Chapter 4

The interpretation of foreign law

How germane is Gadamer?

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Globalization processes attest to foreign law's increasing relevance. Consider how the US Supreme Court, one of the most influential interpreters in the legal world, has been referring to foreign law in high-profile decisions regarding the meaning of the US Constitution.[1] Also, in cases involving immigrants German judges make foreign law a component part of their legal reasoning as they assess whether a defendant's cultural background should impact a decision on guilt or civil responsibility.[2] Meanwhile, New York University has established the Hauser Global Law School, Georgetown the Center for Transnational Legal Studies, Harvard the Institute for Global Law and Policy, and King's College London the Dickson Poon Transnational Law Institute. Law reviews such as the *Columbia Journal of Transnational Law*, the *Indiana Journal of Global Legal Studies* and *Transnational Legal Theory* have emerged, not to mention an immense proliferation of exchange programmes, summer schools, curricula, courses, symposia, colloquia, books, dissertations and blogs. This massive paraphernalia of collective intellectual effort corroborates the fact that in a globalizing world incessantly featuring legal settings informed by multiculturalism and plurilingualism, intercultural legal understanding must now be deemed well-nigh inevitable. Arguably, the intensified interaction between foreign and local legal knowledges makes particular interpretive demands on lawyers. It must follow that legal initiatives aiming for intercultural understanding ought to assume a sensible and sensitive theoretical framework – theory being understood here as being practically oriented – that is, as being destined to be applied.

In this respect, Hans-Georg Gadamer's philosophical hermeneutics solicits special attention. Gadamer had a profound impact on literary and social theory by underwriting the 'interpretive turn'. At least as importantly for lawyers, he devotes aspects of his *Truth and Method*, his masterpiece originally published in 1960 and last revised in 1986, to law. The specific question I want to address is as follows: to what extent can Gadamer's work on interpretation assist ascription of legal meaning – understanding – across cultural lines?

With a view to a critical appreciation of the relevance of Gadamer's model to the interpretation of foreign law, I operate as follows. First, I briefly discuss Gadamer's approach to legal hermeneutics as I apprehend it. Interestingly, Gadamer regards

legal hermeneutics as exemplary for understanding in general. Although I agree in principle with Gadamer regarding the hermeneutic typicality of law in certain respects, his analysis of legal hermeneutics strikes me as too narrow. Second, I inquire whether philosophical hermeneutics can account for intercultural understanding with specific reference to law. Reactions regarding the applicability of Gadamer's interpretive insights to understanding across cultures diverge widely. I address this controversy as I proceed and conclude that it would be unduly optimistic to derive from philosophical hermeneutics, at least as currently articulated, a framework that could be mobilized to account for intercultural understanding.

I. Legal hermeneutics: how typical?

In the second part of his *Truth and Method* (Gadamer 1986b: 321–36), Gadamer includes fifteen pages on legal hermeneutics. Although the book addresses the understanding of texts in general and does not specifically discuss the interpretation of law at any length, Gadamer regards legal hermeneutics as 'exemplary' since, according to him, it illustrates the habitual hermeneutic situation (ibid.: 321). He thus writes that '*[i]n reality [. . .], legal hermeneutics is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth*' (ibid.: 325, emphasis original).

Overall, Gadamer's philosophical project aims to explore and explain the modalities under which understanding occurs. In *Truth and Method*, Gadamer expresses his position pointedly: '[Hermeneutics'] work is not to develop a procedure of understanding, but to clarify the conditions in which understanding takes place' (ibid.: 295). In Gadamer's view, the hermeneutic situation is fundamentally constituted by the interpreter's set of 'prejudices' ('*Vorurteile*'). Prejudices, which Gadamer largely understands in a positive way, refer to knowledge transmitted either consciously or unconsciously to the interpreter through the tradition to which she inevitably belongs. According to Gadamer, 'the prejudices of the individual, far more than his judgments, constitute the historical reality of his being' (ibid.: 278, emphasis omitted).

In Gadamer's (Hegelian) language, the interpreter's set of prejudices delineate the cultural, not least historical, 'horizon' within which she can make sense of the world. For Gadamer, the term 'horizon' refers to 'the range of vision that includes everything that can be seen from a particular vantage point' (ibid.: 301). Now, understanding, as Gadamer envisages the term, always involves the encounter of two or more horizons. When, in the context of a conversation, two horizons meet one another – for example, when a reader's horizon encounters the horizon of a text – a much larger horizon is formed. Gadamer calls this important moment, when understanding effectively happens, the 'fusion of horizons': '*[U]nderstanding is always the fusion of these horizons supposedly existing by themselves*' (ibid.: 305, emphasis original). The metaphor of the 'fusion of horizons' allows Gadamer to emphasize the dialogical or conversational character of understanding.[3] According to him:

> [O]ne intends to *understand the text itself*. But this means that the interpreter's own thoughts too have gone into re-awakening the text's meaning. In this the interpreter's own horizon is decisive [. . .]. [. . .] We can now see that this ['fusion of horizons'] is what takes place in conversation, in which something is expressed that is not only mine or my author's, but common.
>
> (Ibid.: 390, emphasis original)

To return to law, the key reason why Gadamer regards legal hermeneutics as 'exemplary' is because it readily demonstrates how *application* constitutes an integral part of all understanding, an important aspect of Gadamer's appreciation of understanding. For him, 'application is an element of understanding itself' (ibid.: xxix), 'an integral element of all understanding' (ibid.: 307). In *Truth and Method*, in order to delineate the scope of application, Gadamer compares and contrasts the interpretive tasks of the judge with those of the legal historian. The task of the judge is thus 'to concretize the law in each specific case – i.e., it is a work of application' (ibid.: 325, emphasis omitted). Taking the broad hermeneutic view, Gadamer claims:

> [W]e have [here] the model for the relationship between past and present that we are seeking. The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision. Here again, to understand and to interpret means to discover and recognize a valid meaning. The judge seeks to be in accord with the 'legal idea' in mediating it with the present.
>
> (Ibid.: 324)

Accordingly, historical understanding means 'that the tradition reaching us speaks into the present and must be understood in this mediation – indeed, *as* this mediation' (ibid.: 325, emphasis original). Although I think Gadamer makes an important point about legal interpretation, which is that the judge applies the pre-existing law – the past – to the matter at hand – the present – he does not account for the complexity of legal hermeneutics.

First, Gadamer inscribes problematic restrictions. At least according to the English version of his book, Gadamer addresses only those cases 'in which legal texts are interpreted legally, in court' (ibid.: 322). I mention the English version because the words 'in court' are not in the German original (Gadamer 1986a: 330), as the French translation of *Wahrheit und Methode* confirms (Gadamer 1986c: 347). Be that translative issue as it may, while judges have the authority to pronounce on the meaning of legislative documents, the fact is that legal interpretation takes place every time a legal agent – not necessarily an official – needs to ascribe meaning to a law text. This situation includes, among others, the application of immigration law by administrative bodies, the interpretation of contracts by lawyers and the study of foreign law by legally trained comparatists

undertaking research abroad. Any delimitation of legal hermeneutics to the case of judges would therefore be untenable. There is also another issue arising from Gadamer's treatment of the legal as he confines the scope of his analysis to statutes – what his English translators call 'legal texts'. Here, the German term '*Gesetzestext*' validates the justness of the English wording (Gadamer 1986a: 330) as does the French translation, '*texte législatif*' (Gadamer 1986c: 347). The circumvention to statutes is immediately objectionable from the standpoint of the common-law world where judges regularly engage in the interpretation of judicial precedents deemed normatively authoritative. Indeed, a leading theoretician of the common law expressly connects hermeneutics and the doctrine of precedent in a substantial book chapter he entitles 'Hermeneutics: Precedent and Interpretation' (Goodrich 1986: 126–67). Obviously, this commentator is unwilling to withstand Gadamer's curtailment.

Second, Gadamer seems to suggest that the meaning of the law can somehow be confidently identified before it can be applied to the case at hand. In *Truth and Method*, he writes:

> [I]n a state governed by law, there is legal certainty – i.e., it is in principle possible to know *what the exact situation is.* Every lawyer and every counsel is able, in principle, to give *correct advice* [and] can accurately predict the judge's decision on the basis of the existing laws.
>
> (Gadamer 1986b: 326, emphasis added)

Further, Gadamer states that 'it is always possible to grasp the existing legal order *as such*' (ibid., emphasis added).[4] If I may be allowed to react somewhat bluntly, these assertions misrepresent the law which is inherently, structurally, ambiguous or equivocal – and which can only be so given how it consists of words. There is therefore simply no law 'out there', a stabilized and fixed object that would be readily available to the legal interpreter, that would signify identically to all legal interpreters interchangeably, awaiting to be grasped 'as is'. There is no law to be seized correctly, exactly, because words, no matter how precise, simply do not carry a correct or exact, an 'obligatory' meaning. As my law students well know, the sign that reads 'No vehicles in the park' is open to a seemingly infinite range of interpretations, not all of them unreasonable.

Third, Gadamer's work suggests that legal agents, such as judges and lawyers, find themselves in a subordinated role vis-à-vis the legislator who would occupy an elevated, somewhat God-like position. In Gadamer's view:

> We have the ability to open ourselves to the superior claim the text makes and to respond to what it has to tell us. [. . .] Of this, [. . .] legal hermeneutics and theological hermeneutics are the true model. To interpret the law's will or the promises of God is clearly not a form of domination but of *service*.
>
> (Ibid.: 310, emphasis added)

As he links law and theology, Gadamer projects an image of law and legal interpretation that is at once unduly transcendental and too harmonious or consensual. Contrary to what Gadamer seems to suggest, law features important tensions, indeed recurrent antagonisms. Arguably, the abiding task of judges is therefore not to serve the legislator, but actively to arbitrate disputes and assertively allocate entitlements. To these ends, judges are prepared to deploy audacious readings of the law which may go so far as to intervene *contra legem*. Meanwhile, the work of lawyers is to offer an interpretation of the law that will serve not the legislator but the best interests of their clients – hence the usual clash of conflicting interpretations surrounding the same legislative text. Consider a typical lawsuit involving a contractual dispute between a distributor and a retailer. As any seasoned law practitioner can confirm, the parties will very soon be talking past one another, each litigant holding fast to a particular interpretation of the contract favouring his interest and not even being prepared to allow that the other side's opposite interpretation might have something to commend itself. Here, as in every single legal dispute, the language of conversation, dialogue or 'fusion of horizons' fails to capture the profoundly adversarial character of the legal dynamics at issue – an anthropologist studying the language of the law talks of 'dueling' (Mertz 2007: 5) – which the negotiatory dimension that can occasionally emerge in the law does not come close to supplanting. Let me be clear: litigants do not aim to understand each other through some display of goodwill, but they seek to win – and winning is something that is not done consensually but takes place at the expense of someone else, who loses.

Crucially – and, on reflection, unsurprisingly – Gadamer's understanding of legal hermeneutics appears to be informed by a specifically German approach to law. In Germany perhaps more than anywhere else, jurists believe in legal texts having one correct or exact meaning, in that meaning existing as such. For German jurists, law is emphatically a science, and it is therefore to be approached scientifically or, to use a favourite local term, dogmatically – that is, neutrally, objectively. In the same way in which they assume that the biologist in her laboratory has the molecules before her, there, that these exist as such, that there is one correct or exact meaning to the assemblage of two molecules of hydrogen and one molecule of oxygen, that her experiment can therefore be replicated irrespective of her and that her experimental work is in the disinterested service of science or knowledge, that it exists not to 'fabricate' the world but to reveal it, German jurists – and Gadamer – take the view that judges and lawyers exist to service the law, to apply it, to replicate these applications and certainly not to construct or edify it. Although this position is shared to varying degrees in other countries having strong historical links with Roman law (for instance, Article 5 of the French *Code civil* expressly prohibits any judicial law-making), it cannot account for the common-law tradition where, ever since the twelfth century, judges have been unabashed and legitimate law-makers.[5] And common-law judges have been active law-makers who moreover, through the publication of concurring or dissenting opinions, have consistently expressed public

disagreement over the meaning of legal texts, whether statutes or prior judgments, which have never been assumed to carry but one exact or correct meaning and to exist as such.[6] Now, it is a noteworthy feature of common-law adjudication that dissenting opinions can, in later decisions, be incorporated into majority views, a fact which shows that in the common-law world disagreements or misunderstandings, themselves based on the intrinsic polysemy of legal texts, are an important vector of legal development. In other words, discord is seen to harbour potential merit.

To return to Gadamer, it is not only his understanding of the law that appears to be bounded by local knowledge but key aspects of his philosophical hermeneutics also. For example, his idea of the 'fusion of horizons' applies to the overcoming of the distance between historical epochs *within one and the same tradition*. It is 'the historical "worlds" that succeed one another in the course of history' that are emphatically Gadamer's focus (1986b: 444). And he regards understanding across different historical epochs as being possible because ultimately the past and the present belong to one and the same tradition, which constitutes the 'great horizon' within which reconciliation may take place (ibid.: 303). This framework prompts me to revert to the intercultural issue I raised at the beginning of my argument.

If I find myself ranging across legal cultures – that is, across legal traditions, laws and languages – are Gadamer's hermeneutic insights useful to me? Can I derive assistance from Gadamer's philosophical hermeneutics as I embark on the transnational journeys that legal globalization has made seemingly uncircumventable? Are Gadamer's *Truth and Method* and the later writings (Gadamer 2007) a helpful supplement to the toolbox that I take along as I make my way abroad to undertake research in foreign law? Can the Gadamerian 'fusion of horizons' help me to make sense of what happens as I proceed, as a German lawyer, to consider Canadian or Chinese law? I suggest that Gadamer's model is marred by key epistemological inflexions that disqualify within an intercultural situation.

II. Legal understanding: how limited?

In Gadamer's work, language is paramount. Indeed, for Gadamer 'language is the universal medium in which understanding occurs' (1986b: 390, emphasis omitted). And '[t]he fusion of horizons that takes place in understanding is actually the achievement of language' (ibid.: 370, emphasis omitted). The fact that different people speak different languages, an empirical fact that Gadamer obviously appreciates, is not an obstacle to understanding. Gadamer thus asserts that while '[i]t is true that those who are brought up in a particular linguistic and cultural tradition see the world in a different way from those who belong to other traditions[,] [. . .] every such world is of itself always open to every possible insight and hence to every expansion of its own world picture, and is accordingly available to others' (ibid.: 444). To be sure, Gadamer is aware 'how very hard it

is to read a text out loud in a foreign tongue [. . .] in such a way that one can make good sense of it[,] [. . .] that what is meant really comes across' (Gadamer 1978: 255). Yet he maintains:

> [I]t is possible for one to find [the word that can reach another person]; [that] one can even learn the language of the other person[;] [that] [o]ne can cross over into the language of the other in order to reach the other.
>
> (Gadamer 1990: 106)

Because 'each worldview can be extended into every other' (Gadamer 1986b: 445), it follows that as regards intercultural understanding no one must ever contend with finiteness, that one must 'never have a truly closed horizon' (ibid.: 303). In the end, intercultural understanding for Gadamer is but a variation on the general theme of understanding. In other words, translation is another case of interpretation. In Gadamer's own terms, '[t]he translator's task of re-creation differs only in degree, not in kind, from the general hermeneutical task that any text presents' (ibid.: 389). Observe that an important aspect of Gadamer's thinking has to do with the fact that for him, different traditions are but so many 'linguistically constituted experience[s] of world' (ibid.: 454). This view means that, according to Gadamer, each 'linguistically mediated experience' (ibid.: 546) is ultimately, and can only be, an experience of the one world there is, what he calls 'the world-in-itself' (ibid.: 444). In Gadamer's terms, '[i]n every worldview the existence of the world-in-itself is intended' (ibid.). And 'in linguistic communication, "world" is disclosed' (Gadamer 1986b: 443). Gadamer's use of the singular – the one and only world there is – is most deliberate.

These passages from Gadamer's work prompt me to react in two ways. First, I find that Gadamer's emphasis on the central role of language in the process of understanding is of the utmost importance for judges, lawyers and other legal agents. Law's stock in trade consists of words, indeed of a particular type of words – that is, normative words or words having a concrete impact on individuals' daily lives and on the workings of society generally. All individuals who operate in the law consistently address words as they seek to interpret law texts and then to communicate their interpretations to judges, clients or whoever else. Second, and contrary to the view that the universality of language makes cultural alterity accessible and intercultural understanding feasible – for example, Lawrence Schmidt, a prominent exponent of Gadamer's philosophy holds that 'justified critique in intercultural conversations is possible within Gadamer's philosophical hermeneutics' (Schmidt 2014: 226) – I regard Gadamer and his partisans as underestimating the way in which language deeply, and indeed insolubly, problematizes intercultural communication.

Suitably, Peter Goodrich reminds one that '[h]ermeneutics was never an innocent discipline' (1986: 134). In a paper published in 1995, Marina Vitkin thus challenges Gadamer's *commitments*, discerningly so in my view. Specifically, she argues that 'Gadamer's framework does not have inner resources to defend

its fundamental "prejudice" of the one world against the challenge of incommensurablity' (Vitkin 1995: 66). No matter how earnestly Gadamer *states* that language features a universal dimension allowing for the 'fusion of horizons' in intercultural understanding and irrespective of how steadfastly he *asserts* that different languages are but linguistic versions of one and the same world, it remains, in Vitkin's critique, that there is 'nothing in Gadamer's conception [that] can guarantee the sameness of objects, of the world, across traditional boundaries' (ibid.). To state is not to prove, and to assert is not to demonstrate. To refer, as Gadamer does, to 'the superior universality with which reason rises above the limitations of any given language' is to enunciate a (transcendental) proposition that remains wholly unestablished (Gadamer 1986b: 403). And for Vitkin, Gadamer's stance cannot be redeemed as pertaining to simple wishful thinking or even as being tainted by 'mere theoretical imperfection' (Vitkin 1995: 74). Indeed, Vitkin condemns Gadamer for 'the violence involved in "fusing" the unfusable' (ibid.: 73). In particular, she stigmatizes the passage where Gadamer, discussing translation, refers to the hermeneutic predicament as involving 'alienness and its *conquest*' (Gadamer 1986b: 389, emphasis added) – the German word is '*Überwindung*' (Gadamer 1986a: 391) – the idea being 'to make one's own what the text says' (Gadamer 1986b: 390). It is this strategy of interpretive arraignment of alterity and of legitimation of the self that, along with Vitkin, I find incompatible with the ethical comportment based on recognition and respect that ought to inform intercultural research in general and inquiries into foreign law in particular.

Consider translation, a key feature of Gadamer's argument in favour of the universality of language and thus in support of intercultural understanding – for example, he writes that '[t]he translation process fundamentally contains the whole secret of how human beings come to an understanding of the world and communicate with each other' and claims that translation produces 'an indissoluble unity' (ibid.: 552). My illustration is the opening sentence of Albert Camus's novel *L'Étranger*, first published with Gallimard in 1942 and ever since one of the most celebrated and most widely read novels in the French language (Camus 1942). I argue that these few words offer a striking example of how incommensurability challenges translatability even in the most basic linguistic situations – the kind of difficulty that prompts Vitkin to chastize Gadamer, aptly in my view, for his universalizing prejudice, for his 'presumption that all horizons reveal the same world', that 'each is [. . .] an "aspect" of the thing itself' (Gadamer 1986b: 468), a postulate she calls 'illegitimate' (Vitkin 1995: 68).

Camus's original French text starts with the sentence, '*Aujourd'hui, maman est morte*' (Camus 1942: 9). Frankly, it is hard to imagine a plainer, more straightforward opening for a novel in the French language. Yet, over the past seventy years or so, these four words have given rise to many interpretations which collectively point to the insuperable difficulty the English language faces as it attempts to account justly for the French, not least for the term '*maman*', presumably one of the most elementary words in the French language.

In 1946, translating for Knopf, Stuart Gilbert wrote, 'Mother died today' (Camus 1946: 4). This translation that injected a certain formality in the main character's exclamation which will be unrecognizable to a French readership but nonetheless remained unchallenged in print for many years, even finding itself confirmed in 1982 in Joseph Laredo's revised translation for Hamish Hamilton (Camus 1982).[7] In her June 2014 *New York Review of Books* article on *L'Étranger*'s English career, Claire Messud in fact opines that such formality could even be construed as 'heartlessness' (Messud 2014). Then, in 1989, Random House issued a Matthew Ward translation, generally regarded as an 'Americanized' version of *L'Étranger* (Camus 1989: vi). Ward concluded that the intimacy informing the French 'maman' could not be rendered in English (ibid.: vii) and chose to keep the original French thus writing, 'Maman died today' (ibid.: 3). Ward did not even see fit to italicize 'maman'. In this case, the difficulty, of course, is that the preservation of the French term leaves the Anglophone reader puzzled as to what feelings it conveys.

Now, Sandra Smith in her new 2012 translation for Penguin has chosen to solve the conundrum by writing, 'My mother died today' (Camus 2012: 3). In an interview with *The Guardian* released on 28 November 2013, Smith indicates that, for her, '["My mother"] implie[s] the closeness of "maman" you get in the French' (Smith 2013). But then, revealing a pragmatic touch, she adds:

> Afterwards [in the novel], I used 'mama', partly because it sounds like 'maman' and partly because I was aware that a British audience would probably prefer 'Mum' and an American reader 'Mom' so I needed something that worked on both sides of the Atlantic.
>
> (Ibid.)

Meanwhile, author, literary critic and Camus translator Ryan Bloom targeted the various translative efforts purporting to account for the first sentence of Camus's novel in a short article in *The New Yorker* dated 11 May 2012 (Bloom 2012). Bloom's conclusion is crisp: 'The sentence, the one we have yet to see correctly rendered in an English translation of "L'Étranger", should read: "Today, Maman died"' (ibid.). (Note how Bloom capitalizes 'Maman', possibly adding a measure of deference that is missing from Camus's French.[8]) Interestingly, Smith, the 2012 translator, offers a reaction to this very suggestion in her *Guardian* interview of the following year: 'In French, the emphasis often comes at the end of the sentence while in English it is at the beginning. I felt that "Today my mother died" sounded awkward and did not give the proper stress' (Smith 2013).

The summons to Gadamer – in effect, the point of Vitkin's remonstrance – is to explain how something like a 'fusion of horizons' can materialize across languages if five Camus translators (I include Bloom) are unable over a seventy-year period to agree on the passage into English of the simple French sentence '*Aujourd'hui, maman est morte*'. How can Gadamer contend, as he does, that understanding, even across traditions, cultures or languages is 'in a fundamentally

universal way what *always* happens' (Gadamer 1986b: 513, emphasis original)? And how can he maintain, as he does, that 'each worldview [. . .] can understand and comprehend, from within itself, the "view" of the world presented in another language' (ibid.: 445)? The fact of the matter is that there is no object '*maman*', no self-same '*maman*', no '*maman*' as such that unites the original Camus text and its various interpreters. Or, if you will, unlike what Gadamer holds, there is no 'common subject matter [that] binds the two partners, the text and the interpreter, to each other' (ibid.: 389).[9] Ultimately, '*maman*' keeps its secret encrypted, beyond the reach of the various English translations. In other words, '*maman*' is *unwitnessable* in English.

At best, we have what Vitkin calls 'the appearance of understanding', a 'redescribing [of] genuine alienness in familiar and domestic terms', in effect an 'inevitabl[e] distorti[on]' (Vitkin 1995: 57). The 'communion' that Gadamer posits (1986b: 371) simply fails to emerge. There is no 'encounter in a common world of understanding' (ibid.: 386). And there is certainly no such (transcendental) thing as 'the miracle of understanding' (ibid.: 337). When Gadamer defends the view that 'men's coming to a linguistic understanding with one another through the logos reveals the existent itself' (ibid.: 442), it remains, to use a familiar US sports metaphor, that one cannot even get to first base: there is no 'linguistic understanding' in the first place. Literally, the English translators are unable to engage in dialogue – that is, they are unable to pass through (*dia*) the French wording (*logos*). The intercultural situation registers an interruption, and no matter how many translators try their hand at the French text it proves impossible to cancel the interruption: '*maman*' stubbornly remains in its singularity.

Here, I am minded to quote Jacques Derrida:

> No matter how correct and legitimate they are, and no matter what *right* one grants them, [translations] are all maladjusted, as if unjust in the deviation that affects them: within themselves, of course, since their meaning remains necessarily equivocal, and in their relation amongst themselves and thus in their multiplicity, finally or primarily in their irreducible inadequacy to the other language [. . .]. The excellence of translation cannot help it.
>
> (1993: 43)

What Gadamer styles 'the unity of meaning in a text or a conversation [that] rests upon the being-together of people with each other' is nowhere to be seen . . . on the horizon (Gadamer 1994: 395). The fact is that the semantic range of '*maman*' in English is contested and remains uncertain, no English word being determinative of its meaning. What Gadamer acclaims as 'the event of agreement in understanding' (he also talks of 'the communicative event') simply does not come to pass (1984: 21, 35). It cannot be acceptable that Gadamer, since he reckons that 'a peaceful separation of the two sides really will not do in philosophy' (1994: 376) – to transpose a formulation he uses in another context – should attempt to

force the square peg of commensurability into the round hole of untranslatability. Although my Camus example, concerned as it is with primordial language, makes this objection particularly meaningful, my illustration represents a typical rather than an exceptional case.

While I dispute Gadamer's exalted sense of understanding – at any rate as it purports to operate interculturally – I find it possible to identify passages supporting my anti-Gadamerian stance in Gadamer's own work. For example, it is Gadamer himself who writes that 'we understand in a *different* way, *if we understand at all*' (1986b: 296, emphasis original). Now, an analyst could readily argue that this observation insightfully accounts for the discrepancies among Camus's Anglophone translators. Indeed, to the extent that any one of them understood Camus in the first place – and one must remain in the realm of indeterminacy in this regard – what understanding was had differed – and had to differ – from Camus's own and from those that other translators brought to bear on the French text since everyone was operating from a singular interpretive vantage point. Elsewhere, it is also Gadamer himself who refers to the way in which 'self-knowledge [. . .] both prescribes and limits every possibility for understanding any tradition whatsoever in its historical alterity' (ibid.: 301). Again, this intuition helpfully describes what is taking place as Gilbert, Laredo, Ward, Smith and Bloom approach *L'Étranger*. Each translator is intervening against the background of his 'self-knowledge', and it is each translator's very 'self-knowledge' that prompts each translation to underscore selected accents, to constitute a preferred text. And it is that pre-existing disposition that will at once inform the translator's intervention and frame it, thus accounting for what Derrida styles its intrinsically 'maladjusted' condition. Although Gadamer's disciples and partisans will presumably seek to reconcile such passages with Gadamer's philosophical hermeneutics as a whole, I find it remarkable how these two quotations strike a much more nuanced chord regarding understanding than the somewhat lofty pronouncements about 'communion' and 'miracle'.

Now, lawyers must not assume that legal language would somehow be immune from the impassability that I have just described. To recall that the English 'estoppel' cannot be rendered in French or that the Spanish '*amparo*' cannot be translated into German without either loss of meaning or semantic accretion (I am reminded of Ortega y Gasset's 'deficiencies' and 'exuberances') seems to me to be stating the obvious (Ortega y Gasset 1946: 493). More interesting perhaps – and arguably even more disturbing from a Gadamerian standpoint – is the fact that terms *within the same language* also hinder intercultural understanding across space. For instance, the word 'privacy', which is part both of the US and UK legal landscapes, shows well the absence of Gadamer's 'communion'.

The idea of a right to privacy, which refers to the law governing the treatment of personal information (the law which, for example, prohibits one from using a person's name for trade or advertising purposes without consent), was first addressed within a legal context in the United States as Louis Brandeis (later a Supreme Court justice) and another young lawyer, Samuel D. Warren, published

an article on point in the 1890 edition of the *Harvard Law Review*. 'The Right to Privacy' argues that both the constitution and the common law allow for the formulation of a general 'right to privacy' (Brandeis and Warren 1890). Later, in 1960, William Prosser, a prominent US torts lawyer, articulated specific principles to govern privacy law (Prosser 1960). Nowadays, the law of privacy represents an important facet of US tort law (Epstein and Sharkey 2012).

By contrast, in English law there is no freestanding right of privacy. Thus, the House of Lords (now the Supreme Court of the United Kingdom) refuses to recognize a tort of privacy, a stance it made clear in *Wainwright v Home Office* (2003). Rather, English law requires the claimant to refer either to a recognized tort such as 'breach of confidence' (as in *Douglas v Hello! Ltd* [2007]) or to a specific legal text such as the *Data Protection Act 1998* or the *Human Rights Act 1998* (as in *Campbell v MGN Ltd*. [2004]).[10] Indeed, it is argued that there will never be a tort of privacy as a matter of English common law (Wacks 2006).

Within a legal context, then, the word 'privacy' carries a substantially different meaning for a US lawyer and for her English counterpart, especially if one allows, as one must, that the legal treatment of privacy connects with the social expectations informing the idea of control over one's personal information which itself is linked to deep-rooted local understandings of the values of dignity and autonomy, to 'the social norms by which we live', to 'the way of life that happens to constitute us' (Post 1989: 970, 1010). After all, in the words of James Whitman, '[t]he law will not work *as law* unless it seems to people to embody the basic commitments of their society' (Whitman 2004: 1220, emphasis original). Still according to Whitman, '[t]here is no such thing as privacy *as such*' (ibid:. 1221, emphasis original). Rather, 'the norms of "civility", far from being universal, vary dramatically from community to community' (ibid.: 1168). If, to write like Walter Benjamin, the 'way of meaning' ('*die Arten des Meinens*') as regards 'privacy' is not the same in the United States and in England, in addition, *pace* Benjamin, 'what is meant' ('*das Gemeinte*') is not the same either (Benjamin 1923: 257). It cannot be surprising therefore that the comparatist, as she purports to ascribe meaning to privacy law in the United States and in England, faces 'different ultimate understandings of what counts as a just society' (Whitman 2004: 1163). Again, if I may be allowed to rehearse the point, Gadamer's 'communion' remains a figment of his imagination, the more thoughtful argument being the late Robert Cover's: '[U]nification of meaning [. . .] exists only for an instant, and that instant is itself imaginary' (Cover 1983: 15). As Goodrich indicates, the predicament of philosophical hermeneutics as it faces the matter of intercultural understanding is very much a structural issue: 'Hermeneutics, because it is concerned primarily with passing on or teaching a tradition, is not really equipped to examine [. . .] the construction and communication of legal meanings and messages to different audiences' (Goodrich 1986: 165).

Although Gadamer argues that language is 'the medium of understanding' (1986b: 386), it appears that language is at the same time an *obstacle* to

understanding, in particular in the intercultural context I have been discussing. In other words, 'the medium of understanding' is in effect a medium of *misunderstanding*, the relation a *disrelation*. It appears that Humboldt, the pre-eminent nineteenth-century linguist, was highly perspicuous when he wrote that because '[n]obody means by a word precisely and exactly what his neighbour does' – a 'difference, be it ever so small, [that] vibrates, like a ripple in water, throughout the entire language' – in effect 'all understanding is always at the same time a not-understanding, all concurrence in thought and feeling at the same time a divergence' (Humboldt 1836: 63). Although Gadamer heaps praise on Humboldt in his *Truth and Method* on more than one occasion (1986b: 415, 437–8, 440), he does not discuss this specific enunciation of his, with which he would no doubt disagree.

III. Legal Gadamer: how pertinent?

If one considers philosophical hermeneutics at a certain level of generality, one can derive from this mode of philosophical inquiry and engagement some helpful advice for legal agents (understood in the broadest sense) acting as readers, writers and thinkers. Primarily, perhaps, Gadamer reminds one that all modes of understanding are inevitably linguistic and calls attention to the historical continuity of language, that is, to the role of tradition – evidently significant arguments for judges, lawyers and legal scholars, law being at once an eminently linguistical (Mertz 2007: 12) and a strongly traditionary discipline (Krygier 1986; Goodrich 1986: 140–1). But Gadamer also invites attentiveness to the textually and historically situated character of interpretation. Specifically, he teaches that no interpreter can stand outside a given horizon – no one can jettison one's social and political situation or other worldly embeddedness – and that prejudice is the condition of judgment. Although judgment therefore depends upon patterns not necessarily available to consciousness, critical philosophical hermeneutics encourages self-reflection with a view to coming to terms with one's prejudices as much as is feasible. Self-introspection notwithstanding, however, one must forego the idea of interpretive impartiality or objectivity.

As he defends the symbiosis between knower and known – say, between an interpreter and a text – neither being isolated and both existing as historical entities located within the tradition's purview, Gadamer objects to the post-Cartesian search for a scientific method that would ensure unassailably certain knowledge. Rather, there takes place a dialogical encounter between interpreter and text, as two constitutive components of the tradition, that takes the form of a linguistic interaction. And that meeting is thoroughly informed by the dynamic of question and answer as sense-disclosing strategy. Other summaries of Gadamer's work would possibly frame his hermeneutics differently, but I do not think I am doing him an injustice in enunciating his philosophical project as I do, especially in view of the fact that I am deliberately leaving the more contentious aspects of his model to one side (for example, Gadamer retains the idea of 'truth'). In sum,

philosophical hermeneutics offers a rich reservoir of insights for lawyers who constantly deal with words and are incessantly pressed to engage in interpretation. To be more specific, the primordial hermeneutic insight that the other may be correct – '[t]o understand someone else is to see the justice, the truth, of their position' (Gadamer 1992: 152) – is no doubt relevant for lawyers. Again, though, in as much as it runs contrary to the adversarial streak informing the law – in law, '[o]ne does not really listen to the other; rather, one employs whatever means one can muster to defeat the other' (Schmidt 2014: 222) – it remains unclear to what extent this lesson can be embraced except in strictly theoretical fashion. As I indicated, in law more than in many other fields 'one of the conversation partners [. . .] presumes to already know the truth of the subject matter'; now '[a] case of failing to meet the prerequisites for a hermeneutic conversation is to aim only to win the argument' (ibid.).

But there is at least one more lesson to be had from philosophical hermeneutics, which I actually consider crucial for law. This other teaching arises, so to speak, counterfactually – that is, from what I regard as Gadamer's failure to convince. To be sure, Schmidt, who, as I mentioned, is prepared to argue the significance of Gadamer's work as regards intercultural understanding, holds that an intercultural situation is, if you will, optimally hermeneutic, that it is particularly 'advantageous' from a hermeneutic standpoint because it involves 'a greater distance, a greater otherness, between the interpreter and the text or other person' (ibid.: 215). It follows, according to Schmidt, that the interpreter is invited to review more of her prejudices and to interrogate those more fundamentally than would be the case if she had stayed within the tradition. Schmidt argues that '[t]he greater distance increases the chances of a true experience where one learns that what one thought was the case is not the case. Reading a text from a contemporary, like-minded author in one's own tradition is less likely to challenge any prejudgments in the reader; the horizons of meaning are too similar' (ibid.). By contrast, '[t]ravelling in another country, one is confronted with difference, and this often allows one to become aware of one's own customary behaviours and prejudgments, which may then be questioned' (ibid.: 216).

In my opinion, though, Gadamer, very much despite himself, ultimately teaches lawyers that intercultural understanding is beyond reach, no matter how earnestly it would be wanted. Now, I do not pronounce on whether intercultural understanding is in fact desirable or not. My deflationary claim is descriptive rather than prescriptive: I argue that intercultural understanding cannot be achieved, and I maintain that Gadamer's argument in effect confirms this impediment. At best, what goes under the designation 'intercultural understanding' will feature not a 'fusion of horizons' but an approximation thereof (Vasilache 2003: 62), which means that it will in effect amount to a *misunderstanding*. If one (desperately) wishes to retain something of the Gadamerian idea of 'universality', one can perhaps argue the universal character of the *possibility* of understanding arising from the ontological nature of language

or more assuredly the *impossibility* of understanding entirely and authentically (ibid.: 114). Contrary to his stated intention, then, Gadamer in the end would reveal a 'paradox' that would be inherent to intercultural understanding: only 'the impossibility of universality is universal' (ibid.).

To conclude anecdotally, I find it interesting to recall that Gadamer himself experienced the limits of intercultural understanding late in his life. I am thinking of the famous discussion with Jacques Derrida that took place at the Goethe-Institute in Paris in April 1981.

> In the Gadamer–Derrida debates in April of 1981, we have an encounter that is usually seen as a kind of family squabble between the intellectual children of Heidegger, a dialogue (or in Gadamer's opinion, a lack of dialogue) between hermeneutics and deconstruction. It was also an encounter between generations, between languages, and between nations which, less than forty years earlier, had been at war.
>
> (Janz 2015: 479)

What took place in 1981 in Paris was undoubtedly a meeting of two great minds arising in an intercultural setting. Whether there happened a 'fusion of horizons' between the German and the French philosophers is very much a different story.

Endnotes

1 For example, *Atkins v Virginia*, 536 US 304 (2002); *Lawrence v Texas*, 539 US 558 (2004); *Roper v Simmons*, 543 US 551 (2005).
2 For example, BGH, 28 January 2004, 2 StR 452/03.
3 Dialogue and conversation both translate the German '*Gespräch*', Gadamer's term.
4 In this instance, the English text appears to be fair to the German original which features terms such as '*Rechtssicherheit*' ('legal certainty') and '*Rechtsordnung als solche*' ('legal order as such') (Gadamer 1986a: 335).
5 Interestingly, Gadamer observes that 'the concrete passing of judgment in a legal question is no theoretical statement but an instance of "doing things with words"' (1978: 256). Given his overall appreciation of the law, I assume he means these words in a restrictive sense.
6 In this regard, it is important to observe that Ronald Dworkin's 'right-answer' thesis is concerned in important respects with the objectivity of moral determination.
7 This translation was subsequently acquired by Penguin in 1983.
8 Ward also writes 'Maman' but since this word opens the sentence one cannot know whether he had in mind 'maman' or 'Maman'.
9 Such enunciations are particularly difficult to credit as they come from someone who acknowledges how '[t]he requirement that a translation be faithful cannot remove the fundamental gulf between the two languages' (Gadamer 1986b: 387).
10 *Wainwright v Home Office*, [2004] 2 A.C. 406 (H.L.); *Douglas v Hello! Ltd*, [2008] 1 A.C. 1 (H.L.); *Campbell v MGN Ltd*, [2004] 2 A.C. 457 (H.L.).

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