

# CONSTITUTIONAL HERMENEUTIC: A FAITH IN CONSTITUTION INTERPRETATION

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## **Abstract**

*Hermeneutics can be used as a foundation of understanding on the interpretation of the constitution. Hermeneutic goal is not to develop a set of rules or procedures (methods) on textual interpretation, but as meta in the interpretation. Problems of constitutional interpretation cannot be blasted between theories that exist in the interpretation of the constitution. Clash between theories will not be able to resolve the constitutional issue. Each theory has a foundation of rationality and justification of each method. Therefore, the settlement should be drawn more into the realm of deep again, i.e. into the realm of ontology. The purpose is not to develop a set of rules or procedures on the interpretation of the text “method (be cognitive)” but the search for answers to no interpretation itself “ontis”. So objectivity lies in philosophy, then identified “not on what we do or we should do (in interpretation), but what happens to us other than what we want and do”. So it is clear that the hermeneutic assemble themselves on things that are ontological, and identify relationships that cannot be changed between the reader with the text, in the past and the present, which appears at the beginning of understanding.*

**Keywords :** *constitutional, hermeneutic, constitution interpretation*

## **1. Introduction**

Analysis of the constitution requires hermeneutic interpretation. There are some things on which the hermeneutic interest in constitutional interpretation. First, the text “*language*” is a medium of hermeneutic, as well as in the interpretation of constitutional meaning of the text as written norms of the constitution is the object on the interpretation of the constitution, whatever is contained in the constitution, must be in writing. Narrowly it can be said that the constitution is a written script about the government’s authority and rights of the people. Because the object is a constitutional interpretation of the written text and

hermeneutical philosophy tries to open all the possibilities that the entire text can be understood, it is clear that the hermeneutic is a knife that can be used in the analysis of constitutional theory. As stated by Gregory Leyh:

*Notwithstanding the obvious fact that constitutional scholars are divided on many fundamental points, surely most would agree that whatever else the constitution may include, it includes a written text. In other words, the constitution includes, but is not necessarily limited to, a piece of written discourse about the powers of government and the rights of citizens. This claim entails nothing at all regarding the content of that discourse. Because the object of much constitutional interpretation is a written text and philosophical hermeneutics because attempts to reveal the ineliminable conditions for understanding all texts, it would seem that hermeneutics is an appropriate place to begin a serious analysis of constitutional jurisprudence.<sup>92</sup>*

Second, the present debate over the meaning of a text of the constitution is the hermeneutic debate, as contained in the philosophical thoughts and questions about hermeneutics. The debate is often about how to determine the meaning of a sentence (text), either the state or the desire of the drafters of the constitution, the history of language, even the meaning of conceptual changes in the field of law is very important to be understood as part of the hermeneutic problem. Third, the interests of the hermeneutic contribution itself in jurisprudence, which became critical thinking, in view of understanding (*verstehen*) above meanings legal text.

These three things mentioned above illustrates that constitutional interpretation issues can be discussed clearly through hermeneutics. On that basis, this discussion rests on 2 (two) perspective, the first, philosophical hermeneutics explained arguments on the interpretation of the constitution. Second, arrange construction of constitutional hermeneutic thinking.

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<sup>92</sup> Gregory Leyh, *Toward a Constitutional Hermeneutics*, *American Journal of Political Science*, Vol. 32, No. 2 (May, 1988): 371.

## **2. Research Methods**

This type of research is a kind of socio-legal research. The use of such methods is based on the focus of the study to look at the interpretation of the constitution by hermeneutic approach. Therefore, in addition to reviewing normatively, also utilizing empirical study.

## **3. Result and Discussion**

### **3.1. Goodness Value of Hermeneutics**

Hermeneutics is the foundation of understanding on the interpretation of the constitution, through hermeneutic debate constitutional experts who do not get a meeting point can be better discussed. The main virtue of the constitutional hermeneutic is in-depth understanding of the interpreter of the Constitution which seeks to absorb better the achievement of the interpretations in philosophy in daily activities.<sup>93</sup> In addition, the hermeneutic put us in ontological task. Understanding the basis for non-cognitive hermeneutic. Hermeneutic is not a “*method*” that can be used practically in exact answer or a correct interpretation of constitutional questions. An important condition for obtaining an understanding, in Hermeneutics all answered in the ontology. Then certainly Hermeneutics will not result in an interpretation methods designed to produce a certain way to be used in the interpretation of the constitutional judges. However, the importance of hermeneutics lies as a metareflection of a belief in constitutional interpretation. Means that certain constitutional interpretation is measured by the extent to which the interpretation accommodates hermeneutic understanding. If the interpretation of the constitution that are not consistent with the belief hermeneutic understanding of the meaning of the constitution cannot be precisely assessed.

In the ontology of the understanding of hermeneutics rests on the condition of human understanding. The human understanding becomes important in hermeneutics, as stated by Arief B. Sidhartha:

*Hermeneutic philosophy is a philosophy about understand or understand (verstehen). At issue in this philosophy is not how one should understand, so*

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<sup>93</sup> *Ibid.*, pp. 369.

*it is not the teaching of art or teaching methods, putting what happens if people understand or interpret.*<sup>94</sup>

Later it is reaffirmed:

*The understanding and interpretation in view of this hermeneutic philosophy, is an essential aspect of human existence characterized by submission possibilities, attachment to what is out there that cannot be exceeded, and the historicity of which cannot be controlled through objectivity. Human existence (Dasein) is intrinsically characterized by limitations and preciousness. In this regard, the human being is also a reality that history, determined and decisive (coloring) history. As a philosophy about understanding, hermeneutic philosophy with respect to all who choose meaning, as far as it can be expressed in language and understandable.*<sup>95</sup>

In line with this, Leyh also confirmed that philosophical hermeneutics is not a methodology to accurately read the text, but the reverse offers a standard to evaluate all practices methodologies that aim is to understand textually.<sup>96</sup> Leyh also scratch down the role of the man himself who became the core of hermeneutics. According to Leyh, in order to achieve the objectivity of human humanism in the practice of interpretation often is released (regarded as negative), according to the hermeneutic opposite objectivity instead lies in the man himself. Objectivity is to identify all conditions of human knowledge that has been reduced.<sup>97</sup> On that basis hermeneutic role in the interpretation of the constitution is needed to assess the arguments in the constitutional interpretation of a constitutional text. Less attention to hermeneutics as a source of information for the interpreter of the Constitution over the years resulting in an error in understanding. Hermeneutics try to uncover errors in the understanding, Leyh call as “*irregularities are revealed*” (a revealing oddity).

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<sup>94</sup> B. Arief Sidhartha, *Refleksi Tentang Pondasi dan Sifat Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional Indonesia*, dissertation to obtain a Doctorate in Science of the Law at Universitas Padjadjaran with the Rector Authority of Universitas Padjadjaran, defended on November 11, 1996 at Universitas Padjadjaran, pp. 116. See also in B. Arief Sidhartha, *Konsep Ilmu*, (paper without years edition), pp. 8.

<sup>95</sup> *Ibid.*, pp. 117.

<sup>96</sup> Gregory Leyh, *Op. Cit.*, pp. 380.

<sup>97</sup> *Ibid.*, pp. 370.

Then it can be reaffirmed that the goal of hermeneutics is not to develop a series of rules or procedures (methods) on textual interpretation, but as meta in the interpretation. According to Leyh because objectivity lies in philosophy, then identified “*not on what we do or we should do (in interpretation), but what happens to us other than what we want and do*”.<sup>98</sup> Then it is obvious from the foregoing arguments that the hermeneutic assemble themselves on things that are ontological, and identify relationships that cannot be changed between the reader with the text, in the past and the present, which appears at the beginning of understanding.

What is described above, built on the idea of Hans Georg Gadamer. For Gadamer’s hermeneutics is not a method because the method is still far from the truth. Gadamer put pressure on that understanding is the ontological level, not the methodology. Because, according to Gadamer, the truth illuminates the methods of individual, whereas the method actually hinders or impedes the truth. In contrast to Dilthey and Schleiermacher, hermeneutics is not over is a method. So, if the meaning of the text is Schleiermacher effort goes into the inner world of the author to obtain the original meaning.<sup>99</sup> For Dilthey meaning of the text is a concept of history that is associated with the practice of human life and objective spirit.<sup>100</sup> For

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<sup>98</sup> *Ibid.*, pp. 372.

<sup>99</sup> In the next Schleiermacher thought, there is a further tendency to separate the language areas of the territory of thought. The first is the area of interpretation “grammatical”, while the latter is called by Schleiermacher first with the “technique” (*technische*) and then called the “psychological”, see Richard E. Palmer, *Interpretation (Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer)*, edition 5, (Evanston: Northwestern University Press, 1969), pp. 100; According to Schleiermacher, there are two tasks hermeneutic which is essentially identical to 1 (one) each other, namely the grammatical interpretation and psychological interpretation. Grammatical language is a requirement to think of each person. While the psychological aspects of interpretation allows one to catch “a speck of light” author’s personal. E. Sumaryono, *Hermeneutics (a method of philosophy)*, edition 12, (Yogyakarta: Canisius, 1999), pp. 40. See also Lawrence K. Schmidt, *Understanding Hermeneutics*, (Durham: Acumen Publishing Limited, 2010), pp. 12 “*Schleiermacher refers to this second part with both terms, “technical” and “psychological”, but appears to have decided on “psychological” in the end, which will be used here*”.

<sup>100</sup> Poesoprodjo, *Hermeneutics*, (Bandung: CV. Pustaka Setia Bandung, 2004), pp. 38. The concept of understanding as an intellectual process provides us with the human world, it plays a crucial role in the whole work of Dilthey belief that understanding is very important starts of 4 (four) assumptions. First, that it is a process of understanding common in everyday life. Second,

Gadamer meaning of the text cannot simply be released from the entity interpreter or reader itself because the interpreter has his own existential territory. Gadamer thought is very appropriate if it is used to analyze the constitutional issue. The debate in the method of constitutional interpretation must be answered by returning the philosophical thought.

Apart from that, according to Leyh one of the goodness of Gadamer thought is that the activities are practical in understanding the text content is through a philosophical approach. Leyh states:

*One virtue of Gadamer's thought is that it places the practical activity of understanding texts in a philosophic mode. He tries to understand the nature of historical understanding as such, and it is therefore within this richer philosophic vein that issues about textual meaning and interpretation are engaged. What constitutional theory needs at the present time is not more knowledge of the framers' intentions or the Constitution's original meaning, but a self-critical examination of the underlying premises of prevailing conceptions of interpretation itself? Constitutional theorists do not often reflect on the conditions that make historical knowledge possible. Their posture is typically a commonsense view that assumes the acquisition of historical understanding is epistemologically unproblematic. This custom is what philosophical hermeneutics calls into question. Thus hermeneutics invites us to begin a self-reflective conversation about how interpretation is possible at all.<sup>101</sup>*

Leyh believes that Gadamer thought through the underlying premise of the concept of constitutional interpretation can be critically examined. Thus, the

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it understands as a source of even basic knowledge of human reality. Third, related to the understanding of the complex social reality in the form of a unique process, which is that a person cannot be translated or put back by another. Fourth, that understanding is an essential part of the method of different human studies of science. It is key to understanding the human inner life which includes the following things. First, the understanding is done not via introspection, but rather via the history. This means that history plays a very important role to understand the various aspects of human life. Second, understanding the problem lies in the discovery of historical consciousness of human existence. Third, the complexity of human life is in the direct life experience as a totality. Fourth, understanding of *lebenswelt*, it means understanding the particular moment of harmony on the meaning of life. Fifth, part of the meaning of life requires past and future expectations horizon. Sixth, part of the meaning of life is intrinsic temporal and limited, so it must be understood in historical terms. Rizal Mustansyir, *Hermeneutika Filsafat (Sejarah Perkembangan Pemikiran Para Tokoh)*, (Yogyakarta: Pustaka Ras Media, 2009), pp. 44.

<sup>101</sup> *Ibid.*

constitutional debate is the interpretation of the constitution can be tested and completed. Even through hermeneutic can formulate a new concept which is based on hermeneutic interpretation.

### **3.2. Constitutional Hermeneutics**

Before entering into the analysis of the debate philosophical hermeneutic interpretation of the constitution, needs to be explained, that is the essence of the debate that is going on. There are 2 (two) streams in the interpretation of the constitution that face to face, originalist and non-originalist. Among debate how the meaning of the constitutional text must be interpreted. Both have the view that the constitution is a norm that is authoritative in making constitutional decisions. This means that cases should be decided by the constitution, or according to the constitution and the judge in deciding constitutional cases faced should interpret the constitution. Although it went on reasoning above, but how to interpret the intention of the constitution originalist and non-originalist have a different basis. Even originalist and non-originalist have the opposite theory, and faced and has become a controversy that continues over and over.<sup>102</sup>

According to Michael J. Perry for originalist interpret the constitution means defining the meaning original. Michael J. Perry stated ... the norm the textual provision at issue is originally understood to signify.<sup>103</sup> From the beginning of meaning is then searched the meaning of significance what is conceived by the norms related to a conflict or constitutional problems. For originalist enact constitutional means to impose early as understood by the framers or certifier. The search for meaning by originalistis early to give an answer to the question whether the special meaning of a text (some text) in accordance with the constitution of

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<sup>102</sup> Tarance Ball, *Constitutional Interpretation and Conceptual Change*, in *Legal Hermeneutics (History, Theory and Practice)*, Edt. Gregory Leyh, (California: University California Press, 1992), pp. 123.

<sup>103</sup> Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, in *Legal Hermeneutics (History, Theory and Practice)*, Edt. Gregory Leyh, (California: University California Press, 1992), pp. 245.

belief or intention of the framers of “*Father of Constitutions*”.<sup>104</sup> So the meaning of the text is still not going to change, does not vary and do not follow the intent of the interpreter. The significance of the paradigm originalist in contemporary constitutional theory is the proposition that the purpose of the constitution is to tie the future of which remains based on the basic norms.<sup>105</sup>

In contrast to the “*originalist*”, the flow of non-originalist provide answers to the meaning of the text changes from time to time based on the perspectives and interests (objectives) of interpreter.<sup>106</sup> This means interpretation done based on the objectives to be achieved by the interpreter. Interpreter assessing a written constitution cannot anticipate all the events that occur in the future. So the necessary interpretation aims to provide answers to the problems of constitutional.

The original understanding is an important source of the meaning of the constitution, but so are other sources, namely evolving norms and traditions of the community. Interpretation is a dynamic process and that into consideration is what allows people to defend the Constitution faith towards from one generation to the next. For non-originalist constitutional text is full of meaning, the meaning of the text is not single. As stated, Michael J. Perry as follows:

*To the non-originalist, too, of course, the constitutional text is meaningful. But to the non-originalist the meaning of the text is not singular. One meaning of the constitutional text, to the non-originalist, is the original meaning. To the non-originalist, however, that is not the only meaning of the text.*<sup>107</sup>

One meaning of the constitutional text is the original meaning, but it is only one meaning of the text and not the meaning of the text.<sup>108</sup> Michael J. Perry stated, certain terms of the constitutional text are plural. Constitution according to Michael J. Perry is a form of communication to the present from the compilers and certifier

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<sup>104</sup> Tarance Ball, *Op. Cit.*, pp. 129.

<sup>105</sup> Dennis J. Goldford, *The American Constitution and the Debate over Originalism*, (New York: Cambridge University Press, 2005), pp. 90.

<sup>106</sup> Tarance Ball, *Op. Cit.* Interpretation models used non-originalist, namely (1) *doctrine*, (2) *ethos*, (3) *prudence*. Philip Bobitt, *Op. Cit.*, pp. 127.

<sup>107</sup> Michael J. Perry, *Op. Cit.*, pp. 246.

<sup>108</sup> *Ibid.*



in the past. The Constitution also is a symbol of the fundamental aspirations of political tradition. By Michael J. Perry mean what is the constitution for the public (in addition to the original meaning) is also a basic aspirations that form or the principles and ideals.<sup>109</sup>

Not only originalist but also non-originalist equally considers that the final meaning is always the early specific meaning, as stated Michael J. Perry ... for both originalist and non-originalist final meaning is always a preliminary specification of meaning.<sup>110</sup> However, the two frameworks differ; originalist begins by asking the question of how the terms are understood by the original? Then investigate what is meant by that provision, as understood at the beginning of first, in the context of the case faced.

The core of the debate when seen from a philosophical hermeneutic is an understanding of the historical significance rests on: First, the existence rather than the interpreter. Second, historical consciousness: Existence interpreter deals with the concept of aesthetics and prejudice. This concept can be summed up like this: the first, based on the human side of humanism. Humans have a basic concept of man, namely *Bildung*. *Bildung* is not the same as unification process of someone in an educational or training institution whose only purpose is to hone talents in certain ways and have clear objectives.<sup>111</sup> *Bildung* is a unification process of someone in the arena of culture itself.<sup>112</sup> Here *Bildung* not be achieved by technical reconstruction, but grew out of the formation and cultivation of the mind and therefore still in existence *Bildung* is sustainable.<sup>113</sup> So, it based on the concept of *Bildung*, pervasive human tradition which has been there when the man is thrown in the world. This resulted in the understanding (*verstehen*) human beings have never in the zero point, because the man had been there specific prejudice.

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, pp. 148-249

<sup>111</sup> Inyik Ridwan Muzir, *Hermeneutika Filosofis Hans Georg Gadamer*, (Yogyakarta: ArRuzz Media, 2008), pp. 107.

<sup>112</sup> *Ibid.*

<sup>113</sup> Hans-Georg Gadamer, *Truth and Method*, translated by Joel Weinsheimer and Donald G. Mars (London: Continuum, 2004), pp. 10.

Second, prejudice is not something we have to get rid of; prejudice is the basis of human existence to be able to understand the overall history.<sup>114</sup> As stated also by Heidegger when explaining the pre-structure of understanding (pre-structure of understanding) and intrinsic historical aspects of human existence, explaining that the interpretation or the interpretation never be achieved if there is no prejudice before. Heidegger emphasizes in understanding something of consciousness is never empty, but because within us already stored in advance intentions or specific purposes with respect to what we want to understand.<sup>115</sup>

Third, because there traditional present prejudice, tradition is a historical movement “*flow*” that is present at this time and tradition have authority. So, man is not only alive and deeply rooted in tradition, but thrives in history and left. So, what is inherited to this day from the past to have strong grip to humans, and always maintained and preserved. So it is not part of human history but a part of human history. Humans shaped by history. A community is not only alive and deeply rooted in tradition, but thrives in history and left. In the tradition of innovation we can see or can we see the continuity and discontinuity.<sup>116</sup> Historical consciousness relates to the concept of Time Range/Distance Temporal “*Zeitenabstand*”, history *Wirkungsgeschihte* impact, smelting horizons and understands the concept. Historical consciousness is how we see the history, the present reality and the distance that is created on the aforementioned facts, the historical impact *Wirkungsgeschihte*. *Wirkungsgeschihte* impact history is an active and dynamic process.

Gadamer stated we subject of influences affecting history. If we try to understand a historical phenomenon from the historical distance that are

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<sup>114</sup> Palmer, *Op. Cit.*, pp. 136.

<sup>115</sup> *Ibid.*, pp. 176. According to Heidegger's conception of the pre-structure of understanding, we understand a given text, matter, or situation, not with an empty consciousness temporarily filled with the present situation but rather because we hold in our understanding, and bring into play a preliminary intention with regard to the situation, an already established way of seeing, and certain ideational “preconceptions.”

<sup>116</sup> Martinho G. da Silva Gusmao, *Hans Georg Gadamer: Penggagas Filsafat Hermenutik Modern yang Mengagungkan Tradisi*, (Yogyakarta: Kanisius, 2013), pp. 105.

characteristic of our hermeneutical situation, we are always subject to the influences of effective history. The principle of this impact history is intended as an incentive for us to understand and realize that in every understanding, consciously or not, we are always tied to the strength.<sup>117</sup> Similarly, the distance between the past with the present or called by Gadamer as the time spans “*Zeitenabstand*”, not a valley “*gaping*” but is met by a continuity of tradition. It means a span that opened the distance between the interpreter and the text instead of gulf that inhibit and bring misunderstanding and should be avoided because it is negative, positive time span that make up the update.<sup>118</sup> For Gadamer interpretation is not trying to find answers to a misunderstanding but it is an attempt to reach agreement.

Gadamer expressly states that “*the text has become part of the whole tradition*” and “*the text does not depend on the author or people who become destination text*” text reveals itself to the interpreter.<sup>119</sup> Present updates horizon formed by tradition and an accumulation of various horizons of the past in a continuous circular motion. Understanding the past will form its own horizons as well as the present.<sup>120</sup> So, there are two horizons, i.e. horizons horizon interpreter and text, which at the end of the encounter occurred two horizons. On the horizon intermingling between the interpreter and the text is taken through a process of dialogue in the structure of questions and answers.<sup>121</sup> Model no reciprocal relationship, which is characterized there is openness to the text. This relationship is not only projecting the meaning of interpreters but instead has openness.<sup>122</sup>

On that basis, if it is associated with thinking originalist and non-originalist, it can be concluded that the thought “*originalist*” - meaning of the text really contains the original meaning of the text and the meaning of the constitution is

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<sup>117</sup> Inyik Ridwan Muzir, *Op. Cit.*, pp. 139.

<sup>118</sup> Hans-Georg Gadamer, *Op. Cit.*, pp. 232.

<sup>119</sup> *Ibid.*, pp. 296.

<sup>120</sup> Hans-Georg Gadamer, *Loc. Cit. In the sphere of historical understanding, too, we speak of horizons, especially when referring to the claim of historical consciousness to see the past in its own terms, not in terms of our contemporary criteria and prejudices but within its own historical horizon.*

<sup>121</sup> Inyik Ridwan Muzir, *Op. Cit.*, pp. 140.

<sup>122</sup> Richard E. Palmer, *Op. Cit.*, pp. 193.

what is contained in the past have failed to pay attention to the ontological character of understanding history which means failure in the understanding and interpretation of the description of the activity. While non-originalist has managed to keep on understanding the ontological character throughout their history to understand that the time/distance understood not as a temporal gap that give rise to misunderstanding. Several statements argued critique of meaning in originalist. Based on the basic thoughts formulated above it can be concluded stream originalist stated that *“the meaning of the constitution when the constitution is formulated binding, must be adhered to, and have the assurance of the meaning of the judge does not have authority to be”* free *“to interpret the Constitution when making the choice of the fundamental values.”* Statement *“formulated binding, must be adhered to, and have the assurance of meaning”* in hermeneutic rated misleading in the way that is described as an interpretation. Text and history there is no *‘there’* in the past. There are no historical facts separate from the present. Prejudices paved the way for us to look past. For hermeneutic what is at this moment a stream of past history, the past is not a pile of facts which are viewed as objects that are static (stationary) but rather as a dynamic flow (move) to the present and always participated in the effort of understanding. The interpreter is not guided by what is really *“mean”* past (the historical reality and the mind of the author of text) and not well controlled solely by the interests of the spirit of today.

Similarly, the statement *“free”* or *“free for freedom”*, concerns the interpretation is not based on the text’s meaning can create freedom of interpretation at the end opposite to the one written in the constitution, which means meaning the resulting conflict with the constitution itself. This freedom is a big problem, because someone *“judge”* can only enter the thoughts about what is the meaning of the constitution. In hermeneutics is also considered to be very misleading because the judge must be able to understand and dig a correct meaning. The judge must find *“legal idea”* in mediating with the condition at the moment. This is evident in the statement Gadamer as follows:

*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.*<sup>123</sup>

So the “*legal idea*” should be present in the understanding. Subjectivity of interpretation it would be reduced to the most minimal level, because first of all the activities that interpretation must always refer to the *legal idea* of human values and fundamental legal system. Second, the product is always open to interpretation rational assessment of the arguments underlying the interpretation of the products by the legal forum with the legal idea, human values are fundamental and legal system as criterion testers.

Originalist flow gives a boost to withstand the judges of free reading preferences of modern values in the Constitution of the interpretation of judicial decision and further to the moral norms of contemporary constitutional.<sup>124</sup> So, according to originalist adherence to the understanding of originality on a manuscript is one of the strong protections for misuse of authority and aims to preserve moral values. Such claims if understood in hermeneutics is also considered to have failed to protect the moral values. The core is “*moral change our concept as well as changes in our social life*”.<sup>125</sup> Because the constitution contains certain moral values (e.g.: freedom, equality, freedom, democracy), the meaning of the constitutional inevitably have to follow the dynamics of political, social, legal, and developing economies in the life of the state. So, in the interpretation of the judge must be able to capture the moral values surrounding the constitutional text.

It means that interpretation of originalist possesses very narrow, resulting in misunderstanding the interpretation. They put a ‘*brake*’ on wheels constitutional

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<sup>123</sup> Gadamer, *Op. Cit.*, pp. 324.

<sup>124</sup> Gregory Leyh, *Op. Cit.*, pp. 378

<sup>125</sup> *Ibid.*, pp. 379

changes in moral and political discourse, true became a necessity in the interpretation itself.<sup>126</sup> So, true originalist even subverts their own goals to achieve fidelity to the initial meaning in the interpretation of the constitution to protect the values that are clearly stated in the constitution. Originalist contrary to the idea of loyalty to the Constitution as far as to deny the possibility of judicial translates the meaning of the text into the language of morality at the present time.

According to Gadamer there is a practical and existential primacy of knowledge about the actions good and bad in an object encountered, Gadamer calls with phonetic term. Through phonetic can be seen how a moral purpose can be achieved. The achievement of moral purpose is not a mechanical process but is phonetic. Thus, the purpose of this moral mediates between language and meaning of the text and concrete practices.

*In addition, a judge (indeed, each of us) is limited by the terms and character of contemporary normative discourse. Because the purpose of constitutional interpretation is to translate the law's meaning into our immediate context, the linguistic and moral limits of our context must always be respected if the law is to remain legitimate. Nowhere is a judge free to do whatever he or she wishes with or to the text.*<sup>127</sup>

It means that the purposes of interpretation of the Constitution to explore the moral values in our context. Then the statement that judges have free liberty is not appropriate. Judges must be able to drain the 'legal idea' to the case at hand to enforce compliance as a statement of law that is acceptable.

*Judges are taught to establish meaningful links between the "legal idea" and the case at hand in such a way as to demonstrate fidelity to accepted legal canons.*<sup>128</sup>

On that basis, precise is to say that the ontology originalist has failed to understand the constitutional text. Less critical awareness about the history of directing the search character originalistis wrong in seeking to understand the

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<sup>126</sup> *Ibid.*

<sup>127</sup> Gadamer, *Op. Cit.*, pp. 381

<sup>128</sup> *Ibid.*, pp. 381-382

nature of language, text and interpretation. In fact it can be said, in an effort to maintain a history of serious, originalist just ignore history itself, because originalist ignores the history of history itself. Can be summed up briefly back, originalist not quite give us a form adequate to interpret the Constitution.

In contrast to originalist, non-originalist has achieved success throughout to meet the ontological essence of understanding of vulnerable time/temporal distance. The success of non-originalist can be seen there are 2 (two) interpretive moments in non-originalist, first: the moment in which the meaning of the provisions of certain aspirations,<sup>129</sup> Second: the moment in which it confirmed the significance of meaning or confirmed to resolve the conflict. The first moment of interpretation produces the norms to be applied, the moment that both led to the significance of these norms for the conflict faced. The first moment is the intended meaning of the beginning of the constitutional provisions of a general nature, abstract, formal and verbal. The second moment is the intended final meaning is relative, concrete, substantial and existential.<sup>130</sup>

The ontological fulfillment of all the non-originalist essence understands vulnerable time/temporal distance. There are 3 (three) major questions that develop in non-originalist relating to vulnerable time, firstly, difficulty ensuring institutional intention and the intention of the members of the constitution framers. Second, the difficulty of translating is the beliefs and values of the formulator. Third, the issue of constitutional instability, i.e. not all the problems defined in the constitution as a whole, if the constitutional inflexible it cannot adapt to changing circumstances. The statement must be answered with confidence that there is a continuity of the culture of “*tradition*” with the drafters of the constitution. There is the ability to dig back and understand the intent of the constitutional framers intentions with the culture of “*tradition*” is the same as the conditions at the moment. Only rely on the values of the present (contemporary) can result in failure of the hermeneutic understanding.

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<sup>129</sup> Michael J. Perry, *Op. Cit.*, pp. 247.

<sup>130</sup> *Ibid.* pp. 148.

Based on the opinion of Gadamer, meaning in the interpretation of the constitution should be seen as the circular motion of the meaning of the constitution from the past to the present, as the encounter and smelting horizon past with the present, as a dialogical process of the past with the present. Leyh, stating Interpretation is to understand the concepts of ancient (though not all concepts) into the present social terminology that is more easily understood.<sup>131</sup> Interpretation of constitution neither a concept that separates us disconnected with the predecessor generation. Past meetings always will occur through the structure in the present communication. Leyh, emphasizes that:

*Our encounters with the past always occur through the communicative structures of the present. To try to remove or suppress these structures is to reduce the possibility of understanding. Yet the historicity of all inquiry needs to be elaborated and developed. For on first blush it might seem that constitutional interpreters are imprisoned by the contemporary context such that the past is irretrievably lost. But such a view falsely assumes that history does indeed have an objective character after all, a character that contains meaning quite independently of the tacit presuppositions guiding historical inquiry.*<sup>132</sup>

In this way the characteristics of hermeneutic illustrates the constitution in the present circumstances in reconstructing the circumstances in the past. Gadamer have thought through the historical meaning of constitutional text and textual able to connect. Understandings of the constitutional text are simply duplicate the historical significance and ignores contextual values only result in the neglect of the fundamental values of the constitution itself. History is a circular motion until the present date; the time is now part of history. Knowledge of history can only be obtained by looking at the continuity from the past to the present in which legal experts with the appropriate conduct in daily practice, normative work “to make sure there are no defects in the law and continue the tradition of presenting the legal idea”. The discussion specifically on the hermeneutic perspective on

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<sup>131</sup> Gregory Leyh, *Op. Cit.*, pp. 381.

<sup>132</sup> *Ibid.*, pp. 374.



controversial topics in the interpretation of the constitution is giving birth to what is referred to the Constitutional Hermeneutics.

#### **4. Conclusion**

The constitutional hermeneutics never refused the use of the theories developed in the interpretation of the constitution, but opposed any attempt of methodological dogmatic in constitutional interpretation. Options on theories developed in the interpretation of the constitution want in lean on an open consciousness. The judge must be able to make a proper reflection, trying to give a good effect and try to understand the meaning of broadly based confidence by expanding the horizon.

Understanding historically seen as the constitutional text to interpret events in a historical context and practically new. Build confidence that history is colored by tradition that flows through time toward the current period and projected for the future. Interpretation should be able to put moral values, which is understood to flow together and meet our traditions are not an authority of a person or group of people. Judges should strive to realize the “*legal idea*” in the practices of concrete at the moment.

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