# Interpretation / Application / Decisionmaking

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It is not uncommon to think of legal decision making as a process that moves through three stages. As the case at hand has to be decided according to law a decision has to be made as to what the relevant law is and what this law means. Because this will invariably involve reflecting on authoritative legal texts, this stage of the process is well described as a matter of interpreting the relevant legal materials.

The second stage involves the concrete circumstances of the particular case. The facts have to be found. Clearly this involves making findings as to what happened. But this second stage is more than this. For it is not just a matter of deciding which facts are true, as far as this can be done. There is also the complexity of deciding among these true facts which ones are significant for the matter at hand. In the context in which I am thinking about interpretation and application, public law, this aspect is seen in such questions as—how should a challenged Act be characterised? or what is significant about the executive decision under review?

Once the meaning of the relevant law is clarified and the particular facts are found and described, these two processes are brought together in the moment of application. The legal decision is said to follow from the application of the law to the circumstances of the case.

Twentieth century philosophy provides a famous account of the interpretation/application relationship. I have in mind Hans-George Gadamer's discussion in the middle section of *Truth and Method* where he revives the concept of application as a hermeneutic issue.[1] This idea is central to his claim that understanding is always productive rather than reproductive. In these immensely suggestive pages Gadamer presents the understanding of meaning as always a present application of an ongoing tradition.

This paper starts with the question of whether Gadamer's analysis

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1 *Truth and Method,* (New York: Crossroad, 1982).

has anything to say to law's approach to interpretation and application? As potentially this is a large topic it is sensible for me to be clear at the outset as to the limited context I have in mind.[2] It is where there is a considerable gap in time between the origin of the interpretive material and its application in a particular case. Such distancing might occur in the application of case reports or statutes but it is more likely to happen with constitutions. For it is in the nature of these texts that they come to us from an earlier age.[3]

How should the methods of constitutional interpretation take account of historical context? Should recovering the "original meaning" of the Constitution be our basic goal? I consider this in section II by way of the example of *Kartinyeri v Commonwealth*.[4] But there is more to this topic than the adequacy of constitutional methods. Reflection on the interpretation/application distinction has something to tell us about how law as a tradition of texts is transmitted. This is discussed in section III and the example here is *Abebe v Commonwealth*.[5] Prior to considering these matters I outline briefly in section I Gadamer's account of application?

## 1. The philosophy of interpretation

Crucial to Gadamer's exposition is that both the subject and object of interpretation stand within a pregiven historical and linguistic tradition; a tradition which is itself an ongoing process in which the past is transmitted

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2 The distinction between interpretation and application is most readily thought of in the context of the law/fact distinction. The conventional approach is that considering the meaning of the words used in a legal text is a question of law while application of this meaning to the facts of the case is a question of fact. Much may turn of course on this classification with regard to rights of appeal, who in a divided tribunal decides which question, the role of precedent in the decision, and the relevant burden of proof. If it turns out that the application of a legal rule is indistinguishable from its interpretation it may prove hard to decide these issues with a degree of intellectual respectability. But it would be a mistake to rush to this conclusion without considering the area of law in question. For here may well be found additional concepts which make the use of the law/fact distinction in that area serviceable, more or less. In any event these are not the issues I have in mind in this paper. For more on application and the law/fact distinction see E. Mureinik 'The Application of Rules: Law or Fact?' (1982) 98 *Law Quarterly Review* 587; N. MacCormick, *Legal Reasoning and Legal Theory,* (Clarendon 1978), 95, 147, 203.

3 In ways I cannot do justice to in this paper legal practice deals differently with the problem of aged cases or statutes.

4 (1998) 152 ALR 540

5 (1999) 162 ALR 1

into the present. In explaining this Gadamer introduces a number of by now well known concepts—the "fore-structure of understanding", the "fusion of horizons", the principle of "effective history" and the "necessity of application". It is the last, of course, which is of interest for present purposes.

Interpretation, it is said, is always interpretation from a particular historical and social context and the situatedness of the interpreter and the preunderstandings or "prejudgments" that come from being tied to a specific time and place cannot be eliminated from any act of interpretation. We only understand the meaning of something if we relate it to ourselves and to our present concerns. As Gadamer says: "No book speaks if it does not speak the language that reaches the other person".[6]

To put it differently, interpretation is always from a certain perspective for everyone and every object of interpretation has a historically conditioned starting point. It has a definite cultural and historical place that defines what is of interest and importance and in what way these interests can be and ought to be followed. This provides the normative framework (the fore-structure of understanding) which determines in advance what is worth inquiring about, our questions for the subject matter and the methods and standards for the inquiry.[7] These assumptions are not to be seen as distortions of the truth and thus as impediments to understanding; rather they are its precondition. "Only one who stands within a given science has questions posed for him".[8]

Gadamer's discussion of these matters has proved to be immensely influential. However I break off my account at this point. We have enough Gadamer to put to use in section III below and more than enough to see that his approach will not help us directly with the material in section II. What Gadamer is describing is the structure of the relationship between the interpreter, on the one hand, and the tradition in which he or she stands, on the other. As he repeatedly puts it, it is the ontological question that interests him not the methodological question.[9] Because of this Gadamer's analysis is not directed at debates about method within any particular

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6 See above n 1 at 358.

7 *Ibid,* at 267, *Reason in the Age of Science,* Cambridge: MIT Press, 1981) 106

8 *Philosophical Hermeneutics,* (Berkeley: University of California Press, 1976) 9, *Reason in the Age of Science,* at 136.

9 See above n 1 at xiii; For discussion of these terms see among other works, L. Hinman 'Quid Facti or Quid Juris? The Fundamental Ambiguity of Gadamer's Understanding of Hermeneutics' (1980) 40 *Philosophy and Phenomenological Research* 512; M. Ermath 'The Transformation of Hermeneutics: 19th Century Ancients and 20th Century Moderns' (1981) 64 *Monist* 175.

discipline; at the approaches and techniques which supposedly distinguish interpretation from misinterpretation. His account is of what always happens in interpretation, whatever methods we use. In his words what concerns him is not "what we do or what we ought to do but what happens to us over and above our wanting and doing".[10]

But if his account only describes what inevitably happens in all (successful) acts of interpretation then it does not matter what methods we use. And where Gadamer does stray into methodological issues, what he has to say proves too general to be of much assistance. For it applies to *all* interpretive practices. We are unlikely to learn anything about law's specific methods from such an account.

An example should make these remarks clearer. Because Gadamer can convincingly establish the productive role of the interpreter in establishing a text's meaning, he has no trouble in showing the naivety of the author's meaning approach to interpretation. It is structurally impossible for us to leave our historical situation, and the prejudices associated with it, and transport ourselves back into the author's world. This is what makes every act of interpretation a fresh event rather than a mere repeating. And this is why we understand differently from the author if we understand at all.[11] It is a misunderstanding of the nature of interpretation to grant to each text a stable meaning, a meaning put into it by its author. "Not occasionally only but always the meaning of a text goes beyond its author".[12]

But despite this theoretical ascendancy Gadamer's discussion labours under a great difficulty. The canon of author's meaning is *in place* in various disciplines—law, say, or literary criticism—as an acceptable way of coming to terms with certain texts. Whatever we might think about originalism, for instance, as a way into constitutional meaning or the canon of parliamentary intention as a guide to statutory meaning there is no doubting that these approaches are made available to legal interpreters.

A full account of the merits and demerits of an author's meaning approach is beyond the scope of this paper.[13] Gadamer's argument, in short, is that each generation must *re*possess its cultural inheritance. Each age must fit what is handed down to it into *its* framework, connect it to *its* concerns and explain it in a language understandable to the present-day audience. But, and this is the criticism, proponents of author's meaning can accept all of this, as long as they are sufficiently modest in their claim to

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10 See above n 1 at xvi.

11 *Ibid,* at 264.

12 *Ibid,* at 264.

13 For some discussion of this in the context of statutory interpretation and case analysis see A. Glass 'The Author Of Common Law Texts' (1995) 8 *Ratio Juris* 91.

*know* the author's meaning. And when the two approaches are brought together in this way the contest between them becomes one of—which better serves the point of the enterprise in question?[14]

What I draw from this discussion is the following. If the problem is one of methodology, reading Gadamer takes you back to the assumptions and regulative ideals of the cultural field in question. In our case we are sent back to legal practice. By this I don't have in mind an empirical inquiry into how most lawyers think about things. Rather (in a way familiar to readers of Ronald Dworkin) it is an interpretive inquiry into how best to understand the multifarious legal practices we find ourselves immersed in.[15]

## II. Application and method

If we start with the prevailing methods of constitutional interpretation but assume the correctness of Gadamer's structural account of interpretation, what follows for constitutional method? Would an acknowledgment of the applicative moment in legal interpretation alter our view of "original meaning" as a possible strategy to take towards constitutional interpretation?[16] I don't think so. Of course, if Gadamer persuades us we

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14 Professor Raz in 'Interpretation Without Retrieval' in A Marmor (ed) *Law and Interpretation,* (Clarendon 1995) discusses interpretation from this perspective. He asks: what counts as meaning in art? This rightly has him thinking about the point of art and subsequently, the point of law. When Raz thinks of the latter, its legitimacy (unlike art) is for him inevitably connected with its origin. Law is binding because someone with authority promulgated it. For reasons I cannot develop here I do not agree with this conclusion. In any event I notice that Raz thinks differently about constitutional law; see his 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L. Alexander (ed) *Constitutionalism* (Cambridge, 1998). While I do not accept Raz's conclusions I endorse his approach. The starting point for any discussion of legal methodology is to think about the purposes of law. And this is why *general* accounts of interpretation are rarely satisfying. They cannot deal with the *differences* between the goals of various interpretative practices.

15 If the topic was Gadamer rather than the law, the point could be made that Gadamer uses the notion of application in *Truth and Method* to make two quite different claims. And this leads to a degree of confusion. He makes the (plausible) claim set out above that there can be no understanding without a degree of integration of the past into the present. And he makes the stronger (and implausible) claim that all interpretation is like legal interpretation in that it is a matter of making a text *normatively* relevant for the present. This difficulty is well discussed in the literature; see, eg, L. Hinman *supra* and G. Warnke *Gadamer* (Cambridge: Polity Press, 1987) ch 3.

16 Of course this term could cover a variety of approaches. I have in mind here one that promotes the meaning of the text at the time of its enactment as the

will have reason to think that the goal of recovering the author's meaning is ultimately unachievable. But knowing this does not discredit the use of this canon of construction. An unrealisable goal can still play a role in orientating cultural activities. One thinks here of the norm of coherence in law. I refer to this assumption in section III. We rightly expect that all the valid legal rules at a particular point of time will be coherent with each other though we know that this is both not true at present and unattainable. "Original meaning" or the norm of coherence can still be applied sensibly as criteria for evaluating our own interpretations and the interpretations of others even though as standards they are against the facts.[17]

Unachievability is not enough. For us to discard the "original meaning' approach we would have to come to believe that the original meaning of constitutional provisions *should not* count as an aspect of its legal meaning. But what sustains this approach is the quite reasonable anxiety as to who can make valid law and if it's not the people or their representatives, how this should be done. What prevents it carrying the day is that there seems more to constitutional interpretation than this particular fear. We want our official interpreters to be disciplined but we also want them to make the constitution work as far as it is in their province to do so. "We must never forget it is a constitution we are expounding" is as much a part of our constitutional vocabulary as—start with the ordinary meaning of the constitutional text read in the light of its history.[18] In other words, debates about constitutional methods prove interminable because there appears no way of bringing together in a single approach the basic goals of constitutional interpretation. We demand that interpreters respect the authority of the Constitution but we know that the Constitution's acceptability cannot be maintained without the judiciary playing their part in adapting it to contemporary circumstances.

As an aside I note that the distinction between (1) the *legal authority* of a text, (2) its *acceptability* and (3) its *legitimacy* is of some importance.

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only legitimate approach to take; see, eg, A. Scalia *A Matter of Interpretation,* (Princeton Universiy Press, 1997) or J. Goldsworthy 'Originalism in Constitutional Interpretation' 25 (1997) *Federal Law Review* 1.

17 For further discussion of the question of unachievable goals and a criticism of Dworkin from this perspective (which I disagree with) see David Hoy 'Dworkin's Constructive Optimism v Deconstructive Legal Nihilism' *Law and Philosophy* 6 (1987) 321 at 348f. At times, no doubt, the promotion of an unrealisable goal is counter productive. But prescriptions that guide us to good health, say, or assist us to lead a moral life, are not without point simply for the reason that we will *unavoidably* die, or *inevitably* fail to live up to these standards.

18 Of course, Marshall CJ in *McCulloch v Maryland* (1819) 4 Wheat 316 at 417 and McHugh J in *McGinty's case* (1966) 186 CLR 140, 230.

These three concepts or something like them are needed to keep distinct three possible goals of constitutional interpretation. As I use these terms the legal authority of the Constitution is a given. It is established by the formal criteria that declare it to be a valid constitution for a particular jurisdiction. Its legal authority demands that where relevant what it says is binding; that what it prescribes must be used to decide the matter in question. But this says nothing about the social acceptance of the Constitution, or about its intrinsic worth. While legal authority is established by the rules of recognition social acceptance is something that has to be maintained over time. Clearly maintaining acceptance of the Constitution depends on many factors. But as part of the responsibility for doing this falls on the judges (in as much as they are concerned with its workability) they can never be restricted to a method which has them fixated upon original meaning.[19]

On the question of application and its relationship to interpretation *Kartinyeri v Commonwealth* is an instructive example. This was the last of a number of cases generated by a controversial proposal to both develop tourist facilities on Hindmarsh Island, South Australia; and build a bridge from the island to the mainland. While the South Australian government approved the project the relevant Commonwealth Minister blocked the development by declaring it a protected area under the *Aboriginal and Torres Strait Island Heritage Protection Act 1984*. The island, it was said, was of great significance for the local aboriginal group. A different Commonwealth government subsequently passed the *Hindmarsh Island Bridge Act 1997*. This Act removed the area of the Hindmarsh Island bridge area from the operation of the relevant provisions of the *Aboriginal and Torres Strait Island Heritage Protection Act 1984*. At issue in *Kartinyeri* was the validity of this 1997 "Bridge Act".

A central question raised by the case was the interpretation of the race power—s51 (xxvi) *Constitution Act*. Could this power authorise discriminatory laws that worked to the detriment of aboriginals? If 1900 was the relevant historical context within which to pose this question, the answer was clearly yes. The historical evidence strongly suggested that the point of including 51(xxvi) in the Constitution was basically to allow the central government to make restrictive laws as to the employment of Chinese and Pacific islanders.[20] Aborigines were expressly excluded from the provision at that time partly as they were regarded as a State concern

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19 I discuss these three notions: legal bindingness, social acceptability and legitimacy, as well as the judicial responsibility towards maintaining the workability of the constitution in 'Making the Constitution Work' *Constitutional Law & Policy Review* forthcoming.

20 Justice Kirby in *Kartinyeri* marshals some of other more enlightened views. But these do not appear to be representative of the drafters or ratifiers as a whole.

and partly as it was thought that they would die out or become assimilated.

Added to this history, of course, was the complexity of the 1967 referendum. What was the intention behind this amendment to s51 (xxvi) and the repeal at the same time of s127?[21] Does reflection upon this intention lead to a bivocal reading of the race power—authorising discrimination both positive and negative for other races, but only positive discrimination for aborigines?[22] Or does it lead, possibly, to the result that after 1967 51(xxvi) authorises only those laws that discriminate in a positive sense for *all* races.[23]

*Kartenyeri* shows that three different approaches could be taken to this history. First, it could become a theme of the interpretation. Here the focus would be on the 1967 amendments. But an argument based on the changes brought about by these amendments would appear inconclusive. For no matter how forcefully the point is made that the electors in 1967 had in mind doing something beneficial for aborigines they did not embody the specific intention to *only* do this in the constitutional text (or, better, were not given the opportunity to do this). All they did in this regard was authorise s51 (xxvi) to be used for aborigines for beneficial purposes. They did not in 1967 build in any limit to this power.[24]

However (and this is the second approach) an argument could be made that such a limit already existed in the constitutional text. The words "for whom it is necessary to make special laws" can be put to work. As it is for the Court to decide whether a law is properly characterised as falling within 51 (xxvi), the argument goes, there must be material upon which the lawmaker could form the judgment that special laws were needed. For Parliament to do this they must be able to point to a significant difference between the race of people at whom the 51 (xxvi) law is directed and other people. Moreover, the law must be appropriate and adapted to the difference claimed.[25]

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21 The removal of the words from 51 (xxvi)—other than the aboriginal race in any State—and the repeal of s 127 which excluded aboriginal people from the national census.

22 Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 168 at 273.

23 A point I don't pursue is whether 51(xxvi) operates like 51(xxxi) as a general prohibition on power as well as a grant of power. This is discussed by Professor Detmold in 'Original Intentions and the Race Power' (1997) 8 *Public Law Review* 244 and see Geoffrey Lindell 'The Races Power Problem' (1998) 9 *Public Law Review* 272; Peter Johnston and James Edelman 'Beyond Kartineri: drawing the flame close to *Wick*' (1998) 1 *Constitutional Law & Policy Review* 41.

24 See Geoffrey Lindell, *ibid,* at 274.

25 Here I am referring to the approach promoted by Justice Gaudron in *Kartinyeri* p556ff. This argument has a history; see Stephen J in *Koowarta*

Finally, readers of *Kartinyeri* might be puzzled by the fact that two of the judges, Brennan CJ and McHugh J, chose not to speak about these important issues at all.[26] Whatever the reason for this it illustrates an important point. We have been thinking so far about how all interpretation includes an element of application. But there is a sense of application in legal decisionmaking that has to be kept apart from interpretation. For the interpretation of the law is always for a specific reason, namely, to resolve a dispute. Judges cannot interpret the law one way and then decide the case on other grounds. But they can choose whether or not to incorporate certain interpretations into their deliberations. If the case can be adequately decided on other grounds then there may be no need to venture a view about what particular legal provisions mean.

While this last point is hardly profound it does disclose an element of choice within the idea of application that has to be accounted for. Constitutional interpreters can choose among various strategies. They might avoid offering a particular interpretation at all. Where they do offer an interpretation they might distance themselves from the original historical context and, in our example, bring to the fore the *difference* between the original understanding of the "race power" and our present understanding as to how this power should be used. Or, alternatively, interpreters might choose to merge the earlier period with our own. In our case they might simply ask ahistorically—what do the words "for whom it is necessary to make special laws" mean *now*?[27]

In short, "application" is a way of thinking about the historical or social (or for that matter personal) standpoint of the interpreter. The example of *Kartinyeri* shows how this idea can be thought of in two ways.[28] First, in Gadamer's hands it refers to the inevitable role of the interpreter's "horizon of understanding" in any act of interpretation. All the Judges in *Kartinyeri* had to start their interpretation from a contemporary standpoint. Where else could they start from? But the term "application" also identifies an aspect of interpretation that is optional. The judges had an option apparently whether to interpret s 51 (xxvi) at all. More interestingly, those who did give their views on this power had a choice as to whether to

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(1982) 153 CLR 168, 209 and the *Native Title Act* Case (1995) 183 CLR 373, 460.

26 They decided the case on the basis that as the original Act was valid so was the amending Act.

27 I notice Justice McHugh's endorsement of this approach in *Re Wakim; Ex Parte McNally* (1999) 163 ALR 271, 286.

28 Here I build upon a remark of David Hoy, 'A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction' (1988) *15 Northern Kentucky Law Review* 479, 494f. Hoy distinguishes between the application of a text and its appropriation.

emphasise or de-emphasise the historical distance between the origin of the law and the present-day.

## III. Application and the transmission of law

Here I make a different and larger point. A distinction is drawn at times between two types of laws in our legal system.[29] There are laws that are solely a matter of agreement. For example, should we drive on the left-hand side or right-hand side of the road. But there are other laws that can be said to be more than human convention. Such laws deal with a subject matter that is always larger than the specific laws in place in a particular jurisdiction. This insight could be described as the truth of natural law thinking.[30] Its truth is not that natural law is immutable (or we might add that law is ultimately connected to something larger than human will). But, rather, that the content of many laws is such that their subject matter exceeds the attempts of any particular lawmaker or interpreter to give it final specification. This point can be exemplified as follows.

One of the basic ideas at work within our legal system is the value (understandably close to the judicial heart) of having an independent judiciary. This value has been found to inhere in the structure of our Constitution. One facet of this implication is that the judicial process is constitutionally protected from undue interference by the legislature.

The recent case of *Abebe v Commonwealth* fits within this context.[31] Briefly, the *Migration Act* was amended in 1994 in a way that limited the ability of the Federal Court to review migration decisions. A number of traditional grounds of review were rendered inapplicable. Much of the argument in *Abebe* concerned the concept of "matter" employed in ss 73 to 78 Constitution. Could a "matter" be fragmented and only part of it be given to a ch III court? Is it possible to understand the idea of a "matter" independently from the proceedings in which the dispute is resolved? Ultimately four judges decided that this fragmentation of "matter" did not matter (if you will forgive me) while three decided that it did. The majority worried about the inconvenience (both generally and in this particular area of law) of holding that a matter could not be fragmented. The minority thought that the 1994 amendments had left the Federal Court without the power to "quell the controversy" before it. This "stultified" the exercise of judicial power. The Court was put at times in the invidious position of sanctioning a decision that may well be in (non-reviewable) respects unlawful.

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29 I am departing from the remarks of above n 1 at 285.

30 *Ibid,* at 285.

31 (1999) 162 ALR 1

Underlying this argument (and sometimes explicitly referred to) was the larger issue of whether the restrictions placed upon the Federal Court were an unacceptable intrusion into the judicial process? Here each judge would have approached the value of judicial independence with something like this framework in mind.[32]

1. On the one hand, the integrity of the judicial process is a vital concern protected by our Constitution. Public confidence in the independence of the Courts must be maintained. This means that if a ch III Court is used it must not be given powers that make it an unacceptable repository of these powers. Parliament cannot direct the manner in which a ch III Court decides cases.

2. On the other hand, Parliament can restrict ch III Courts in a number of ways. It can establish their jurisdiction and enact laws of evidence for them. Further, in line with the *Hickman* principle, power may be validly conferred on the executive in ways that make the lawfulness of its decision more or less beyond question in these Courts.[33]

Here we can see how the activity of judicial interpretation works to promote the overall coherence of constitutional law. Clearly within the case law are a number of different ideas concerning judicial independence; some promote it others, in the interests of other goals, inhibit it. The judges in *Abebe* whether in the majority or minority had to approach these tensions in the same way. They had to downplay them. It is part of their job to reconcile differences in the law not to exacerbate them. As the above summary shows this is often accomplished by structuring the basic value into compartments; each compartment dealing with a different legal problem. The destabilising effects of contradictory decisions are neutralised when these decisions are coordinated and explained as dealing with different situations. Law explained in this way is subject to rival approaches but different approaches unlike contradiction do not unsettle the overall coherence of constitutional doctrine.

This splitting of the value into different contexts cannot go unchecked. At some stage it is simply not plausible to make these distinctions. For example, is the *Hickman* solution convincing in its promotion of an approach that keeps apart measures that expand the power of the executive from those which restrict the power of the Courts?[34] Be that as it may, what we see by way of the example is how judicial interpretation works to legitimise the law. It posits the coherence of the law, or for that

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32 For a useful summary of the relevant case law see Kirby J in *Nicholas v Queen* 151 ALR 312.

33 *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.

34 And one thinks here in a different constitutional context of the fate of the 'criterion of operation' test. See *Cole v Whitfield* (1988) 165 CLR 360.

matter its rationality, as something to be found in the legal materials and then proceeds through the course of the interpretation to realise this value. It assumes the rationality of the Constitution and the coherence of constitutional doctrine and shows how these materials can deal with the problem at issue. *Abebe* is interesting as the interest in making the Constitution work is expressly referred to by three of the judges.[35]

Here is the inherently conservative side of constitutional interpretation. The judges make the Constitution speak to new circumstances. Each case dealing with judicial power—*Boilermakers, Lim, Polyuchovitch, Brandy, Kable, Nicholas* and now *Abebe*—clarifies what the Constitution says. Each case demonstrates how these materials can deal adequately with new problems. But while each case reveals a new meaning rather than an old meaning, in doing this it keeps the Constitution and its supporting doctrine alive. It makes the Constitution relevant to the present.

This is not to say that the judges will always be successful in this. There is always the risk of incoherence. To return to the idea of two types of laws. Judicial independence has a value which will always mean more than whatever the Constitution or the cases say about it. It is the job of present-day interpreters to try and fix this meaning. But if we accept Gadamer's account we can see why this remains a task rather than something accomplished. The idea will reassert itself. The tradition handed down to us is always more than the institutions that try to stabilise it.

## IV. Conclusion

What follows from rethinking the interpretation/application distinction? First, we can distinguish between application as necessity (Gadamer) and application where the historical distance between the text and the interpreter is deliberately emphasised to make the text more problematic for the contemporary audience. This second approach is sustained in legal analysis by the connection we make between law's origin and its authority. But it can never carry the day in constitutional interpretation because we want more from our courts here than competent history.

Second, we can see better the two sides of legal interpretation and how it helps to preserve and transmit the legal tradition. By positing the law in certain ways—as coherent, as rational, as workable—courts help to make the law acceptable and bring its polysemy under control. On the other hand, there is an emancipatory dimension to this. What is handed down to the courts will exceed their efforts to give it meaning. The tradition will unfold in unforseen ways. At any point of time the legal ideas are always more

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35 Gleeson CJ and McHugh J (13). Kirby J refers to this idea as a 'facultative principle of constitutional interpretation' (47).

than the institutions that try to control it.

There is the larger question of whether the legal tradition has the potential vocabulary for expressing the different interests at work in present-day society. Can this inheritance and our present legal institutions forge a single community over time? Gadamer's position assumes that they can. But on this point he has his critics.[36]

[36] For a interesting essay among many, Dieter Misgeld 'Modernity and Hermeneutics: A Critical-Theoretical Rejoinder' in H Silverman (ed) *Gadamer and His Critics,* (New York: Routledge, 1991).