, Dilthey or, more recently, Heidegger and Gadamer. In effect, Nietzsche subverted the confidence of the Enlightenment in its project of liberation through science and knowledge. Freud subverted the naïve belief in objective rules of morality, especially in sexual matters. Marx subverted the belief in a rational political unity of all free and equal citizens; all were divided by the class struggle. Accordingly, every representation—mental representations in epistemology and metaphysics and political and legal representations in the organization of society—was deprived of its value and legitimacy by means of these radical critiques.

Today some believe that Freud, Nietzsche, and, particularly, Marx are only names for specialists in philosophy, and not the inspirers of actual political movements. Nevertheless, their “hermeneutics of suspicion” have pervaded the masses, so that there is no “legitimate representation” left in public conscience anymore. The masses do not respect their rulers as democratic representatives of the will of the people; on the contrary, they despise

<sup>20</sup> K. MARX, *The German Ideology*, 145.

<sup>21</sup> See S. FREUD, “The Future of an Illusion”, particularly parts VI and VII, 25-39. See also S. FREUD, “Civilization and its Discontents”.

them as the necessary evil of a corrupted self-interested class, needed only to enable each one to pursue his or her own interests.<sup>22</sup>

We must not forget, moreover, that these philosophical critiques were in some way confirmed in the beginning of the 20th century by the failure of liberal democracies to preserve peace and to satisfy the most basic requirements of material wellbeing for their purportedly equal citizens. The First World War and the so-called “social question”—the miseries of working classes, more visible albeit not more appalling than the wretchedness of the slaves and the poor of previous centuries—made it manifest that something was not working in the idyllic myth of liberal democracy.

In this context of crisis of the enlightened reason, the hermeneutic turn prepared by Schleiermacher<sup>23</sup> and Dilthey<sup>24</sup> came to a full development in practical philosophy both in the Anglo-American and the Continental traditions.

Heidegger and Gadamer stressed the plurality of existential situations of the human being.<sup>25</sup> There is not a single being that can be frozen and described once and forever by the human mind. There is no mental representation of the being as such. Gadamer, despite the many contrary interpretations of his work, did make clear, at least, that in every piece or expression of knowledge there are intertwined elements coming from the past—the tradition of interpretation and the authorities to which the knower is attached—and elements coming from the present situation of the subject. The-

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<sup>22</sup> V. BUFACCHI, “Sceptical Democracy”, 23-30; D. MATTEI (ed.), *Political Mistrust and the Discrediting of Politicians*; G. SKAPSKA & A. ORLA-BUKOWSKA (eds.), *The Moral Fabric in Contemporary Societies*.

<sup>23</sup> See F. SCHLEIERMACHER, *Hermeneutics and Criticism and Other Writings*.

<sup>24</sup> See W. DILTHEY, *The Formation of the Historical World in Human Sciences*.

<sup>25</sup> See M. HEIDEGGER, *Being and Time*, particularly sections 31 (“Being-there as understanding”, 182-188) and 32 (“Understanding and interpretation”, 188-195). See also M. HEIDEGGER, *Ontology – The Hermeneutics of Facticity*, in particular sections 3 (“Hermeneutics as the self-interpreting of facticity”, 11-16), 7 (“Historical Consciousness as the being-interpreted in the today”, 28-32) and 11 (“The interpretation of Dasein in historical consciousness”, 40-45). See also H. G. GADAMER, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, particularly Part II, I, 3, B (“Heideggers Entwurf einer hermeneutischen Philosophie”, 246-269). English version: H. G. GADAMER, *Truth and Method*, specially “Heidegger’s Project of a Hermeneutical Philosophy”, 254-264. As a general guide to philosophical hermeneutics, see J. GRONDIN, *Introduction to Philosophical Hermeneutics*, particularly chapters V (“Heidegger: Hermeneutics as the Interpretations of Existence”, 91-105) and VI (“Gadamer and the Universe of Hermeneutics”, 106-123).

re cannot be a tradition-independent or a subject-independent knowledge of reality.<sup>26</sup>

The second Wittgenstein in particular, but also, immediately after him, the linguistic philosophers of the “Oxford ordinary language philosophy,” stressed the practical character of every piece of knowledge and of expression of knowledge as part of different “language games” and “forms of life.”<sup>27</sup> In legal philosophy, H.L.A. Hart abandoned the idea that the law could be defined in a rigid way, since there are many points of view that account for many aspects of an analogical concept of law.<sup>28</sup> There was indeed a hermeneutic turn in the sense that it was recognized that no “objective” knowledge of the law and of other practical realities was possible from a purely external, descriptive point of view, since only from the internal point of view is it possible to grasp the main features of those practical realities. The internal points of view of human protagonists of legal and political phenomena are, however, indefinitely many. So, there can be varied interpretations of the same rules. It is true that Hart still maintained that a strictly descriptive science of the law in its core of clear meaning was possible, which is something that sounds contrary to his otherwise hermeneutic approach to legal theory.

This hermeneutic approach was taken also in legal theory by those authors who stressed the subjective aspects of every interpretation. Authors such as Theodor Viewegh, Chäim Perelman, Josef Esser, Arthur Kaufmann, Ronald Dworkin, and others, acknowledged the role of legal principles and of different ideals of justice in adjudication.<sup>29</sup>

Today, after the hermeneutic turn, it is widely shared the view that legal and political institutions are not the expression of abstract and neutral political ideas of liberty and equality. The law in its actual operation through law-creating and law-applying institutions is not capable of embracing whatever content the representatives of popular sovereignty decide to enact.

<sup>26</sup> See the concepts of “horizon” and “Wirkungsgeschichte” as shown in H. G. GADAMER, *Wahrheit und Methode*, 305-312; H. G. GADAMER, *Truth and Method*, 300-307. See also J. GRONDIN, *Introduction to Philosophical Hermeneutics*, 113-115.

<sup>27</sup> See L. WITTGENSTEIN, *Philosophical Investigations. The German Text, with a Revised English Translation*. See also J. L. Austin, *How to Do Things with Words*. For a complete review see T. BALDWIN, “The Oxford Movement”, 39-63.

<sup>28</sup> H. L. A. HART, *The Concept of Law*, 15-17.

<sup>29</sup> See C. ORREGO, “Hermenéutica y no cognitivismo ético en la teoría analítica del derecho”, 321-333.

This is so because there is not any clear-cut distinction between creation and application of the law and because at all levels of the concretization of the law there is a hermeneutic circle that demands value judgments and personal implication and, thus, personal responsibility of those who hold power. And this new situation has widespread consequences for the legal hermeneutics of representation.

#### **IV. The legal hermeneutics of representation after the hermeneutic turn**

I shall call “legal hermeneutics” the process of determining the meaning of a “text” in the context of the working of the law. Because from a post-hermeneutic point of view there is no separation between determining the meaning of a text and knowing practically its application in each context, the expression “legal hermeneutics” comprises at the same time the abstract meaning and the practical consequences of its applications in a context. Here “text” is understood in the widest sense of hermeneutic philosophy: linguistic expressions, either oral or written; cultural phenomena; natural entities subject to human knowledge and/or manipulation; human history; etc. And “law” is understood as a social system consisting of principles, rules, institutions, practices, etc., as they appear in the deliberations and interpretations of all the persons who partake in the system (this definition is, of course, hermeneutically circular or “in spiral”).<sup>30</sup>

The “legal hermeneutics” of representation is straightforward in the rational system of liberal democracy, which in theory still governs us. The People is sovereign. The process of democratic designation of authorities and the formal processes of legislation and adjudication, in so far as they approach the ideal of representing the people by democratically legitimized officials, define the basic requirements of the legitimacy of the content of the law. Those who believe they have been wronged by whatever content of the democratically enacted law or its application have open to them the same means of action and defense in the legal and political systems as those who have managed to establish the controversial content. The minorities can become a majority or can ask for protection of their constitutional rights as minorities. The “representatives” are so by virtue of the law and by

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<sup>30</sup> See C. ORREGO, “La analogía entre la analítica y la hermenéutica: H. L. A. Hart y Arthur Kaufmann”, 417-436.

following legal procedures for their election. They represent the people and the citizens, who can be counted as free and equal individuals.

After the hermeneutic turn, however, the “legal hermeneutics” of representation is problematic. There are no more just “free and equal citizens,” constituted from the single point of view of the Enlightenment’s human reason. There are indefinitely many points of view, in a way that tends to convert almost any “permanent” characteristic of a person or group into something publicly relevant. And this new situation, a world of radically differing points of view and incommensurable interpretations, raises seemingly insoluble problems for the “legal hermeneutics” of representation. For in the same way that in modern political philosophy the theory of representation was a myth that reflected the epistemological and metaphysical conceptions of the mental representation of a doubtful reality, so too the conceptions of representation after the hermeneutic turn of post-modern political philosophy dispel that myth and assert the impossibility of a single rational representation of free citizens. In effect, *if* the human minds are not united in the single rationality of mega-narratives, but rather there are as many rationalities as points of view, traditions, personal traits of character, etc., and *if* there is no unitary world of mental representation in a single model of science and philosophy, then it seems to follow, for practical philosophy, that there cannot be a unique form of political representation, but many points of view from which differing powers and interests struggle to be represented.<sup>31</sup>

Before showing some of the problems that emerge from this new philosophical and political situation, I would like to mention the two main orientations in the interpretation of the hermeneutic turn, which lead to radically opposed formulations of, and answers to, these new problems.

The dominant hermeneutic view is a radicalization of the “hermeneutics of suspicion,” particularly in its strongest, Nietzschean form. According to this sort of hermeneutics, as we find it developed e.g. by Vattimo<sup>32</sup> or Rorty,<sup>33</sup> not even the hidden content of a “real” will to power (or struggle of

<sup>31</sup> See W. KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, especially chapter 4: “Rethinking the Liberal Tradition”, 49-74. See also C. TAYLOR, *Multiculturalism: Examining the Politics of Recognition* and C. TAYLOR, *Understanding and Ethnocentricity*, 116-133.

<sup>32</sup> G. VATTIMO, *Beyond Interpretation: The Meaning of Hermeneutics for Philosophy*.

<sup>33</sup> R. RORTY, *Philosophy and the Mirror of Nature*, particularly the third part, “Philosophy”, 315-394.

classes or whatever) subsists behind the ideological masks of rationality, morality, culture, religion, and democracy. There are no “facts” whatsoever, hidden at last behind a long chain of interpretations of texts. There is neither a “being,” nor a “good,” nor a “reason” that we may strive to attain by means of our interpretive activities. There are no “objective” reasons to decide between one system of government and another. There is no “truth” behind interpretations. So, the infinitude of interpretations of what we are inclined to call “reality” are themselves the only “realities.” There are only interpretations of interpretations, and it is radically impossible to get to a solid rock of true reality (*i.e.*, outside of human interpretations) in order to make of some interpretation “the only true” interpretation. We can, of course, argue for one interpretation as better than others; we can choose our preferred interpretation: this is all what dialogue, disputes and wars are about. Each of us has one’s own preferred interpretations and can even use the concepts of “truth” and “justice” in bona fide. But behind these games of language, these human practices in which we take sides, there is no “objective reality” to be attained. We have just what we have (*v.gr.*, democracy, or human rights) because it works, and we value it because it is our form of life, which is the basic tenet of Rorty’s pragmatism, postmodern priority of democracy over philosophy.<sup>34</sup> We tend to think that we value it because there is some objective good, but this is ideology: no more than a self-deceiving form of wishful thinking. We do not hold absolute truths that are better than the “truths” of radically incompatible forms of life and of political organizations and practices. This is a radically nihilistic form of hermeneutics.

The other post-hermeneutic orientation accepts the hermeneutic insight and its extension against the enlightened project. It admits the failure of the emancipating project of the Enlightenment. It endorses the unity between the “objective” and the “subjective” both in science and in life, and the unity between knowledge and practice. It accepts the critique of radical hermeneutics (*i.e.*, Nietzschean) against the naiveté of rationalist ideals of science, law and politics. It affirms the many points of view, which are not to be reduced to the abstract point of view of rational beings as such, who are free and equal. These post-hermeneutic authors, however, use the methods of radical hermeneutics (deconstruction, critique of ideology, genealogy of purportedly rational arguments, etc.) against radical hermeneutics

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<sup>34</sup> R. RORTY, “The Priority of Democracy to Philosophy”, 175-196.

itself. Alasdair MacIntyre states that behind all the attempts of radically hermeneutic authors to destroy the belief of humans in their nature as rational animals and its practical consequences (*v.gr.*, the relative superiority of some traditions over others, the possibility, and the need of virtues) there is hidden not the will to power of others but the self, i.e. a radical will to power of the thinker himself. Accordingly, there is a way out of this radical emotivism and the nihilist culture produced by the dissolution of modern philosophy. The way out is the systematic confrontation of radically opposed traditions, along with the cultivation of the classical Thomistic Aristotelian tradition in a superior, evolved way, in small communities capable or nurturing human virtues.<sup>35</sup>

Robert Spaemann, for his part, accepts that there is no going back to the pre-modern conception of knowledge and metaphysics, but he incorporates the critical tradition of Kant in the Socratic tradition of the ever-open examination of the self<sup>36</sup>. Therefore, Spaemann, instead of attacking the possibility of truth in philosophy, as radical postmodernists do, claims that philosophy should be always open to critically re-examining old arguments as if they were new ones. As Madigan says, Spaemann's "philosophical project" is "to understand the phenomenon of modernity, to criticize the deficiencies of modern thought, and to preserve what is good in modernity by rehabilitating the ideological understanding of nature that modernity largely rejected."<sup>37</sup>

In this restatement of what Leibniz called *philosophia perennis*, Spaemann adopts a truly post-modern stance, i.e., he endorses no absolute human knowledge, no purely rational organization of social life, no abstract definition of the person, no utopian political discourses of autonomous consensus, no reduction of social reality to working systems, etc. He rescues, however, the language of natural teleology arguing that radical anti-foundationalism leads to the emaciation of human rights, to making them altogether relative, while natural teleology grounds them in the real

<sup>35</sup> A. MACINTYRE, *Three Rival Versions of the Moral Enquiry: Encyclopaedia, Genealogy and Tradition*, especially, on this topic, 47-55, 204-216. See also A. MACINTYRE, *After virtue*, particularly 181-243.

<sup>36</sup> Of course, this does not mean that the principles of contemporary philosophy could be different from the principles of Aristotelian philosophy, but it does mean that we may not ignore the challenges that rival thinkers and traditions have posed for the Aristotelian tradition.

<sup>37</sup> A. MADIGAN, "Robert Spaemann's 'Philosophische Essays'", 105.



possibility of the external self-realization of flesh and blood human beings. “Only if there is the natural, that which exists by itself and with its own structure, can there be reason: otherwise nothing could be revealed.”<sup>38</sup> Or again: “Without something like normality—not only in the statistical sense, but in the normative sense—there is no humane life together in society.”<sup>39</sup>

Accordingly, the stance of radical hermeneutics is refuted as a luxury of those intellectuals already established amid our secure, advanced, rich, capitalist societies; but this luxury, so argues Spaemann in a sort of *ad hominem* style, means nothing precisely to those who suffer hunger, torture, or death. For them, their “interesting case” seems not just a matter of interpretation.

After this hermeneutic turn, in spite of some critical defenders of the ideals of the Enlightenment somehow attenuated by 20th Century’s evil experience, such as Jürgen Habermas,<sup>40</sup> the two main positions outlined above seem to me the strongest alternatives competing in the war of interpretations and actions about the new problems of political representation<sup>41</sup>. In effect, the enlightened alternative, despite its embodiment in present legal doctrines and political institutions, can account only for the representation of organized majorities and minorities in or around political parties and pressure groups. This is only a quantitative form of representation, completely blind to the new problems of the global community and the multicultural interactions in even the smallest social realms such as schools, hospitals, public squares, airports, etc.

<sup>38</sup> R. SPAEMANN, “The Natural and the Rational”, 87.

<sup>39</sup> R. SPAEMANN, “Why There Is No Law without Natural Law”, 19. Please note that conceiving “nature” and “normality” in a normative sense allows to be brought to the fore the classical and Thomistic conception of natural law and rational ethics. See, for example, *Summa contra gentes* III, chapters 121 and ff.

<sup>40</sup> J. HABERMAS, *The Theory of Communicative Action; Truth and Justification*; and *Postmetaphysical Thinking*, especially 139-143.

<sup>41</sup> There are other possibilities, of course. For example, Paul Ricoeur has also developed a post-hermeneutic stance that is free from naïve enlightened ideology because he accepts in all its radicalism the plurality of points of view and the intrinsically conversational and hermeneutic nature of our human condition. At the same time, he avoids the extremes of dogmatic rationalism and hypercritical skepticism. He defends a hermeneutic elucidation of an ethics of respect and a politics of inclusion and participation. He cannot be included, however, in the Aristotelian tradition. See P. RICOEUR, “Hermeneutics and Critique of Ideology”, 63-100. See also S. CLARK, *Paul Ricoeur*, particularly 110-115.

The post-enlightened hermeneutic alternatives on the other hand, are starting to influence the political and legal, institutional organization of the new forms of representation, as can be seen in successful forms of semi-direct democracy (*v.gr.*, referenda, popular initiatives for law-reform, etc.) and of counter-democracy, to use the expression of Pierre Rosanvallon<sup>42</sup> (*v.gr.* judicial activism to represent, through the enforcement of loosely conceived human rights, new minorities; massive protests in the streets to blockade initiatives by legitimate formal representatives; lobbying and effective use of the means of social communication and of virtual social networks; highly symbolic acts to make visible some minorities; etc.).

This new influx of non-quantitative forms of representation constitutes, however, only a partial, emergency response to the serious problems of representation and political order that are open before us. I shall mention only one of these problems, but I shall leave open for future reflections the task of finding how a solution could be articulated by one or the other form of post-modern or hermeneutic philosophy. We know that ideas have consequences. In which world, with which representations and exclusions, shall we live, or are we already living?

The only problem on which I am going to reflect for the present time is the following: how the two main alternative ways of conceiving political representation are equipped to face the most terrible experiences of human history, the evil of totalitarianism. I am persuaded that this reflection will shed light on the consequences that flow from each of the two alternatives open before our eyes, and, therefore, on which of the two can offer the hope of achieving justice to some degree at least in our living together.

## **V. Representation and conflicting identities in the post-modern world: how to face the totalitarian experience**

The problems of representation are the other side of the coin of social conflicts and divisions among the members of a people or a community of peoples. In the last decades—and with fierce confrontations prompted by the so-called “cancel culture”—these conflicts and the crisis of modern representation have followed the lines of “identity politics.”<sup>43</sup> In effect, if

<sup>42</sup> P. ROSANVALLON, *La contre-démocratie. La politique à l'âge de la défiance*; in English, P. ROSANVALLON, *Counter-democracy. Politics in an Age of Distrust*.

<sup>43</sup> See F. FUKUYAMA, *Identity. The Demand for Dignity and the Politics of Resentment*.

all human beings were united in their identities, aspirations, interests, etc., or if they were “angels” whose conflicts were automatically solved through pre-political acts of good will, some sort of authority for coordination would still be needed. As Joseph Raz, among others, has put it: “Even a society of angels may have a need for legislative authorities to ensure coordination. Angels may be in agreement about both their values and the best policies for implementing them.”<sup>44</sup> In such all too imaginary circumstances, however, there would be authorities and “representatives,” but no need for *different or opposed* representatives, much less for fair procedures to nominate the representatives (for the way to choose them would be “fair” due to the good-will of the “angels”).

In fact, whatever the procedure and whoever might be appointed as public authority, that authority would represent the community as a whole (not just the people as the part ruled that gives its consent to bestow legitimacy) because of the mere fact of their holding authority over people who do not disagree in their basic views and interests. There would be no need of representation to ground authority, which is part of the modern myth of representation, but the other way around: authority would be the ground of any possible representation of the political community and of its members. This form of representation was identified by Thomas Aquinas who held the force of positive laws to depend on it, and it certainly holds true today in forms of organization that revolve around so called “objective common goods,” which are recognized by the members of the group as superior to any particular interest. Here the ruler represents the group because he or she is/has the authority. His or her authority does not rest on representation, but the other way around, as stated<sup>45</sup>. This can be seen, for example, regarding the authority in the family or in a religious group.

On the contrary, the authority of the American Congress or the British Parliament, according to the modern view of representation, is grounded on their representing the people. They have authority because they represent the people (who give their consent and so bestow legitimacy), not the other way around. Where there is division and conflict in the community, and the authority is conceived of as a way of representing the many views and the whole of the people in the unity of collective power, then the ac-

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<sup>44</sup> J. RAZ, *Practical Reasons and Norms*, 159.

<sup>45</sup> This is the classical view as it appears, for example, in T. AQUINAS, *Summa Theologiae* I-II q. 90, a. 3, c.

tual authorities derive their authority from representation, and not the other way around.

Now, after the hermeneutic turn, once we acknowledge that the divisions are multiple, that they are related not only to majorities and minorities of opinion, but to multi-faceted oppositions of personal and/or collective identities (*i.e.*, biological, ethnic, racial, cultural, economic, linguistic, religious, moral, sexual, and other relevant characteristics), then we see that the grounds and the occasions for conflict are justifiably many. The needs of representation and the problems of representation are, accordingly, justifiably complex and varied over time. The adequate formulation and solution of these problems determine a good deal of the foundation of legitimate authority. Since these problems have not been solved, we should not be surprised by the fact of a continuous loss of legitimacy of actual political authorities in liberal democracies.

This is the reason that leads and forces us to search for a different ground of legitimacy. The Modern one is irretrievably eroded. We therefore need to adjudicate between the two alternative traditions that take part in the dispute to lay such ground, the dominant post-Modern and the restatement of the *philosophia perennis* proposed by Alasdair MacIntyre and/or Robert Spaemann.

Now, the post-hermeneutic problem is this: Do we have objective criteria of justice to decide about the allocation of power and representation, criteria that are prior to the very definition of politically relevant minorities, or, contrariwise, is there unlimited hermeneutic freedom to construct these collective identities and to assign to them their proportion of power? The paradox here is that to ascertain “objective” criteria common to all human beings (therefore “objective” beyond particular identities and particular hermeneutics), would reinforce the value of the protected minority (protected for reasons that apply to those who are not members of the minority even against their particular interests and opinions); but, on the other hand, this very “rational force” of an “objective hermeneutic” would set limits to the movement of construction of new identities, thus undermining the claim of “unlimited” or “nihilist” hermeneutics.

In fact, the understanding of the protection of under-represented minorities from abuses of power or any form of threat demands a hermeneutical construction of a concept of harm to, and well-being of, those minorities, and also a hermeneutical narrative of historically ascertainable ways in

which that harm has come about or that well-being has been and is being threatened. This is the most difficult task for a historically conscious post-hermeneutic approach to morality and politics.

We can exemplify this problem with two departure points appropriate to Western culture and history: the trials after the Second World War and after the unification of Germany. According to the legal hermeneutics of representation that eventually prevailed, there were some minorities subjected to totalitarian repression, persecution, concentration camps, undue punishments including death, etc., both under Nazi Germany and under the Communist Democratic Republic of Germany. In both sorts of trials, after the triumph of the “free world”, though in differing degrees, many persons were punished by actions that, according to the prior “legal hermeneutics” upheld by the representatives of the people at the time of their actions (the Nazi Führer and the Communist Party respectively), were justified and even required.<sup>46</sup> This is not, however, the main point. The present problem is that these competing hermeneutics are still being proposed. Thus, for example, there are still many communist parties and organizations in the world that purport to interpret in a sympathetic way the history in the former Soviet Union and its allies like the Democratic Republic of Germany. So, the hermeneutic problem is to which extent reassert the *protection* granted to minorities threatened by the political discourses of Nazis and of Communists, racial minorities in the former case, religious and class minorities in the latter; and to which extent grant *recognition* and equal opportunities of *representation* or of expression *also* to the minorities constituted by Nazis and Communists (granted in the U.S.A., but not in Germany and Austria).

From the dominant post-modern point of view, so rampant in many Philosophy departments in western universities, how should the picture of the Holocaust and the Gulag be constructed? Were there “actual” gas chambers and millions of Jews as “real people” in the world “out there,” over and above our hermeneutic constructions and narratives? Were there “real” Stalinist gulags, purges, and brainwashing? And are there “objective” ethical principles for the grounding of the universal condemnation of those narrated events, or just the armed victory of a particular hermeneutic construction over another? Likewise, ought we to build and maintain

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<sup>46</sup> See H. ARENDT, *The Origins of Totalitarianism*, especially, on this topic, 389-510.

a system that prevents alternative narratives from emerging, condemning therefore the minorities that sustain these narratives to the underworld of political criminality and no-representation?

The authors who held that the said trials could in principle accord with justice resorted to classical and (perhaps implicitly) Thomistic principles in order to explain such accord. Gustav Radbruch openly stated that when the law departs too sharply from justice it becomes a non-law. He even invoked the scholastic principle *lex injusta non est lex* and the New Testament principle “one must obey God rather than man.”<sup>47</sup>

Again, the paradox arises. The same metaphysics that grounds a solid denunciation of extreme injustice is under the accusation of promoting “large metanarratives” and illusions, that are at the root of crimes committed in the name of a gigantic “Reason.” These metanarratives, this Reason, is suspect for post-modern hermeneutics. On the other hand, however, a “weak thinking” or “*pensiero débole*” seems to undermine the radical force of the denunciation of extreme evil. As Vattimo says:

To summarize, then, how a weak ontology conceives of truth, we could begin by saying: first, the true is not the object of a noetic apprehension of evidence but rather the result of a process of verification that produces such truth through certain procedures always already given time and again (the project of the world that constitutes us as *Dasein*). In other words, the true does not have a metaphysical or logical nature but a rhetorical one.<sup>48</sup>

This sort of reduction of metaphysical and objective reality to “rhetoric” liquifies the solidity of different “collective identities” that purport to claim for justice or for protection according to criteria that are also valid for and may be justly imposed to those people of other “identities.” It seems, therefore, that only a solid neo-classical or neo-Thomist metaphysical understanding of political reality can offer the hope or reaching a new just organization of our living together.

Again, what is at stake here is whether we can attain hermeneutics of representation grounded on so-called “objective principles”, that could give

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<sup>47</sup> See G. RADBRUCH, “Leyes que no son Derecho y Derecho por encima de la ley”, 14-16. See also *Summa Theologiae I-II, q. 93 a. 3 ad 2m* and *Puer Jesus III*.

<sup>48</sup> G. VATTIMO, “Dialectics, Difference, Weak Thought”, 50.

to every group in the world its due, or, on the contrary, we are left only to a crude war of competing “narratives” for the conquest of power over the world. Eventually, we need a new political philosophy of representation, that must face the problem of differences at a global scale, and that must acknowledge that the model of the dialectic between majority and minorities in the national state is superseded.

The legal hermeneutics of representation is but a corollary of metaphysics, epistemology, and general philosophy. If we admit a form of philosophy that submits the realities of human persons and their societies, their intrinsic value, to indefinite games of interpretations, let us not weep later over the leftovers of new genocides. “Genocide”, in fact, would be not a name of a brutal, evil solid “fact”, since there would be no solid facts “out there” anymore. “Genocide” would be the word of the victor in the war of competing interpretations to justify punishment within that specific language game. “Genocide” would eventually be just another word for yet another game.

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