A CRITIQUE OF PURPOSIVE AND DYNAMIC INTERPRETATION

MASTER'S THESIS

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A CRITIQUE OF PURPOSIVE AND DYNAMIC INTERPRETATION

ABSTRACT

This paper is concentrated on providing a critical assessment of the two predominant theories of interpretation, purposive and dynamic interpretation, which have gained much traction within the circles of jurisprudence. The core assumption upon which the critique is found is that because these theories endorse some form of departure from the text of the legal documents, the courts that embrace them become entitled to reshape the law and by doing so they intervene with the legislative tasks, which are an exclusivity of the legislative branch. Thus, they create some imbalance between the prerogatives that each of these two branches enjoy. The analysis extends to the accuracy and validity of the central pillars for each approach. Regarding purposive interpretation, it is maintained that the concept of the intent of the legislature as a whole is fictitious and that legislative history, contrary to what is generally acknowledged, cannot reflect intent. Also, as a result of compromises between different groups in the parliaments, laws often serve different interests and functions simultaneously, and therefore establishing one purpose in the light of which to interpret them is erroneous. As for the dynamic interpretation, it is contended that it has no guiding principles on how to estimate in which direction has the law evolved and that despite what is emphasized as a benefit, it does not provide flexibility. Furthermore, it is argued that the only w ay to repeal old laws is through the legislative process, not by extending the discretion of the judiciary. The conclusion is that both forms have some implications regarding the separation of powers in democratic systems and also, when applied, generate some degree of subjectiveness and arbitrariness.

Key words: purposive interpretation, dynamic interpretation, democratic equilibriums.

KRITIKË E INTERPRETIMIT QËLLIMOR DHE DINAMIK

ABSTRAKT

Ky punim ofron një vlerësim kritik të dy teorive mbizotëruese të interpretimit, atij qëllimor dhe dinamik, të cilët kanë fituar shumë terren në qarqet e jurisprudencës. Premisa thelbësore mbi të cilën ngrihet kritika është se për shkak se këto teori mbështesin një formë të shmangies nga teksti i dokumentave ligjorë, gjykatat që i përdorin ato, fitojnë të drejtën të ridimensionojnë ligjin dhe për pasojë ndërhyjnë në kompetenca legjislative, të cilat janë një eksluzivitet i pushtetit legjislativ. Për këtë arsye, ato krijojnë një mungesë balance mes prerogativave që secili prej këtyre dy pushteteve gëzon. Analiza shtrihet gjithashtu në saktësinë dhe vlefshmërinë e shtyllave kryesore mbi të cilat mbështetet secila qasje. Në lidhje me interpretimin qëllimor, pohohet se koncepti i qëllimit të ligjvënësit në tërësi është fiktiv dhe se historia legjislative, në kundërshtim me atë që pranohet përgjithësisht, nuk mund të pasqyrojë këtë qëllim. Për më tepër, si rezultat i kompromiseve ndërmjet grupeve të ndryshme në parlament, ligjet shpesh u shërbejnë interesave dhe funksioneve të ndryshme njëkohësisht, dhe për këtë shkak, përcaktimi i një qëllimi të vetëm në dritën e të cilit duhet të bëhet interpretimi i tyre, është i gabuar. Sa i përket interpretimit dinamik, parashtrohet ideja se ai nuk ka parime orientuese me anë të të cilave mund të vlerësohet se në cilin drejtim ka evoluar ligji dhe se pavarësisht asaj që gjerësisht i atribuohet si avantazh, ai nuk ofron fleksibilitet. Për më tepër, argumentohet se e vetmja mënyrë për të shfuqizuar ligjet e vjetra është përmes procesit legjislativ, dhe jo duke zgjeruar diskrecionin e gjyqësorit. Në përfundim vlerësohet se të dyja këto forma kanë disa implikime lidhur me ndarjen e pushteteve në sistemet demokratike dhe se aplikimi i tyre gjeneron një shkallë të caktuar subjektiviteti dhe arbitrariteti.

Fjalët kyce: interpretimi qëllimor, interpretimi dinamik, ekuilibrat demokratikë

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Lastly, a very special thank you to my late grandfather, Luan, who with much sacrifice instilled in me the desire to work diligently and tirelessly, and the proclivity to deepen into and develop critical thinking on every idea.

DECLARATION

I hereby declare that this Master Thesis, titled “A critique of purposive and dynamic interpretation”, is based on my original work except for quotations and citations which have been duly acknowledged. I also declare that this thesis has not been previously or concurrently submitted for the award of any degree, at Epoka University, or any other university or institution.

Reni Maçi

June 2023

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CHAPTER

INTRODUCTION

The most common impediments and concurrently the biggest challenges surrounding the justice systems and the rule of law range from inequality before the law to corruption, lack of genuine separation of powers, undue political interference within the branches of government, and so on. There is no doubt about the seriousness of the hazard that each of them poses to democratically run societies. However, as important as they are, those are not the focus of this thesis. Instead, the attention is turned to a problem that is much less discussed, definitely less ill-founded, profoundly more technical, and yet, in our view, as significant as all the others. That is the manner in which legal texts are interpreted. Even though this statement may at first sound as an exaggeration, the logic behind it will be unfolded in detail throughout this paper.

There is no need to be a diligent observer of jurisprudence to notice that some of the most prestigious international courts, such as the European Court of Justice (ECJ), European Court of Human Rights (ECtHR), as well as the highest domestic courts in continental Europe (and not only), in which Albania's High and Constitutional Courts make no exception, have steadily and continuously preferred purposive (teleological) and dynamic interpretation of the laws to settle the conflicts that appear before them (Foster, 2019; Letsas, 2004; Kalaja, 2018; Poiares Pessoa Maduro, 2007). It is exactly the irreconcilability of these two forms of interpretation with the rule of law that stands at the heart of this work. While a detailed explanation is dedicated to each, they are briefly described below for the purposes of this introductory part.

Purposivism is the view according to which a central issue of the interpretation is to find the purpose and the spirit of the law, to discover what the legislator meant and aimed to achieve through the legal text that was adopted (Berberi, 2018).

It is maintained that the written and enacted words can be properly understood only if they acquire the meaning that fits with the end that is being endeavored (Fuller, 1957). In this perspective, legislative intent is the primary consideration, while the words of the law are an indication, a starting point that supplies information about that intent (Schacter, 1995). Thus, whenever the wording is deemed imprecise, or the relevant provisions "suffer" from unclarities and contradictions, it is up to the interpreter to resolve such difficulties in the way that best fulfills the objective sought by the legislators through the contested law, and whenever the text of the law despite having a plain meaning, pointedly contravenes the apparent aim of that piece of legislation, it is bound to capitulate to the latter (Manning, 2005). In simple terms, if needed, the words may have to be abandoned, so that the purpose can be upheld (Scalia & Garner, 2012).

On the other hand, dynamic interpretation is a form of interpretation that relies on the idea that the meaning of legally binding documents evolves as time passes, in a way that makes them more compatible with the current prevalent values and needs of the society (Van Alstine, 1998). The main contention is that the meaning of the words should not be considered as static, carved at the moment in which they are written, but rather it should be adjusted by the interpreter to match the conditions that are present when the dispute arises (Nuni, 2013).

Both have only one thing in common. They not only justify, but strongly advocate and favor the deviation from the letter of the law (Barret, 2010). Nevertheless, they base their approach on completely different grounds. The first is willing to sacrifice the law for its purpose, while the second for the ever-changing values and beliefs of the community that is governed by that law (Barret, 2010).

If one has ever questioned the odd disparity between the decision of a court on one hand, and the applicable law on the other, he has most likely been encountered with an instance of the usage of one of these two modes of interpretation. As attractive and rightful as they might seem at first glance, these two approaches are in full contrast with the rule of law for one very simple reason. In a democracy, the parliaments are exclusively equipped with the power to enact laws, while the courts are empowered and limited to only applying those particular laws when conflicts arise (De Witte et al., 2013; Frankfurter, 1947). Consequently, whenever the judges, either in the name of purpose or some evolving conditions, choose to set aside or modify the written and explicit legal rules, they are

effectively engaging in lawmaking and therefore exercising a prerogative they certainly do not have (Brannon, 2018; Frankfurter, 1947). The premise of the analysis here is evident. Binding rules in a democracy stem either from the sovereign itself through referendums, or through its elected representatives in the parliament. Such power belongs only to them. Thus, judges cannot create new norms or remake the existing ones in their decisions, and if they do, there is a shift from being ruled by the law to being ruled by the will of one or some men that happen to adjudicate upon the given case (Scalia, 1997).

Despite what it may seem as a deeply theoretical nature of the problem, the practice shows otherwise. The fate of some of the most controversial social issues such as the death penalty, life imprisonment, same-sex marriages, the right to an abortion and so on, has been sealed not by codified rules, but by court decisions (Albanian Constitutional Court, 1999; Vinter and Others v. the United Kingdom, 2013; Obergefell v. Hodges, 2015; Roe v. Wade, 1973). In our view, not only is that wrong, but it is quite revolting. It does not matter whether you support the death penalty or oppose it, whether you think same-sex marriages should be legal or not, or whether you approve or disapprove of a woman's right to abortion. Disagreements are natural and frankly, unavoidable in democracies. What matters is that they are resolved by the only mechanism that this system offers; by voting on them and passing the laws (Scalia, 1997). Therefore, when judges exceed the contours of the written laws, they are in fact deciding on issues that are not voted on and by extension seizing a power that lies with the people and their representatives (Scalia & Garner, 2012; Frankfurter, 1947). That is at least undemocratic (Scalia & Garner, 2012).

The main purpose of this thesis is to elaborate on how the purposive and dynamic interpretations deform the natural flow of democratic processes and also to simultaneously analyze in depth the shortcomings of their core foundations. Evidently, the paper is dominated by the critical setting, rather than organized in a descriptive manner, but for more coherence and constructiveness it seeks to provide two alternative philosophies of interpretation for the abovementioned approaches, namely textualism and originalism, which even though not flawless, are consistent with the role that judges are bound to play in democracies. It needs to be borne in mind that the philosophies that are treated here are discussed in principle, without being confined in the legal tradition of a particular country or region or in the different legal systems that are predominant in different parts of the world. The structure consists on two main parts. In the first part it is dealt with the defects

of purposivism and it goes in parallel up to a certain point with an explanation of the characteristics of textualism and in the second part the same chronology is dedicated to dynamic interpretation and originalism.

METHODOLOGY

In building a demanding, but nevertheless humble critique, this paper makes use of the works of prominent academics, professors of law, judges and philosophers that have reflected on this intriguing issue in different time intervals. It additionally provides illustrative examples from the jurisprudence of various courts, which include the ECtHR, the US Supreme Court and the Albanian High and Constitutional Court, not only as a means of exhibiting the features that each of these types of interpretation has, but also to demonstrate how their application distorts the democratic process.

CHAPTER 1

PURPOSIVISM AND TEXTUALISM

Many difficulties and obstacles appear before a court when interpreting a legal text that addresses a specific conflict that has emerged. Some words or provisions may have been framed too generally and ascertaining their scope becomes hard, some have an oddly narrow meaning, some may bear more than one meaning, some are contradictory and there are also situations that the law simply does not regulate (Easterbrook, 1994; Brannon 2018). The manner in which a judge tackles these hurdles differentiates purposivism from textualism (Barret, 2010).

1.1 Purposivism

As was peripherally explained in the introductory part, when facing these scenarios, the main question for a purposivist is what the legislator intended to convey with the text (Greenawalt, 2012). It is argued that provisions pursue the attainment of some goals and it is only by knowing those, that one can obtain an adequate understanding of their meaning. (Kola Tafaj & Vokshi, 2018). The logic is simple. Every law governs certain situations or behaviors and it is presumed that those who adopt it, want to achieve a desirable result through it and realize some expectations as to the effects that the new norms produce (Barak, 2005). These are their intentions (Barak, 2005). However, due to the imperfections of human beings, the written text may lead to different directions than the ones that were originally aspired (Manning, 2001). The legislature may have spoken clearly, but not accurately, and that is why the reading of the words can only be done in the light of the broader aim that is pursued, the legislative intent (Manning, 2001).

If their outward meaning prevents the fulfillment of this central aim and creates unintended consequences, it is proclaimed to be fair for the interpreter to alter it so that it matches the intent (Manning, 2010; Breyer, 2011). Hence, the written words of the law are merely instrumental in finding the spirit and the purpose (Kola Tafaj & Vokshi, 2018). They are enforceable to the extent that they are not incompatible with those (Breyer, 2011).

Some even share the perspective that individual words are in themselves mostly empty and by virtue, ineffectual in dispatching substance to the reader, absent the nuances that can be attached to them by the reasons behind the legislation (Fuller, 1957). This point is illustrated by a quite intellectually challenging example offered by Lon Fuller. The philosopher hypothesized about a law that banned sleeping in railway stations and then posited the question of whether the rule applied to a passenger that lightly napped for a few minutes while waiting for his train to arrive or only to those who used the station as a place to spend the night (Fuller, 1957). He argued that taken at its literal meaning, the word "sleep" would connote no difference between the two categories and they both would be subjects of the relevant punishment, but if one knows, for instance, that the law addressed the lack of security or hygiene in such places, then he immediately would have excluded the liability for the first category (Fuller, 1957). The logic is that the meaning of the provisions is heavily dependent on their purpose and there should be no separation between the two when interpreting (Fuller, 1957; Greenawalt, 2012).

Advocates of this approach argue that this is the best way to guarantee that justice is done and to enhance the faith of the public in the system, as the courts ensure that the people are governed by the genuine will of their representatives, not by their honest mistakes (Breyer, 2011; Greenawalt, 2012).

Another important element of this theory is the way in which the intent of the legislators is ascertained. Up until now, it has been analyzed how, according to the purposivists, intent prevails over the text, which means that the intent itself is unexpressed (it is outside the text), and that naturally raises the question of how to detect it. The help here comes from what is referred to as legislative history, which includes all the preparatory work that precedes a piece of legislation, such as reports of parliamentary commissions, statements of sponsors, floor speeches and debates, messages exchanged with the executive, expert testimonies etc, (Benson, 2008). These documents usually define and list the reasons why the law is necessary, the circumstances that created the need for an intervention, and the

improvements and goals that are sought by it (Landis, 1930). Therefore, they present the most adequate path to assess the purpose behind the legislation (Landis, 1930).

However, it is accepted that sometimes, even after a thorough consultation of these sources, the intention of the legislators remains nevertheless doubtful and indecipherable (Breyer, 2011). In these cases, another tool becomes valuable and that is the intent of a reasonable legislator (Breyer, 2011). The search at this point becomes hypothetical, because one is not attempting to uncover the intentions of the real legislators anymore, as in those who actually passed the law, but rather to assert the intent that a reasonable legislator would have had if he dealt during the lawmaking process with the controversy that is presented before the court (Barak, 2005). A reasonable legislator is presumably someone rational who is coherent and clear in what he wishes to convey (Sebok, 1996).

1.2 Textualism

The alternative to purposivism is textualism. A textualist interpretation is confined solely to the extremities of the letter of the law (Miller, 1999). They reject the core foundation of purposivism and stress that people are bound by the laws, not by the unexpressed intention of the legislators, and courts are under a duty to apply the law as adopted by the parliament, not to supplement or substitute it (Scalia, 1997). Any intent that a legislator may have can be realized only if it becomes a law, if it is enshrined in a binding rule, otherwise, it is just that, an intent (Scalia, 1997). It has no binding force and it bears no importance (Scalia, 1997). From a textualist perspective, the key aspect of interpretation is to find out the right meaning of the words, not to use them as means of finding purpose (Grove, 2020). Therefore, the question is not what the author of the text purported to say, but what a “reasonable and objective” reader, sufficiently skillful and knowledgeable of the grammatical rules, would understand from the written norms, considering the context in which they are used, common sense and the shared conventions of communication in that given community; the latter being the collectively attributed meaning to certain words and phrases (Brannon, 2018; Manning 2001, Scalia & Garner, 2012).

For example, a textualist would not appeal to the intent of the legislature to provide a response to the scope of the hypothetical rule that was presented by Lon Fuller and there is no need to guess. There have been extensive studies on the corpus linguistics of the phrase

"sleeping in" dating back to the 1950s and 1960s, the time in which Fuller published his article, using the databases of the institutions that have recorded the development of American English (Goldfarb, 2017). Those revealed that the phrase "sleeping in" was exhaustively used to refer to a place that was used to sleep, that served particularly that purpose for the person using it, and not the inconvenient location where one inadvertently snores for a matter of minutes (Goldfarb, 2017). Therefore, the first category of the people that was thought to be included in a textualist reading of the law, was in fact not (Goldfarb, 2017).

As it has been repeated throughout this paper, the text unfortunately sometimes does not offer easy and straightforward answers tailored to relieve the interpreter of any headache, but rather troubles him with various ambiguities, vagueness and, apparent vacuums. How does a textualist solve the unclarities?

1.2.1 Context

Firstly, context is usually vital in accurately determining the meaning of certain words or provisions (Scalia & Garner, 2012). Take for instance the word "order". In a law that regulates the internal structure and organization of the military troops, it absorbs the meaning of a rank or position or a command transmitted by a superior. In another act that lists the sources of law, it is understood as a binding issuance by the executive, the president or another institution. However, if the word "order" is contained in a law that governs the online sale of shoes, then it would mean the act of purchasing the product. Ascertaining context requires reading the text as a whole (Black, 1911). Blurry words or provisions with seemingly more than one meaning can be clarified by referring to other parts of the text, which may dispel the initial doubts (Black, 1911). Different parts of the same legal document are interrelated and that is why they are not to be read autonomously and in isolation, but rather systematically and in harmony with one another (Black, 1911).

Textualists are by no means literalists, a doctrine that promotes an eager and strict employment of the first and direct meaning of the words (Goldsworthy, 2009). It is precisely the heavy emphasis and insistence in the context which separates the two (Manning, 2005). That is why the formers are always seeking the understanding of the reasonable and objective readers (Manning, 2005). Here is an instance in which the division becomes apparent. A statute in the US contemplated harsher punishments for

those persons who committed drug crimes *using a firearm* (Soames, 2013). The accused in that case had made an exchange. He had traded his gun to get drugs (Soames, 2013). The question before the court was whether he "used the firearm" within the meaning of the law and by extension whether he deserved an added sentence or not (Soames, 2013). For a literalist, this is not even a close call, as exchanging an object for another inarguably means using that object. Yet, one of the most brilliant textualists that we are aware of (Justice Antonin Scalia) wrote this in the dissent:

"*To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon …I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered "no" to a prosecutor's inquiry whether he had ever "used a firearm," even though he had once sold his grandfather's Enfield rifle to a collector".* (Wagner, 1997, p. 242)

What is important to note here, and reflected in Justice Scalia's persuasive reasoning, is that a necessary prerequisite to attain the ordinary meaning of a disputed word or a phrase and to fairly understand it, is to not detach it from the given context (Slocum, 2015). Even though the majority was not on the same page with him, Scalia eloquently urged that in the context of utilizing and enabling the commission of a crime through it, a firearm could only be thought of as a weapon. From our standpoint, it is hard to find a compelling counterargument. If you tell someone that a fellow citizen has been convicted for the commission of a drug crime using a firearm, he, in all probabilities, would not get back at you saying "Did he shoot, threaten with it, or successfully traded it for an amount of drugs?". The latter meaning just does not suit the context.

1.2.2 Canons of interpretation

As important as context is, establishing it does not necessarily preclude the presence of uncertainties and unclarities that the letter of the law occasionally creates (Brannon, 2018). They can still persist. Words and provisions, even after being put in the right context may still be prone to more than one possible meaning (Scalia & Garner, 2012). That triggers the

usage of another mechanism that is deployed by the textualists to grasp with such obstacles, namely canons of interpretation (Scott, 2009).

Canons of interpretation are legal axioms that provide the much-needed guidance and orientation to the interpreter in his attempts to accurately understand the text (Mikva et al., 2015). Due to their considerable number, it is impossible to rigorously analyze and elaborate on them in this paper, but nevertheless, it is deemed necessary to give some examples for a better comprehension of their nature.

In a landmark case before the Albanian High Court, A and B had signed a contract before the notary by which A sold his house to B, but the contract was never registered in the cadaster (Gjon Ndreca v. Zef Ndreca, Lazer Ndreca, 2009). Later, A denied the transfer of ownership and B eventually sued (Gjon Ndreca v. Zef Ndreca, Lazer Ndreca, 2009). Two provisions governing the matter appeared to conflict each other. Article 164 of the Civil Code stated that: "*Ownership of property is acquired by means of contract, without having to hand over the thing"*, while Article 83 contemplated that "*the legal transaction for the transfer of ownership of immovable assets and of the real rights over them, must be notarized and registered, otherwise it is not valid*" (Albanian Civil Code, 1994). If you follow the first rule, the contract is sufficient to acquire ownership, but if you refer to the second, the transfer of ownership is not valid without being followed by a registration. The canon applicable in this case would be *"lex specialis derogate legi generali"*, which means that when contradictory, specific provisions prevail over general ones (Black, 1911). Thus, in this case, Article 83 that specifically addresses the transfer of ownership of immovable assets (such as the house) prevails over Article 164 which serves as a general rule for the ownership of all properties. Ownership still belonged to A at that point. The Court surprisingly (due to the high recognition and acceptance of this canon) and mistakenly did not arrive at this conclusion, even though a substantial minority disagreed (Gjon Ndreca v. Zef Ndreca, Lazer Ndreca, 2009).

Another canon is the *ejusdem generis* canon, which provides that whenever an enumeration of two or more things precedes a general word, the latter includes only those things that belong to the same category as the enumerated ones (Benson, 2008). For instance, suppose an outrageous law that prohibits the usage of "guitars, pianos, violins and all other instruments". Does this mean that the telescope is banned too? Of course not. The general word "all the other instruments" in this hypothetical case refers to the class of

musical instruments, not optical ones. These and other canons (from which one may mention the presumption for the validity, constitutionality or effectiveness of a provision, but numerous others can be added) are valuable and indispensable tools for the interpretation of legal texts (Brannon, 2018).

1.2.3 Objectified intent

Finally, to avoid any misunderstanding, a textualist also considers the purpose of a text, as an indicator of context (Scalia & Garner, 2012). Nonetheless, unlike the purposivists, the search is not for the subjective intent of the legislator, but for an "objectified intent", that is the intent that derives directly and reasonably from the text (Scalia, 1997). There is no denial of the fact that every rule that addresses a certain matter, corrects a mischief or inadequacy or puts forward a policy, performs some kind of social or economic function, which may as well be called a purpose (Frankfurter, 1947). The evident difference is that from the textualist approach, the purpose can be understood by closely reading the text, while for purposivists, the text is understood by looking at the purpose (Frankfurter, 1947).

Here is an illustration of this gap. Assume a rule defined as below: "During an altercation, all players not participating in the game must remain in the immediate vicinity of their bench, otherwise they will be suspended" (Eskridge, 1998, p. 1509). The objective intent here is to keep the bench players off the field when a quarrel is taking place (Eskridge, 1998). That is it. A purposivist, beginning the journey outside the law, may say that if a bench player nevertheless enters to ease the tensions, he should not be suspended because the ultimate aim of the provision is to prevent the escalation of the fight (Hillman, 2013). What the advocates of this theory seem to neglect is that you can draw many other general intentions from the same rule (Manning, 2005). For instance, the purpose may be to prevent an overpopulated pitch, so that the referee has a clearer vision of those responsible for it, in order to eject them and not mistakenly some others that did not contribute at all. Another purpose can be to stop the bench players from entering, because as good-hearted and well-intentioned as they may be, following a provocation, they can also join the altercation, despite wanting to originally end it. In this scenario, you could frame the purpose like this: "The entrance is forbidden because we do not trust your ability to self-control."

Pivotal to this stance is that once it is accepted that establishing intent may go beyond what emanates reasonably from the wording of the instrument, many reasons can be claimed to be embodied in the norm and there is just no way to determine in the light of which of those the interpretation should be made (Barak, 2005; Scalia & Garner, 2012).

Preambles and purpose clauses, typical for the first parts of a law, fuel key insights for determining objective intent as they tend to formulate the background aims in explicit terms, but however, it must be noted that they are helpful only insofar as they clarify the context in which a provision or a word is used (Black, 1911). They cannot serve as a valid justification to broaden or narrow the scope of the application of the written rules (Story, 1873). Many courts in their jurisprudence have developed an approach according to which exceptions and limitations to certain rights are to be strictly interpreted, meaning as narrowly as possible, while the rights themselves should be interpreted liberally, because that ensures that they are effectively enjoyed and satisfies their core purpose (Lenaerts & Gutiérrez-Fons, 2013; Guide on Article 2 of the European Convention on Human Rights, 2022; Guide on Article 8 of the European Convention on Human Rights, 2022; Guide on Article 10 of the European Convention on Human Rights, 2022). That is pure nonsense. Exceptions, conditions and limitations to any right that is conferred to an individual by a given instrument, are as much part of the essence of that right as any other part (Scalia & Garner, 2012). In such cases, if the purpose was to create an entitlement with a restriction, then it cannot be fulfilled by enforcing “less” of that restriction or “more” of that entitlement (Scalia & Garner, 2012). It is realized by applying them precisely as they are (Scalia & Garner, 2012).

Following this concise explanation of the foundational rationales and main features of both purposivism and textualism, the next sections are dedicated to the deficiencies of the former.

1.3 The fiction of legislative intent

As it has been stressed more than a few times, the mission of a purposivist interpreter revolves around legislative intent. When facing a dilemma, a situation that was not foreseen by the law, some discrepancy between the letter and the so-called spirit, the question that he must pose is how the legislator intended to regulate it (Knapp & Michaels,

1982). He has to clarify how the majority of the parliament would have acted had they been aware of the issue with which the court is struggling (Manning, 2001).

To put it bluntly, the biggest defect of legislative intent is that it simply does not exist, or even if it does, which is highly doubtful, it is next to impossible to find (Easterbrook, 1994; Radin, 1930). Legislatures are multi-member bodies and in order to ascertain what they as a whole or a majority of them intended, the interpreter would have to enter into the minds of each of the members at the time of the enaction, figure out what their individual response would have been, group and count the like-minded representatives and then deliver the verdict (Schacter, 1998; Barnett, 2014; Barak, 2005; Arrow, 2012). That is, by definition, supernatural. And bear in mind that this fanciful technique is used to discover their intention on matters that they may have not even considered when the law was passed, a state of affairs that was not predicted, and controversies that were not carefully observed (Benson, 2008; Manning, 2005). The technicality that disturbs the court may have been barely read, let alone been a point of deep reflection by the legislative body (Scalia & Garner, 2012).

The only intention that one can be assured of that existed, is the intention to vote (or not) for the enaction of the law (Canale & Poggi, 2019). As to the reasons why the elected representatives voted the way they did, no one can express certainty (Canale & Poggi, 2019). Some may not read the bill at all and vote for it because their unified party decided so; some may read, but completely misunderstand it and consequently vote for something they did not agree on; some may vote to satisfy a part of the electorate with which they have not been successful with because it is an election year, or may support it because their donors are conditioning them; and some may mistakenly vote “yes” instead of “no” at the moment when the voting is held (Breyer, 2011; Edwards v. Aguillard, 1986; Radin, 1930). Others, probably more cynical, may approve it believing that a clause inserted in there will be detrimental and defeat what the law is expected to achieve (Breyer, 2011). Unscrupulous legislators may vote for it because they are bribed or corrupted (Manning, 2010; Arrow, 2012).

The point here is that the range of interests and considerations for each legislator is so large that it makes it practically impossible to determine the reasons behind their stance (Easterbrook, 1983). But even if one were to know the priorities that each of them was following, it still remains unclear how one can project their vote on a matter they did not

thoroughly think about and did not confront when the law was adopted (Easterbrook, 1983). For instance, it may occur that if one had analyzed the application of the disputed provisions, he would have changed his vote from "yes" to "no" or vice versa. From whichever angle you look, the task cannot be accomplished. One scholar described this way the search for intent: "*It is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head*" (Curtis, 1949, p.409).

Because it is basically non-existent, it is subject to the greatest degree of manipulability, as any judge that claims to have found it, is arbitrarily declaring one (Scalia & Garner, 2012). An example of a reckless reliance on intent by the Albanian Constitutional Court on a case concerning the constitutionality of capital punishment is provided below.

At the time of this ruling, the Criminal Code contemplated that certain grave crimes were punishable by the death penalty, while Article 21 of the Constitution stated that "*the life of a person is protected by law*" (Albanian Criminal Code, 1995; Constitution of the Republic of Albania, 1998). Based solely on this latter provision, the Court unanimously held that the death penalty was unconstitutional (Albanian Constitutional Court, 1999, Decision nr.65). The Court was unanimously wrong. It was reasoned that the previous Constitution explicitly permitted the penalty, while after the modification that was made to it, the New Constitution did not mention it at all, and therefore the intent of the legislator could not have been to favor its existence, because otherwise it would have included or left untouched such provision (Albanian Constitutional Court, 1999, Decision nr.65). Hence, its intent was to ban it (Albanian Constitutional Court, 1999, Decision nr.65).

First of all, if this supposed intent was indeed to ban it, why did they not write "The death penalty is hereby prohibited". There was nothing that prevented the legislature from doing that if they wished so. Second, the wording "the life of a person is protected by law" clearly means that it is the law that defines the extent and the limits of the protection, a point which was paradoxically made by the Court itself in that very same decision. Thus, the evident truth is that the Constitution simply did not regulate the matter and did not determine the scope of the protection, but instead left it to the laws to work out the particularities. The Criminal Code was a law and therefore fully capable of imposing a restriction on such right, just like the law "On the use of firearms" or the institute of self-

defense impose others. There was nothing in the Constitution that prohibited it. The ruling erroneously, and even amateurishly equates the lack of regulation with prohibition.

The Court also relied on another argument. Article 5 of the Constitution obliges Albania to apply the international law that is binding upon it (Constitution of the Republic of Albania, 1998). The state had ratified the ECHR at the time. According to the judges, the spirit of the Convention was incompatible with this penalty, and consequently, it was a constitutional obligation to enforce the prohibition (Albanian Constitutional Court, 1999, Decision nr.65). Setting aside the principled disbelief towards the abstractly detected "spirit", that was most certainly not the case. Why? Because the Convention itself explicitly allows the death penalty (protocol nr.6 which prohibits it was still not ratified then). Thus, the conclusion was that the Convention permitted capital punishment, but its spirit did not. That is, to put it mildly, absurd.

To avoid any doubt of bias based on personal opinions, it needs to be highlighted that arguments for or against the appropriateness or morality of the death penalty are completely irrelevant as far as this analysis is concerned. In criticizing the Court's decision, it is in no way implied that such severe sanction is to be preferred or not. Having said that, the narrow point here is to show how vulnerable and weak the dependency on intent is to subjectivism. There is no way to substantiate or verify the accuracy of the assessment of judges in this regard. They said it, and therefore that must be it. The bigger picture consists of the consequences that flow from it. The people's will at the time, as expressed by the norms in force, was for the Constitution to not address the controversial penalty, and for the law to allow it. By their ruling, the judges undid and invalidated such will and replaced it with that of their own. They did what kings do, impose unilateral commands (Scalia, 1997). That is how much discretion this form of interpretation generates (Scalia, 1997).

On the other hand, an exclusive reliance on the text yields objectiveness (Treviño, 2017). If the Constitution says it is up to the law, that means it is up to the law. End of discussion. If at one point in time, a change in this direction is considered desirable, then the citizens, either directly or indirectly, can vote to repeal the relevant provisions of criminal law and abrogate the death penalty or amend the Constitution. A court can do neither.

Another element that deserves attention is that even if the intent of the legislators were to magically be discovered, it would still make no difference (Radin, 1930). Representatives are licensed to make laws, not to have intentions or ideas and to wonder on their own about them (Scalia & Garner, 2012). Such intentions can create legal effects only insofar as they are embodied in a legal document. They should not impact interpretation in any other way (Radin, 1930). From this point of view, the intent of the legislature is the law itself (Kadzadej & Vorpsi, 2020).

We end this segment with a quote from Justice Holmes: "*Only a day or two ago-when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean"* (Slocum 2015, p. 6; Frankfurter 1947, p. 538).

1.4 Legislative compromise

Another aspect that is neglected by the proponents of purposivism is that, not rarely, vague and ambiguous wording or contradictory provisions within the same legal instrument are deliberately framed so and are not a result of genuine mistakes (Brannon, 2018). How so? In gathering the votes for the passage of a piece of legislation, different interests are to be satisfied (Easterbrook, 1994). Whether driven by ideological imperatives or pure pragmatism, it is only usual that different members or groups within the legislature differ in what requests and conditions they have to promise their vote in return (Manning, 2001). These priorities which can be not only divergent but also contrasting, should be simultaneously accommodated and that is why the legislative process is rifled with negotiations and bargains (Barak, 2005). To reach the required majority, concessions and compromises are essential, so that all the involved parties are partially and yet sufficiently pleased (Barret, 2010). This causes the legislation to end up serving a mix of non-convergent functions (De Witte et al., 2013). That is why seemingly incompatible provisions or general words are, at times, a reflection of an agreement by the competing forces during the legislative process (Manning, 2005). Therefore, when a court interprets a legal text in light of this or that purpose to resolve such difficulties, it is actually choosing one political interest or commitment over the others and breaking the balance struck by the legislature (Easterbrook, 2010; De Witte et al ., 2013).

An example of this is the Norwegian Law on Housemaids (Treviño, 2017). A compromise was reached between the left-wing representatives, who were insistent on improving the working conditions of housemaids, and their right-wing counterparts, who were mostly concerned with guaranteeing privacy to housewives (Treviño, 2017). After some dialogue and resistance from both parties for their ends, a middle ground was founded and the law was passed (Treviño, 2017). While the two camps championed their causes, the language of the text turned out to be so confusing, contradicting and unclear that it prompted a worrying lack of understanding and by extension enforceability (Aubert, 1967). Nonetheless, had any court tried to overcome such inconveniencies by picking one of them, in the name of legislative intent, it would have become the ultimate arbiter of the legislative process (De Witte et al., 2013). It would have decided which principle was more worthy and virtuous to be followed, while overstepping and not remaining faithful to its boundaries.

1.5 Legislative history

As explained in section 2.1, purposivists strongly contend that the source that provides the best map in the search for legislative intent is legislative history (Brannon, 2018). The missing pieces of the puzzle from the adopted legislation are likely to be found in the voluminous documents that precede a law and contain a detailed analysis of various aspects that are covered by it, such as commission reports, floor speeches etc (Katzman, 2014). In fact, the acceptance of preparatory work (*travaux preparatoires)* as instrumental to interpretation has been so broad that its validity is hardly even debated anymore (Miettinen & Kettunen, 2015; Vienna Convention on the Law of Treaties, 1969; Young, James and Webster v. The United Kingdom, 1981; Benson, 2008). It is strenuous, if not impossible to find a court, either at international or domestic level, that does not use it every now and then (Van Alstine, 1998). Up until now, it has been argued that the legislative intent is non-existent, and logically there is no path or tool that can help someone to find something that is fictitious. Nevertheless, in this section, for the sake of the argument, this point is disregarded and legislative history is taken on its own merits.

The obvious problem with the use of legislative history as a reflection of the intent of the legislators, is that it rests on the presumption that the preparatory work is carefully read and considered by all members of the parliament and also equally accepted by them (Scalia

& Garner, 2012). That is after all how intent is formed, by knowing what motives drive your decision-making. Not only that, but it also supposes that the small details and technicalities which hinder interpretation, are thought by all members to be resolved in the exact manner that some precise page or paragraph in those documents offers (Scalia & Garner, 2012). Nothing can be further from the truth.

First, reports of parliamentary commissions, after being compiled by a group of experts are rarely even read by the members that serve in those commissions, but what is improbable there becomes impossible in the plenary session (Scalia, 1997; McNollgast, 1994; Greenawalt, 2012). A great dose of naivety is needed to believe that each member dwells into the hundreds of pages of the reports for every piece of legislation that crosses his desk, before voting on it (Scalia, 1997). It just does not happen. However, even if by some miracle this actually occurs, it is far from being sufficient. For a collective unified intent to be established, they not only have to read and understand in the same way the given materials, but they also have to agree, to share the same views, and to connect them identically with the provision that is contested before the court (Radin, 1930). At this point, the only thing left to be witnessed is the lengths in which the fantasy of the interpreter is willing to go (Brest, 1980).

The same goes for floor speeches (Scalia, 1997). Whenever a deputy is speaking regarding a certain issue pertinent to the law, assuming that all members are present (quite a rarity by itself), it is unclear how one can determine how many of them are attentively listening, thinking about it, and much less agreeing with what is said (Scalia, 1997).

The information that these materials provide, as qualitative and comprehensive as it might be, is just not reflective of the reasons why the majority voted to pass the law (Manning, 2005; Greenawalt, 2012). In most cases, only a handful of legislators are aware of it (Radin, 1930). Yet, sadly, the courts have not only frequently used them in cases of blurriness, but also when the meaning of the provision has not been doubtful. Here is a recent example from the Albanian Constitutional Court.

In 2018, the Prime Minister proposed the appointment of a new Foreign Minister, but such a proposal was rejected by the President who refused to decree him (Albanian Constitutional Court, 2021, Decision nr.26). The question before the Court was whether the President had the competence to reject the proposal or not (Albanian Constitutional

Court, 2021, Decision nr.26). The matter was governed by Article 98 of the Constitution which stated: *"A minister is appointed and dismissed by the President of the Republic, on the proposal of the Prime Minister"* (Constitution of the Republic of Albania, 1998). On the other hand, Article 94 contemplated that "*the President of the Republic may not exercise other powers besides those expressly contemplated by the Constitution and granted by laws issued in compliance with it"* (Constitution of the Republic of Albania, 1998).

As it can easily be derived from the abovementioned articles, the answer in this case was not complicated. If the prerogative of rejecting a proposal was expressly stated in the Constitution, then he was within his powers, and if not, he was in violation of them. A cautious look at the Constitution would reveal that nowhere in it is such competence expressively attributed. Therefore, regardless of how well-motivated the reasons behind the refusal were, the President had exceeded its powers. He could only appoint or dismiss ministers following the proposal. Nothing else. What should have been one of the easiest decisions to write turned into an extensive inquiry of legislative history. After consulting the numerous pages of the preparatory documents of the relevant commission, the Court found somewhere in there that the President was not obliged to appoint the person proposed and the reasons for which he could reject it corresponded with the causes, laid down in the Constitution, that prevent a person from becoming a deputy (Albanian Constitutional Court, 2021, Decision nr.26). After extracting the intent of the legislator from these lines and furnishing it with the "spirit of the Constitution", arguing that it is built on checks and balances of a parliamentary republic and the neutral role of the President, the Court decided in the aforementioned grounds, the President retained the right of refusal (Albanian Constitutional Court, 2021, Decision nr.26).

That is flagrantly incorrect, and not just because committee reports hardly indicate the intent of any legislator, let alone the qualified majority needed to adopt a constitutional provision, but also because in this case, legislative history did not clarify the law, it prevailed over it. To simplify, the Court ruled that the applicable law was not Article 94 of the Constitution, but page 405 of a commission report.

Regarding the argument on the spirit and the purpose of the Constitution, it should be emphasized again that is to be taken into account only to the extent it originates directly from the text. Is the political system based on checks and balances? Yes, because the

Constitution says so. Does the role of the President require neutrality? No doubt it does because that is also promulgated in the text. Does that mean that he can exercise competences beyond those contemplated there? Of course not, because those show exactly how the balance and neutrality are designed to be attained. If such purposes were thought to be accomplished better by him having more powers, then the legislature would have accorded more prerogatives.

The core point is that it is not up to the judges to decide how the general principles laid down in the Constitution are realized, but for the Constitution itself and the laws emanating from it. The members of the Court may think that for a stronger system of checks and balances, it is desirable to have 200 representatives, two chambers of parliament, or a President that can veto a law three times, and as good ideas as those may be, they cannot replace what *is* with what they think should have been (Scalia & Garner, 2012).

Another defect of legislative history is that when consulted, it does not necessarily offer a more unclouded tableau, but instead, it is capable of adding to the confusion (Grove, 2020; Benson, 2008). Like the law itself, commission reports are not free from inconsistencies (Benson, 2008). They are, not rarely, filled with dissimilar or contradictory statements and proposals, coming either from the experts, members of the committees, or different interest groups that have actively participated in the first stage of lawmaking (Benson, 2008). Selecting some of them instead of others, as a trace of intent, is arbitrary. A judge once compared their usage with "*entering a crowded cocktail party and looking over the heads of the guests for one's friends*". (Wald, 1982, p. 200)

The only instance in which textualists allow the utilization of legislative history is as a means of ascertaining that a word can bear a certain meaning (Brannon, 2018). To clarify, in establishing whether a given word can absorb a linguistic usage, the legislative history is no more valuable or persuasive than a dictionary, a newspaper, an article, broadcasted segments of televised media, or any other source of information that shows that that word is understood in some specific way by the community at the time of the enaction of the law (Scalia & Garner, 2012). Besides this, the scrutiny of legislative history is considered to be a waste of time and a needless expense during litigation (Danner, 2003).

1.6 The reasonable legislator

Another approach that has been articulated with respect to legal interpretation based on intent is that, when there is a lack of evidence for the aim of the actual legislators, the interpreter can turn to the formula of the "reasonable legislator" (Breyer, 2011). From this perspective, the reading of the text deflects from being viewed in the light of the intent of the real legislators, to being understood based on the purpose that a reasonable legislator with a rational and sound judgment, would have had in passing that law if he was confronted with the issue at hand (Barak, 2005; Sebok, 1996; Breyer 2011).

Despite the optimistic remarks by some purposivists, the method does not account for much good. First, being reasonable does not mean being alike. Two people can be equally reasonable and yet greatly divergent in their ideas, mindsets, and principles on how to best realize the public interest (Easterbrook, 1994; Greenawalt, 2012). A conservative deputy is not reasonable in the same in which a liberal deputy is, just like a libertarian is not prudent in the same in which an environmentalist is. Communists and capitalists deem one another as not reasonable at all, and yet are fully capable of passing laws if elected. Thus, when asking what a reasonable legislator would have tried to transmit, the interpreter is at a crossroads, with no clear path on how to proceed, other than his own idea of what a thoughtful outcome would look like (Scalia, 1997). The most likely scenario is that he will end up surrendering to the temptation of imposing his sense of what a just and coherent legislation would be (Scalia, 1997). After all, only a few intelligent people know a more reasonable person than themselves (Scalia, 1997). This hypothetical test does not evict the risk of being too subjective to be fairly and impartially applied.

Moreover, the parliament, not that infrequently, adopts unwise, ineffective, and even detrimental laws that are not to be expected from sensible representatives, but as unfortunate as that is, it is not the duty of the court to rectify and replace those with what it reckons as more decent and righteous (Scalia, 1997). The will of the people remains intact and does not lose its force and significance, even when it leads to reckless and foolish enactments. That is one of the downsides that democracies suffer from. Nevertheless, it is in the hands of the electorate itself to reverse such outcomes, not the judges (Scalia, 1997).

CHAPTER 2

DYNAMIC INTERPRETATION AND ORIGINALISM

In the second part of this thesis, we concentrate on another philosophy of interpretation which is vulnerable to subjectivism, arbitrariness, and a large unfounded judicial discretion, just as much as purposivism, if not more (Treviño, 2017). That is the dynamic interpretation.

Dynamic interpretation seeks for the legal norms to be understood neither by the intrinsic meaning that they had at the time they were written, nor in the light of legislative intent, but rather by the meaning that can be bestowed to them according to the social, moral and economic conditions that are present at the time of the interpretation (Eskridge, 1986; Van Alstine, 1998). The premise is that, as time passes, societies evolve in almost every aspect and often markedly (Treviño, 2017; Eskridge, 1986; Miller, 1999). Their economies, fundamental values, and perception of justice undergo substantial changes, and in order to be able to adapt to these changes and adjust to the new realities, the law must be flexible enough (Miller, 1999; Balkin, 2015; Llewellyn, 1949; Van Alstine, 1998). If a comparison can be drawn, the law would be like a chameleon that changes its colors every time it changes its habitat. Its supporters claim that this type of interpretation enables addressing the current needs and problems of the society, and avoids the risk of it being governed by the "dead hand" of the past, that is the outdated laws that cannot provide decent answers to novel circumstances (Eskridge, 1986; Breyer, 2011; Llewellyn, 1949). If the interpreter does not factor in the extra-legal and ever-changing context in which the law is applied, then the latter would inescapably lose its core function of providing justice, as it would potentially upset the widely-accepted social contours (Dworkin, 1999; Breyer, 2011).

Its integrity would be dubious due to the separation from reality (Llewellyn, 1949; Dworkin 1999). Since it is impossible for the legislature to rapidly modify the legal framework at the rate of the social changes, the judges are responsible for doing so (Treviño, 2017; Balkin, 2015). There is no better portrayal of the rationale behind this theory, than the one offered by Justice Oliver Wendell Holmes:

"*The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics*" (Holmes, 1881, p. 1)

As it is evident, the departure from the law under this doctrine is justified on the grounds of the continuously evolving state of affairs (Barrett, 2010).

The alternative approach is originalism, which relies on the assertion that words and phrases have no other meaning, except for the one that they bore at the time of their enaction (Barrett & Nagle, 2016; Whittington, 2013). It is fixed and unchangeable (Barrett & Nagle, 2016; Whittington, 2013; Smith, 2010). Justice Scalia has illustrated this point with an interesting example. In the 18th century, Queen Anne described the architecture of St. Paul's cathedral as "awful, artificial and amusing", by which she meant, "awe-inspiring, highly artistic and thought-provoking" (Scalia & Garner, 2012). Since then, these three words have gone through remarkable changes and now convey negative attributes, rather than positive remarks (Scalia & Garner, 2012). If anybody were to read the comments of the queen using the current meaning of the words, it would conclude that she was disgusted by the cathedral, which would be the complete opposite of her feelings and appreciation towards it (Scalia & Garner, 2012). That is why, in order to determine the right meaning of the words, it is absolutely necessary to find the linguistic usage that had at the time they were written (Easterbrook, 1994; Brannon, 2018). This basic premise is indisputable. If hypothetically, a hundred years from now "dictatorship" means "democracy", it does not follow that Churchill was expressing his preference for the one-man rule, when comparing it with the other forms of government.

Having said that, originalists recognize that laws do get old, in the sense that they may cease to be useful in the current order. Nevertheless, they contend that there is only one way to modify or redo them and that is through the legislative process (Easterbrook, 1997; Scalia 1988; Frankfurter 1947). In fact, that is the whole point of having a legislature, to codify the prevailing and temporary wishes and interests of the community (Easterbrook, 1997). Because those change, so do the laws. If all that was needed to renovate the legal fabric of the society were a group of judges, it would be hard to explain the importance of having periodic elections and chosen representatives in the parliament (Easterbrook, 1997; Scalia 1988). Thus, it is up to the citizens to determine what change and when will it take place, not to the judiciary (Scalia 1988; Frankfurter, 1947).

Also, the objection that certain norms become inapplicable when new circumstances that did not exist and were not foreseen when the law was enacted surface, is unrealistic (Easterbrook, 1995). As a matter of fact, laws apply to future unanticipated phenomena and events frequently (Easterbrook, 1995). A 1950s norm that criminalizes the stealing of movable properties would still apply today, if someone stole a laptop or an iPhone from another person, even though these electronic devices were not even dreamed of at the time of the adoption (Scalia & Garner, 2012). The same would go for a 19th-century statute banning interstate transport of goods. The prohibition would be as valid for transportation via airplanes, despite them being invented a century later.

There is one notable hurdle that is associated with this form of interpretation, which usually occurs when the law has been in force for a long period of time (Scalia 1988; Breyer, 2011). That is because to obtain a fair understanding of the content of its provisions, the interpreter has to search and analyze the historical context and background of a previous generation and sometimes even more than that (Barrett & Nagle, 2016; Whittington, 2013; Scalia 1988; Breyer, 2011). The necessary findings in this regard require a great deal of detailed and careful research of history (Barrett & Nagle, 2016).

To put the theoretical in more concrete terms, the unbridgeable gap between the two philosophies was patently visible in the US Supreme Court decision in Dobbs, which overturned the famous and controversial ruling Roe v. Wade, which held that there was a constitutional right to an abortion (Roe v. Wade, 1973; Dobbs v. Jackson Women's Health Organization, 2022). Because such right is not explicitly accorded by the US Constitution, the case revolved around the question of whether it was "deeply rooted in history and

tradition and essential to the Nation's scheme of ordered liberty", as the only other categories that could confer constitutional protection (Dobbs v. Jackson Women's Health Organization, 2022).

The majority, dwelling into the historical records, argued that from the 18th century to the second part of the 20th, there was no recognition of such right either in the laws of different states, the jurisprudence, or the doctrine, while on the contrary, on the same timeframe, abortion was criminalized in a varying, but always considerable number of states (Dobbs v. Jackson Women's Health Organization, 2022). Therefore, after being assured that the entitlement was not deeply rooted in the history of the nation, it ruled that there was no implicit constitutional protection for the right to abortion (Dobbs v. Jackson Women's Health Organization, 2022). The matter had to remain within the jurisdiction of each individual state (Dobbs v. Jackson Women's Health Organization, 2022). The dissenting judges reasoned that just because such a right was not understood to be implicit in the concept of liberty when the Constitution was adopted, it did not mean that it should be understood in that way now (Dobbs v. Jackson Women's Health Organization, 2022). They pointed out how the attitudes and public perception had changed with respect to what constituted liberty and due to such considerations, they were of the opinion that the Court should have ruled differently (Dobbs v. Jackson Women's Health Organization, 2022).

In the sections below, the emphasis shift to the flaws of dynamic interpretation.

2.1 No governing principles

Even if the validity of the merits of the argument presented by non-originalists is not impugned, and it is firmly established that laws are to be interpreted in the light of the social and moral atmospheres that change from time to time, it must be accentuated that they have no unison in the method that should be employed to find the prevalent values (Whittington, 2000; Scalia 1988). Justice Scalia has exemplified this point as below:

What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? (Scalia, 1997, p. 45)

There is no source or list of sources acknowledged by the non-originalists, from the prism of which it can be objectively attested what the political and social realm is, to what extent the law is incompatible with it, and how should it shape to secure conformance and coherence (Whittington, 2000; Scalia 1988; Calabresi, 2008). Thus, if one departs from the text and has no leading principles according to which this departure takes place, it can land wherever he wants (Bork, 2010; Scalia 1988; Calabresi, 2008). At that point, it is not about what the law promulgates or prescribes anymore, but what the interpreter thinks it should (Bork, 2010; Scalia 1988; Calabresi, 2008). His views on what is just and his will become the law (Bork, 2010; Scalia 1988; Calabresi, 2008).

A good example of this is the ECtHR decision in *Scoppola v. Italy* (Case of Scoppola v. Italy (No. 2), 2009). The applicant in that case had intentionally murdered his wife, a crime that carried a sentence of life imprisonment in the domestic legislation, and summary judgment was not allowed for this category of offences (Case of Scoppola v. Italy (No. 2), 2009). After the crime was committed, a modification in the Code of Criminal Procedure created an opportunity for the defendant to request a summary procedure, which converted the life sentence to 30 years in prison (Case of Scoppola v. Italy (No. 2), 2009). Such modification was subsequently annulled before a decision was rendered for the accused, and he eventually was sentenced to life (Case of Scoppola v. Italy (No. 2), 2009). The latter claimed a violation of Article 7 of the Convention which states: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*." (European Convention on Human Rights, 1950).

It was submitted that since a more lenient and favorable penalty became available before the final decision, the defendant should have benefited from it and the failure of the Court to apply it amounted to a breach (Case of Scoppola v. Italy (No. 2), 2009). The Court agreed and reasoned that it would be more consistent with the rule of law if Article 7 did not only prohibit the imposition of a higher sentence than the one contemplated at the time the crime was committed, but also entitled the person to take advantage of subsequently enacted, more lenient penalties (Case of Scoppola v. Italy (No. 2), 2009).

On the point of law, there is not much to be discussed in this case. The decision is on the verge of being utterly ridiculous. The majority of the Court completely rewrote the law as

it wished and such effortless observation was noted even by the dissenting judges (Case of Scoppola v. Italy (No. 2), 2009). No literate man would read the provision and conclude that it obliges the State parties to apply the most favorable sentence to the defendants. It simply does not allow the enforcement of harsher punishments compared to those that existed at the time of the commission. The language used cannot be plainer and more intact or complete than that. The applicant did not receive a heavier punishment, because at the time in which the crime occurred, the corresponding provision promulgated punishment by life imprisonment. What adds to the paradoxicality of the reasoning is that the Court invoked consistency with the rule of law as one of the primary grounds. It is challenging to understand how the supremacy of the law justifies its circumvention. This was, not surprisingly, not elaborated on in the ruling. Consistency with the rule of law, in this case, meant not following the law.

As a matter of fact, this is only one of many odd decisions that are issued based on the evolutionary approach. In another case, a man that had a wife and four children underwent hormone therapy and re-assignment surgery, in order to live like a person of the opposite sex (Case of Christine Goodwin v. the United Kingdom, 2002). After some years and following a divorce, he requested from the national authorities to marry another man (Case of Christine Goodwin v. the United Kingdom, 2002). His request was denied because the domestic legislation of the UK at that time allowed only marriages between a man and a woman (Case of Christine Goodwin v. the United Kingdom, 2002). Following the refusal, the applicant brought the issue before the ECtHR, and among others claimed a violation of Article 12 of the Convention that states: *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*" (European Convention on Human Rights, 1950).

On the face of it, the provision is clear. It guarantees a man and a woman a right to marry each other and delegates to the States the regulation of the conditions under which this right is exercised. There was not much of a doubt on this understanding of the norm as it had been tested and confirmed on many occasions (Case of Cossey v. the United Kingdom, 1990; Case of Sheffield and Horsham v. the United Kingdom, 1998; Case of Rees v. the United Kingdom, 1986). Since the UK had decided not to permit the marriages of people of the same sex and the Convention did not contain any prohibition or restriction in this aspect, the application was overtly pointless as it had no relevance on any point of law or

fact. Not to the Court. The latter, after calling a fully grown man with four children and an ex-wife by the pronoun “she” throughout the whole decision, noted that gender was not determinable only by biological factors (chromosomal, gonadal, genital) anymore, as a result of a major social and medical evolution in this regard that developed other criteria (Case of Christine Goodwin v. the United Kingdom, 2002). It maintained that because the applicant lived as a woman and wanted to marry a man, the right in question was breached (Case of Christine Goodwin v. the United Kingdom, 2002).

To simplify it, the Court ruled that a person with XY chromosomes, male reproductive organs and cells could indeed be a woman and that if he lives like one, he is in fact one, for the purposes of the law. The sex of the individual which once could be scientifically ascertained and known had currently become more of an unknown. That is an unusual way of evolving. Also, the Court overrode the degree of discretion that the Convention left to the States arguing that it could not extend that far as to prevent transsexuals from marrying persons of the same gender (Case of Christine Goodwin v. the United Kingdom, 2002). It decided that it was too generous for States to treat men like they were men.

Of course, the point of this analysis is not to underline the absurdity of the decision, but to stress that the word “man”, “woman” and “according to the national laws governing the exercise of the right” become completely meaningless in this form of interpretation. They bear no essence by themselves and can have whatever meaning the interpreter wishes to attribute to them. This way every question has numerous answers, and no matter how robust and rigid the law is, the outcomes of any case become unpredictable (Bork, 2010; *U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer Conversation on The Constitution (2009)*, 2019).

Even further, the same evolutionist judges facing the interpretation of the same legal base may have different responses to it at different times. For instance, in 2010, two applicants claimed that the lack of recognition of the same-sex marriages by their State violated Article 12 and 14 of the Convention (Case of Schalk and Kopf v. Austria, 2010). The Court relying on the precedents ruled against the claim, but the reasoning was not convincing. After noting that there was an increasing tendency for the codification of same-sex marriage, it explained that the State parties were nevertheless “still” free to legislate upon the issue (Case of Schalk and Kopf v. Austria, 2010). The key word here is *still.* The Convention either protects such right or not and consequently, the States are

either free to regulate it or not. However, the Court essentially said to remain alert, because a change may be coming in the near future. The articles of the instrument, while remaining unmodified, may mean tomorrow what they do not mean today. Hence, for the advocates of this theory, nothing is set, and identical, unaltered provisions incur transformative meanings on a daily basis (*U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer Conversation on The Constitution (2009)*, 2019). One cannot think of a single more devaluing technique for the text of the law.

Adhering to the dynamic interpretation means accepting that the fate of the legal conflicts hangs completely in the hands of the judges, because as soon as the wording becomes irrelevant, no two people can agree on how the trends of the current society are different from those which existed at the time of the passage of the disputed statute (Scalia & Garner, 2012).

Before moving to the next section, it is reasonable to repeat that the critique addressed by this thesis is not result-oriented, and not founded or inspired by any personal conviction, other than the one that the judiciary cannot make new laws when resolving conflicts.

2.2 The mirage of flexibility

Probably the biggest misconception in the endorsement of dynamic interpretation is that it is more advantageous compared with the other forms of interpretation, because it ensures flexibility (Miller, 1999; Balkin, 2015; Llewellyn, 1949; Eskridge; 1986). This remark is verifiably misleading as the usage of this technique is often a recipe for rigidity (Scalia, 1997). To demonstrate this "veiled" feature, it may be appropriate to bring attention to another example from the ECtHR jurisprudence. Three men who had committed multiple murders were sentenced to life without any possibility of parole (Case of Vinter and Others v. The United Kingdom, 2013). They claimed that punishment by life imprisonment without any prospect of review by the relevant institutions contravened Article 3 of the ECHR which prohibits "*torture, inhuman or degrading treatment or punishment"* (Case of Vinter and Others v. The United Kingdom, 2013; European Convention of Human Rights, 1950). The Court, after assessing the contemporaneous legal climate, was persuaded by the argument that these three concepts had evolved up to the point that they currently encompassed life imprisonment without any potential review in the future, and decided in the favor of the applicants (Case of Vinter and Others v. The United Kingdom, 2013).

On the merits, there is no doubt whatsoever that this criminal sanction did not violate Article 3 of the Convention. At the time of its adoption (1950), not only most of the States had that promulgated in their criminal codes, but they also almost unanimously practiced the death penalty, which is an even more severe form of punishment (Schabas, 2002). Therefore, nobody thought that it was implicitly included in the category of acts that constituted torture, inhuman or degrading treatment.

However, the core issue that is distinctively treated here is another. Before the Court issued its decision, the States were free to decide whatever they wanted; some could impose such sentence, some could have conditioned it and provided periodic reviews, and some could abolish life imprisonment altogether. The Convention did not produce an obligation to have it in their national jurisdictions, but simply did not prohibit it. In other words, the regulations for this subject were flexible, as they depended on the preferences of each State. However, after the Court decided that the aforementioned sanction contradicted the Convention, that was an ending point for any continuing debate. No State could introduce or enforce provisions that allowed it anymore, without willingly breaching an international obligation. Hence, the ruling generated rigidity and a lack of choice.

The same can be said about the US Supreme Court in *Dobbs*, had the minority been a majority. The right to an abortion would have remained out of the democratic process (Scalia, 1997). The States could not have voted either in support or against it, being left with no autonomy for the matter (Scalia, 1997).

Thrusting definite answers for matters, when the law does not provide them, instead of letting the people settle those democratically, can only be inelastic and inflexible (Scalia & Garner, 2012; Easterbrook, 1997). On the other hand, if by flexibility it is meant that the judges are free to bring out of the text the solution that they want, then the most appropriate word to be used is irresponsibility.

2.3 The “dead hand” argument

One critique that is commonly addressed to originalism is that this method of interpretation risks causing modern affairs to be governed by obsolete laws (Miller, 1999; Eskridge, 1986; Van Alsine, 1998). It makes the people of today bound to live and adhere to the standards laid down in the distant past (Breyer, 2011). A proponent of dynamic

interpretation would say: Why should we be confined by what "torture, inhuman and degrading treatment" meant in 1950 or by what liberty implied in 1789, when we can untangle their meaning now (Brennan Jr., 1985)? The contention is that the present scale of development and emancipation is not to be impeded by the inadequacies of the past (Breyer, 2011). In our assessment, this argument is, for the most part, groundless.

First, if the present society does not want to be tied up to some pre-existing rules, then it has the option of repealing and amending them (Easterbrook, 1997; Brannon, 2018). For instance, if they wish for a more comprehensive list of acts that constitute torture, they can pass a law to that effect, or if they want the concept of liberty to comprise something else, they have the power to add it. No interference by the judiciary is needed (Scalia & Garner, 2012).

Secondly, legal norms almost always precede disputes, and with the exception of retroactive laws, courts can only apply past laws to present situations (Goldsworthy, 2009). Therefore, if past laws equate a "dead hand", then the argument is not a counter to originalism, but to having any laws at all (Goldsworthy, 2009). The claim appears to be more of a play with words tailored to invoke a sense of archaism and insensibility towards the originalist interpretation, rather than a reasonable ground for a debate. (Easterbrook; 1997) It is also not precisely clear how it can be deduced when a certain provision ceases to be relevant. Is it after a decade, 30 years, half a century or more? (Calabresi, 2008; Easterbrook, 1997)

Thirdly, another aspect that is quite problematic is the inconsistency and arbitrariness of those who employ dynamic interpretation (Treviño, 2017). The reader should not be under the wrong impression that once a law has been in the books for far too long, it is not worthy of being understood according to its original meaning (Calabresi, 2008). On the contrary, only some laws deserve the special treatment of evolving, while others can stay as they are. An advocate of this philosophy has no trouble applying the original meaning of a 1920s statute that confers to women a right to vote or a 1860's law that abolishes slavery, but they refuse to apply the same to 1990's statute that does not recognize same-sex marriages (Calabresi, 2008). It seems that the criteria to use the evolutionary approach is not a matter of the age of the legal document, but one of convenience and personal belief (Bork, 2010; Scalia, 1997; Calabresi, 2008). It is the judges themselves that selectively choose what norms are a byproduct of a "dead hand" and what not (Scalia, 1997;

Calabresi, 2008). If the law corresponds with their views of the reality, it may as well stay static, but if not, it is up for elevation (Bork, 2010; Calabresi, 2008).

2.4 The politicization of the judiciary

As has been constantly displayed throughout this paper, both purposivist and dynamic approaches are destined to create a legal terrain in which courts enjoy an enormous amount of discretion. Because their premises, respectively legislative intent and evolving needs, are fallible and cannot be obtained by any objective parameter, whenever they are used to justify a verdict, in all likelihood they conform with the judge's own political sentiments and stances (Stone Sweet, 1999). Adding to all of the problems that have been outlined so far, these two philosophies trigger another unwanted consequence, the politicization of the highest judiciary institutions of a country (Scalia & Garner, 2012). This effect is inevitable and intuitive. Once it is established and normalized that sidestepping, deviating, or adding to the text is sometimes not only possible but necessary for a fair interpretation, it is unavoidable that political actors would be tempted to appoint judges that are ideologically closer to them, so that the judicial outcomes are politically expedient (Bork, 2010; Scalia & Garner, 2012). Since a law can be shaped by the courts, it is only logical to wish that it shapes in the preferred direction. The incentive is irrefutable. They can accomplish by one decision what may not be accomplished for years to come in the legislative process due to lack of votes and sufficient support (Bork, 2010). Why bother persuading a stubborn electorate about some views, when you can have a judge make them binding for you?

This is not a logical deduction, but a confirmable reality. The appointments and hearings of the candidates for a seat at the highest courts have become increasingly political and partisan (Coroado et al., 2019; Garoupa, Gomez-Pomar & Grembi, 2017; Dalla Pellegrina, et al., 2016; Espinosa, 2017; Portnoy, 1986). For instance, it is very common to speak of the "liberal" and "conservative" wings of the US Supreme Court, as if they were two political camps, not neutral and impartial public officers (Galloway, 1979; Doerfler & Moyn, 2021; Whittington, 2013). For a long time, the sitting Presidents and the Senate have almost invariably manifested bias in nomination proceedings (Portnoy, 1986). One President that appointed judges that shared the opposite ideology was Eisenhower, and even he later regretted it, and when asked of any mistake during his presidency, he famously said: "*Yes, two, and they are both sitting on the Supreme Court*" (Wermiel, 1994,

p. 534). This trend is neither centered nor confined to the US. Empirical studies of the decisions of the constitutional courts in European countries back the impression that rulings and appointments are influenced by political and ideological leanings (Coroado et al., 2019; Garoupa et al., 2017; Dalla Pellegrina et al., 2016; Espinosa, 2017).

The general population also growingly perceives the impartiality of the courts that makes them protagonists in the political sphere (Bybee, 2010). Public opinion polls asking whether the judicial decision-making is too liberal or conservative, or whether a nominee with a certain attitude on gun rights or affirmative action should be appointed and so on, are randomly and frequently made (Bybee, 2010).

The core idea here is that if the courts simply followed the enacted texts, it would not matter where the judges stand in the ideological spectrum (Scalia & Garner, 2012). Applying the written letter would make their beliefs irrelevant, but because desertion of the text has become customary and widespread with the emergence of the two methods of interpretation that are objects of this study, such beliefs have gained special importance (Scalia & Garner, 2012).

SOME FINAL REMARKS AND THE CONCLUSION

In this final section, prior to the summary of the crucial parts of this work, we would like to take the opportunity to dwell a little bit more on what inspired the research on this topic.

To probably any law student, from the first days to the very last, the encounter with countless court decisions is inevitable. What is also inevitable is the instinct to make sense out of them, to form an opinion (no matter how unqualified) on whether the verdict was right or wrong, whether the reasoning was convincing enough, and whether the merits deserve to be praised or criticized. During our time at law school, we dealt mostly with the Albanian courts, but not much less with the jurisprudence of ECJ, ECtHR and other international judicial institutions. What struck us from day one was that on many occasions, after reading the facts and the legal base, the answer seemed pretty straightforward that virtually anyone could have guessed it, but surprisingly, the reasoning and the decision would come out the other way. That naturally triggers a little skepticism.

However, your wondering does not last much after learning that these apparently odd results stem from the employment of the techniques of purposive or dynamic interpretation. At first, any doubts vanish quickly as they sound very reasonable. It is way more righteous to embrace what was intended through the legislation or to serve the current goals and conditions, than to cling to the technicalities of the text like a close-minded person who fails to understand that delivering justice is more important than getting stuck in some words.

That is what law is about, promoting moral and virtuous outcomes, and not a game when you can experience some joy playing with the meaning of the words. And who would disagree with that?

But it is not only just. After you start applying it yourself in cases that are analyzed and debated, you find out that it is very tempting too. Why? Because whenever the text is inconvenient and not likeable, you can get passed it by arguing that the intent was different or that the circumstances have changed so it cannot be applied in the same way anymore. You can insist, for instance, that following the letter may produce unacceptable consequences and the legislator could not have possibly had those in mind when writing the law down. You can go above and beyond the text to show that the spirit of the law dictates another understanding. On the other hand, what you may find unacceptable, for another one may be reasonable and as a result he may argue that the purpose had to have been the opposite of what you are advocating for. The discussion can go back and forth for days without any consensus. That is because you are not disagreeing about the meaning of a phrase or a provision, but something that cannot get more abstract; what the majority of the legislators were thinking or how has the society changed. Your debate is far less legal than it is philosophical or political.

It is exactly at this point that it may occur to you, as it occurred to us, that by using the "intent" or the "evolving nature" of the legal norms, everyone tends to bring the law precisely where his own moral beliefs lie. They are always happy with the end that the interpretations yields because they have equated what the law is with what they wanted it to be. It is only normal to claim that the legislature could not have intended a certain solution or consequence because you think it is irrational. You do not imagine that someone could have aimed for that because you would not have done it yourself. It is also normal for another one to think that that is definitely the purpose that the legislature pursued because it appears very coherent to him. By the same token, the disagreements about the direction in which the society has advanced, the current state of economic affairs or prevalent moral values are not less colorful. You can hardly find two people, let alone judges or lawyers who take special pleasure in demonstrating intellectually provocative views, that agree on how to read the social phenomena. Once the analysis is free from the constrain of the text, there are as many intents and answers as are parties.
Hence, after a thoughtful consideration of all these, we decided to take a closer look at the foundational grounds of both purposive and dynamic interpretation.

The premise of this paper that is designed as a critique of both philosophies is that first, they impinge on the rule of law as they empower courts with legislative prerogatives, given

that they advocate for altering or disregarding the text, and second, they are too subjective and arbitrary to rely on. For a constructive assessment, a description of the ideal alternatives for each, respectively textualism and originalism, is also included.

The first part was concerned with the shortcomings of the purposive interpretation. First, it was displayed that the whole concept of the "intent of the legislature" is fictitious as in order to assert it, you need to know the intent that each individual legislator had when they voted to pass the law. And because conducting psychoanalysis on them is impossible, so is the ascertaining of legislative intent. But even if one could discover it, it would still lack relevance because only the law as written, not thought, is binding. Second, ambiguities and inconsistencies within the same instrument may not be incidental, but a fruit of compromises and negotiations between different political forces in the legislative process. Therefore, the legislation can embody various interests, and reading it from the lent of only one purpose would be plain wrong.

Third, reliance on legislative history as a reflection of intent is also baseless. The reports of the commissions, expert testimonies, or floor debates are often considered by a small number of representatives and even those may not share the same perspective on how to understand them. So, the idea that they may somehow mirror the aims of the majority (which does not read or hears them) is simply incorrect. Fourth, the technique of the "reasonable legislator" is not helpful either. Reasonable people offer nothing more than a tremendous variance in the ideals or principles that they represent. Hence, the question of what a reasonable legislator would have done unavoidably brings the interpreter to his own sense of reasonableness.

In the second part, the focus was concentrated on the dynamic interpretation. The most significant flaw of this type of interpretation is the lack of any guiding principles on the basis of which the text can be sacrificed. While it is accepted that the social, economic and cultural terrain changes, the assessment of the nature or the extent of that change and its impact on the written rules, is prone to as many standards as there are interpreters. Consequently, the only acceptable way in which the meaning of the text may change is through its modification in the parliament. Second, the claim that the evolutionary approach yields flexibility is unsustainable, as many decisions that are grounded on this philosophy have imposed prohibitions or restrictions that did not exist in the legal framework, and could otherwise be resolved through the democratic process. Due to the

binding nature of these rulings, such autonomy is taken away from the people in these instances. Therefore, flexibility is prevented. Thirdly, because dependency on either intent or evolution makes the judgment completely subjective, as a consequence, the appointments of judges in the highest courts have become increasingly political as political forces tend to choose those judges that are ideologically closer to them.

All in all, the take from this thesis is that a proponent of purposive or dynamic interpretation is a pleased interpreter, but probably not that good of a judge because, almost always, his conscience and the law become one. There is no verdict from which they may incur some moral discomfort due to the gap between the outcome and their idea of justice. This may be the reason why both approaches are so widespread and accepted. But this peace of mind comes at a cost; the failure to adhere to the principle of objectivity, which bounds, or at least should bound, any judge. The rulings become arbitrary. On the other hand, a textualist (and originalist) in many instances may be personally troubled by the decisions that he issues, as a result of not letting his beliefs penetrate the legal reasoning, but is always faithful to his duties on the bench and to the principles of adjudication.

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