Constitutional Interpretation – Between Legalism and Law-Making

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1 Introduction

There is something inherently attractive about constitutional interpretation. Why? Clearly, it must be because it really matters. From a theoretical perspective constitutional interpretation may be regarded as just another branch of legal interpretation. From a normative perspective, however, the constitution deals with issues more fundamental than do must other legal documents, such as the basic values of the legal system, the distribution of power among state organs and the basic rights and freedoms of individuals. Furthermore, from a political perspective the stakes involved in constitutional interpretation are much higher than in others fields of legal interpretation, because the constitution is the superior law of the legal system, commanding even the legislature.

Constitutional interpretation is defined here as *the activity aimed at extracting from a written constitution the general normative content and specific meaning of its provisions*. Consequently, I exclude from the concept of constitutional interpretation the formulation and interpretation of other sources of constitutional law, such as constitutional custom and unwritten constitutional principles both of which may sometimes function as autonomous sources of constitutional law, amending or derogating from the written constitution.[1] I do so because there is a fundamental difference between relying on, respectively, provisions of the written constitution and unwritten constitutional principles: The validity of the written constitution requires no specific justification other than reference to the authority of that document in a rule of law state,[2] whereas the existence of unwritten constitutional principles (to the extent the concept is at all recognised) must first be convincingly justified.[3]

A full survey of the issue of constitutional interpretation would require a two-fold perspective, since constitutional interpretation is as much a matter of *who* as a matter of *how*:[4] Whatever be the agreed method and principles of constitutional interpretation, a margin of appreciation and choice will, inevitably, remain open to the interpreter; and so: Should the final say be left to the courts or to the democratically elected legislature?

In the present article I will deal only with the *how* – i.e. the "methodological" aspect of constitutional interpretation.[5] In so doing, I assume that the methods and principles of interpretation discussed are relevant to whatever state organ interprets the constitution – judges, politicians or

1 On the question of recognising unwritten constitutional principles, *see* J.E. Rytter, *Grundrettigheder*, Thomson, København 2000, p. 100-110.

2 *See* J.E. Rytter, *op cit.* Note 1, p. 99.

3 *See* J.E. Rytter, *op cit.* Note 1, p. 101-102.

4 *See* already E. Andersen, *Forfatning og Sædvane*, Gads Forlag, København 1947, p. 7; *see* further J.E. Rytter, *op cit.* Note 1, p. 291 et seq.

5 I have previously written in English about the question of judicial review and who should have the final word in the interpretation of constitutional rights, *see* J.E. Rytter, *Judicial Review of Legislation – a Sustainable Strategy on the Enforcement of Basic Rights*, in M. Scheinin (ed.), Welfare State and Constitutionalism – Nordic Perspectives, Nord 2001: 5, Nordic Council of Ministers, Copenhagen 2001, p. 137-174.

administrative authorities. Whether the power to give the final ruling on the meaning of the constitution be left entirely to the courts, entirely to the legislature or something in between, it is relevant to discuss the proper methods and principles of constitutional interpretation. If you favour judicial activism *vis a vis* the legislature, i.e. that the judiciary should enforce its own interpretation of the constitution rather than submitting to the will of the legislature, the potential impact of that position - how much power would it leave to the courts - will depend very much on the orthodox theory of interpretation. Conversely, even if you favour absolute sovereignty of the legislature to interpret the constitution that would not make irrelevant rules of constitutional interpretation; it makes perfect sense to hold that the legislature would still be bound by the legal meta-norms of constitutional interpretation, even though there would be no judicial organ to review the legislature's interpretations for compliance with them.[6]

In the article I refer to legal doctrine on constitutional interpretation as well as to constitutional case-law. As regards the latter, I also refer to the case-law of the Strasbourg Court of Human Rights concerning the interpretation of the European Convention on Human Rights (ECHR). Although this Convention is no constitution, the ECHR has acquired quasi-constitutional status in many European legal systems; furthermore, the interpretative style of international judicial bodies like the Strasbourg Court is challenging national traditions of constitutional interpretation (cf. section 6).

The structure of the article is as follows: As a basis for the discussion I briefly offer my view on the nature of (constitutional) interpretation (*Section 2*). Then I sketchily line up the (perceived) two conflicting schools of constitutional interpretation (*Section 3*). In the central part of the article I analyse the two basic questions concerning methods and principles of interpretation: How should one determine the abstract contents of a constitutional norm – by textualism or purpose-orientation (*Section 4*)? How should one determine the specific meaning of that norm – by originalism or a dynamic approach (*Section 5*)? Before concluding, I turn briefly to the challenge to constitutional interpretation posed by inter- and supranational law and practice (*Section 6*). Finally, I provide some concluding observations and a sum-up of my own view on how to interpret constitutions (*Section 7*).

2 The Constructive Nature of (Constitutional) Interpretation

It is common ground that any legal norm is subject to interpretation. In particular, broad and vague legal norms such as are most of the norms found in a constitution, need complementing and concretization. There is the constitutional text and then there is the question of the abstract normative contents and scope

6 Ernst Andersen took the somewhat more pragmatic position that "to the extent, agreement is reached concerning the last problem [who gives the final interpretation of the Constitution] the relevance of the first [how should the Constitution be interpreted] is reduced", E. Andersen, *op. cit.*,nte 1 p. 7 – my translation from Danish.

of that text as well as the question of the specific meaning of the norm in the context of a specific case/problem.

Notwithstanding the subtleness of different theories of (constitutional) interpretation and whatever be the fancy of those theories' claim to the contrary, the fact remains that there is just no way of claiming that one can deduce by rational means from a broad constitutional text its normative content and, even less, the specific implications of that normative content. The interpretative process is constructive, or, if you will, creative. That holds true especially for constitutional interpretation due to the broad and often vague character of many of its provisions. No results of constitutional interpretation could thus claim absolute correctness, whereas some interpretative results may well be better justified than others.[7]

3 Two Conflicting Schools of Constitutional Interpretation(?)

It is common ground that also constitutional interpretation is subject to rules and that, therefore, not all interpretations of a constitutional text are acceptable or equally justifiable. However, there is no universal agreement on the exact rules of constitutional interpretation. On the contrary, the proper methods and principles of constitutional interpretation have long been and remain the subject of learned legal and philosophical debate.

The theory of constitutional interpretation is often perceived as divided into two conflicting schools or legal philosophies:

The first school, which may be labelled *legal positivism* or *textualism-originalism*, essentially regards constitutional norms as rules, requiring that constitutional interpretation strictly respect the text of the constitution as well as the original meaning of that text which can be deduced from its preparatory works and historical background.

The other school, which may be labelled *legal normativism* or *teleological-and-dynamic approach*, essentially regards constitutional norms as principles, holding that constitutional interpretation should, above all, realise the object and purpose of the constitution and so the text cannot always be decisive, and that the constitution is dynamic so that original intent and meaning cannot be decisive, if subsequent developments call for a different interpretation.

A primary aim of this article is to try and differentiate this oversimplistic picture of the debate and to narrow the divide between different schools on constitutional interpretation. First, there is no necessary connection between textualism and originalism; some textualists are not originalists. Second, the dichotomy between textualism and purpose-orientation and, respectively, between originalism and a dynamic approach, is not absolute; even textualists will sometimes engage in purpose-oriented interpretation to avoid absurd formalism, and even originalists may approve of some degree of dynamic

7 *Cf.* R. Alexy, *Theorie der Grundrechte*, Suhrkamp, Frankfurt am Main 1986, p. 520 et seq; *see* also the statement of the German Constitutional Court in Entscheidungen des Bundesverfassungsgerichts Vol. 82, 30 (pp. 38-39). For a different view, *see* R. Dworkin, *Taking Rights Seriously*, 2nd ed., Duckworth, London 1978, Chapters 4 and 13.

approach; on the other hand, there are limits of judicial interpretation which even scholars adhering to a teleological-dynamic approach should accept.

4 The Abstract Contents: Textualism v. Purpose-Orientation?

In the theory of constitutional interpretation there is a (seeming) dichotomy between textualism and purpose-orientation. *Textualism* in its pure form implies that a constitutional text contains no more and no less than its semantic reference. *Purpose-orientation* (teleological approach) in its pure form implies that the underlying purpose and spirit of the constitutional text decides what the norm contains, regardless of what the text actually says.

The question is: How real is the dichotomy and how far apart are textualists from those favouring purpose-orientation – to what extent can the divide be bridged?

Like legal interpretation in general, all constitutional interpretation starts with the question: What is in the text? Words do have meaning. Sometimes the meaning of a constitutional text will be rather straightforward: If you need a "warrant" to search someone's home, then a warrant is what you need; and if an arrested person must be put before a judge "within 24 hours of arrest" then that is the time-limit which must be respected. More often however, the wording of constitutional provisions is broader and its meaning less clear, not due to careless drafting, but because the words give expression to a broad principle: What does it mean, for example, that there is "freedom of speech" or a right to "due process"? Although they couldn't mean just anything, clearly these terms could be construed in different ways and more or less broadly. By necessity, many constitutional norms are broadly framed. Purpose-orientation to this extent is unavoidable. The real question is, to what extent could considerations of purpose warrant a construction of the norm which deviates from the natural meaning of the text, transgresses the limits of the text or even contradicts the text?

Justice Scalia of the US Supreme Court is one of today's most famous and eloquent advocates of textualism in constitutional interpretation. The rationale of textualism, according to Scalia, is that judges have no authority to make new law and therefore must remain within the boundaries of the legal text, including that of the constitution:[8]

> "Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible (…). In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail and to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear."

8 A. Scalia, *A Matter of Interpretation*, Princeton University Press, Princeton 1997, p. 24 and 37.

Norwegian scholar Eivind Smith also adheres to textualism in constitutional interpretation, holding that the judge: [9]

> "has to rely upon norms established by the written constitution. [Therefore, when constructively interpreting those norms, judges must] establish convincing links between the norms of reference left to their attention and the constitutional choices actually operated. The less convincing this part of the justification of judicial decisions, the more doubtful the legitimacy of the resulting decisions."

In contrast, German scholar Jörg Paul Müller provides the rationale of a non-textualist, purpose-oriented approach to constitutional interpretation, stating as regards basic rights:[10]

> "Decisive in realising basic rights cannot be the often time-conditioned wording or dogmatic positions; rather, the deeper normative content, the spirit underlying the wording, must time and again be crystallized and confronted with present-day challenges."

Such a purpose-oriented approach has always been applied by the German Constitutional Court. In a decision from 1973[11] the Court stated as its interpretative philosophy that the obligation of the courts to enforce legislation and the rule of law:

> "does not mean an obligation towards the letter of the legislation, i.e. being forced to engage in grammatical interpretation, but an obligation towards its spirit and purpose. Interpretation is the method and way by which the judge explores the meaning of a legislative provision, taking into account its place in the entire legal system and without being limited by the formal wording of the legislation."

Similarly, the Strasbourg Court of Human Rights concerning the ECHR has stated that:

> "any interpretation of the rights and freedoms guaranteed must be consistent with the general spirit of the Convention …"

It is obvious that textualism and purpose-orientation are in conflict with one another. Indeed, as a matter of principle, they are incompatible. However, I will try to show that, in real life, (sensible) textualists will sometimes resort to purpose-orientation in disregard of the literal reading of text and that, therefore, the conflict between the two is one of degree rather than principle. I will also try

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9 E. Smith, *The Legitimacy of Judicial Review of Legislation – a Comparative Approach*, in E. Smith (ed.), Constitutional Justice under Old Constitutions, Kluwer, The Hague 1995, p. 388. For a similar Danish view, *see* J.P. Christensen, *Juridisk metode i statsretten*, Ugeskrift for Retsvæsen, afdeling B, p. 353 et seq (358).

10 J.P. Müller, *Zur sog. Subjektiv- und objektivrechtliche Bedeutung der Grundrechte*, Der staat 1990, p. 33-48 (47) – my translation from German.

11 Entscheidungen des Bundesverfassungsgerichts, Vol. 35, p. 263 et seq (279) – my translation from German.

to argue that there are limits of interpretation within which even lawyers adhering to broad purpose-orientation must remain. As we shall see, there is a slide from textualistic rigidity over 1) textualistic purpose-orientation in order to avoid absurd formalism to 2) more full-blown purpose-orientation in order to realise the spirit if the norm. Beyond the boundaries of text and purpose lies 3) pure law-making disguised as interpretation.

4.1 Purpose-Orientation to Avoid Absurd Formalis

To avoid absurd results, even declared textualists must from time to time engage in purpose-oriented construction. As Scalia concedes [12]

> "Textualism should not be confused with so-called strict constructionism, a degraded form of textualism. … A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means (…)."

Letters as "Speech"? Scalia has no doubt that the protection of "freedom of speech [and] of the press" in the First Amendment of the US Constitution covers also handwritten letters. According to Scalia, this is the only reasonable interpretation of the First Amendment.[13] Indeed, but that conclusion requires considerations of the purpose of that provision and a departure from text, since the semantics of "speech" or "press" simply will not cover handwritten letters. When exploring the purpose of a provision to establish its general content the abstract intention of the framers is relevant – did they write "speech and press" to exclude handwritten letters? Or was "speech and press" just specific expressions of a more general principle of freedom of communication? Clearly, the latter is true.

Factual Information as "Thoughts"? Article 77 of the Danish Constitution protects freedom of expression by providing i.e. that: "Everyone has the right to make public his thoughts …..". Does the reference to "thoughts" mean that only statements of personal opinion, but not of facts, is protected? Of course this could not have been intended, everyone agrees.[14] Freedom of speech must cover also the dissemination of factual information, which may be as crucial to society and the functioning of democracy as the expression of personal opinions. However, this reasonable interpretation is also doubtlessly beyond the semantic limits of the text.

12 A. Scalia, *op.cit.* note 8, p. 23.

13 A. Scalia, *op.cit.* note 8, p. 38.

14 *Cf.* already C.G. Holck, *Den danske Statsforfatningsret*, II, Den Gyldendalske Boghandel, København 1869, p. 345; H. Matzen, *Den Danske Statsforfatningsret*, 4.udgave, Bind III, Schultz, København 1909, p. 373.

4.2 Purpose-Orientation to Realise the Spirit Behind the Text

Textualists like Scalia will be reluctant to take purpose-orientation further than the above demands of "common sense". According to those favouring a less positivist approach, however, purpose-orientation can and should be applied more broadly whenever required in order to (better) realise the spirit behind the text.

Freedom Without Real Freedom? The Danish Constitution in Article 77 on the freedom of expression provides that: "Everyone has the right to make public his thoughts in printing, in writing or orally, subject, however, to responsibility before the courts. Censorship and other preventive measures can never again be introduced". Does the textual reference to responsibility before the courts mean that there are no limits on the legislature's freedom to sanction speech by way of subsequent punishment? Of course not, one should think. Clearly, freedom of speech requires more than a mere prohibition on censorship and other prior restraints, since most people would be hesitant to speak their mind publicly if they knew that their use of that liberty entailed subsequent punishment by the state.[15] Nevertheless, the traditional position in Danish theory and practice has been that since the text does not explicitly place any limitations on the extent to which expression may subsequently be sanctioned, then there are no constitutional limits in this regard, that is, the legislator is free to sanction expression concerning any subject.[16] Alf Ross thus holds that the Danish legislator is in principle free to punish political debate as such - even if, according to Ross, such legislation would be "utterly incompatible with the spirit of the Constitution and with democratic ideas".[17] Accordingly, Danish Courts have so far never explicitly relied on Article 77 as a basis for restricting the legislature's freedom to sanction speech; although freedom of speech is clearly a substantial consideration in Danish case-law interpreting legislation, it is so far left unsettled whether or not this principle has constitutional rank.[18] This orthodox position runs counter to the spirit of freedom of expression and can only be explained as a result of strict textualism. Although the wording of Article 77 does not explicitly protect against arbitrary sanctions, neither does the text stand in the way of such a protection, which the democratic purpose and spirit of freedom of expression so strongly demands.[19] Ironically, the

15 *Cf.* A.Ross, *Dansk Statsforfatningsret*, 2. udgave, Bind II, Nyt Nordisk Forlag – Arnold Busck, København 1966, p. 707-711; J.E. Rytter, *op.cit.* note 1, p. 150; J. A. Jensen, *§ 77* in H. Zahle (ed.), Grundloven. Danmarks Riges Grundlov med kommentarer, Jurist- og Økonomforbundets Forlag, København 2006, p. 539.

16 *Cf.* P. Andersen, Dansk statsforfatningsret, Gyldendal, København 1954, pp. 670-72; A. Ross, *op.cit.* note 15, p. 705-706; M. Sørensen, *Statsforfatningsret*, Juristforbundets Forlag, København 1969, p. 355.

17 *Cf.* A. Ross, *op.cit.* note 15, p. 705-706.

18 *Cf.* J.E. Rytter, *op.cit.* note 1, p. 140-141; J. A. Jensen, *op.cit.* note 15 p. 550-551.

19 *Cf.* The criticism of the restrictive, orthodox position by P. Germer, *Statsforfatningsret*, Jurist- og Økonomforbundets Forlag, København 2001, p. 273-280 (280); H. Zahle, *Dansk forfatningsret, Bind 3: Menneskerettigheder*, Christian Eilers Forlag, København 2003, pp.

unacceptable consequences of this textualist interpretation of Article 77 has lead orthodox scholars to search for other constitutional provisions which might imply some sort of substantial freedom of speech – e.g. Article 13 on the responsibility of ministers as a basis for precluding sanctions against criticism of ministers, Article 31 on the election process and its purpose of ensuring an equal representation of the political views among voters as a basis for precluding general sanctions on political debate, Article 67 on freedom of religious association as a basis for precluding general sanctions on religious speech – even though there is not the slightest textual basis in those provisions for doing so and even though they are concerned with quite different matters.[20]

Article 5 of the German Constitution on freedom of expression is textually quite similar to Article 77 of the Danish Constitution in so far as both seem to imply a distinction between formal freedom: freedom from preventive measures (protected) and substantive freedom: freedom from subsequent sanctions (not protected). Article 5 provides that "1. Everybody has the right freely to express and disseminate their opinions ….. There shall be no censorship. …. 2. These rights are subject to limitations embodied in the provisions of general legislation…". Nevertheless, the German Constitutional Court in its "Lüth-Judgment" from 1958[21] held that a sharp distinction between preventive censorship (protected) and subsequent sanctions (not protected) would contravene the very spirit of freedom of expression, which implies also some freedom from the latter, and that, consequently, and despite its wording, Article 5 must be interpreted as also protecting against such subsequent sanctions, which cannot be considered necessary and proportionate.

The Strasbourg Court of Human Rights, taking a similar teleological approach, has interpreted the terms of Article 5 ECHR on the right to liberty of person quite expansively to provide effective guarantees against arbitrary and unnecessary deprivations of liberty. According to the wording of Article 5, "everyone has the right to liberty and security of person" and a person may only be deprived of his liberty in the cases mentioned in Section 1, litra a-f, all of which require that the deprivation of liberty be "lawful". On its face, the word "lawful" would seem to require nothing but legality: that deprivation of liberty be "in accordance with law". The Court, however, referring to the purpose of Article 5 being to protect against arbitrary deprivations of liberty, first interpreted into the word "lawful" a requirement of non-arbitrariness,[22] which, in turn, formed the basis of the Court's subsequent statement of a general requirement that any deprivation of liberty must be necessary in the circumstances and proportionate to the legitimate aim pursued.[23] Clearly, this is

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84-92 (91-92); J.E. Rytter, *op.cit.* note 1, p. 149-151; (partly) M. Munch, *Trykkefrihed og forbud*, Ugeskrift for Retsvæsen, Section B, p. 61-72 (65).

20 *Cf.* H. Zahle, *op.cit.* note 19, p. 89.

21 Entscheidungen des Bundesverfassingsgerichts Vol. 7, p. 198 (210).

22 *Cf.* the leading case *Winterwerp v. Netherlands*, 1979, ECHR Reports Series A, Vol. 33, para. 39.

23 *Cf.* in recent case-law *Enhorn v. Sweden*, judgment of 25 January 2005, Appl. no. 56529/00, para. 36.

stretching the text of Article 5 quite far from its natural meaning. Yet it cannot be denied that the Court's interpretation corresponds with the purpose underlying Article 5. In the same vein, the Strasbourg Court has recognised a right of negative association inherent in Article 11 ECHR, although this provision explicitly protects only positive freedom of association, and even though the drafters consciously refrained from inserting an explicit protection of negative association because it was politically sensitive at the time. The Court's underlying rationale is that effective positive freedom of association implies negative freedom.[24]

4.3 Transgression of Text and Purpose is Law-Making

Even the most enthusiastic advocate of purpose-orientation cannot – or should not – defend constitutional interpretation as a means of law-making. This however, would be the case, if the interpreter not only derogated from the text of a constitutional provision but also from the underlying object and purpose of the norm to which that text gives expression.

Does a Right of "Due Process" Provide a Right of Abortion? In the famous *Roe v. Wade* from 1973[25] the US Supreme Court struck down as unconstitutional Texas criminal abortion laws, which prohibited abortion unless necessary to save the life of the pregnant woman. The Court held that the legislation was incompatible with the Fourteenth Amendment of the US Constitution, which provides, among others, that "(…) nor shall any State deprive any person of life, liberty, or property, without due process of law".

The question was: does a general prohibition of abortion deprive a pregnant woman of her liberty "without due process of law"? In the opinion of the Court's majority (7-2), the answer was affirmative. Justice Blackmun delivered the opinion on behalf of the majority, in which he stated, among others:[26]

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, … the court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or Individual Justices has, indeed, found at least roots of that right in [different amendments to the Constitution, including the Fourteenth Amendment]. (…) The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, (…) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. (…) We, therefore, conclude that the right of personal liberty includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation."

24 See *Young, James and Webster v. United Kingdom* from 1981, ECHR Reports, Series A, Vol. 44, para. 52; *Sørensen and Rasmussen v. Denmark* [GC] from 11 January 2006, Appl. no. 52562/99 and 52620/99.

25 410 U.S. 113.

26 410 U.S. 113, at 152-154.

Justice White filed a dissenting opinion, joined by Justice Rehnquist, stating among others that:[27]

> "I find nothing in the language or history of the Constitution to support the Court's judgment. The court simply fashions and announces a new constitutional right for pregnant mothers …."

Clearly, *Roe* is problematic from a textualist perspective, since it departs from the natural reading of "due process of law" and also from the original meaning of the provision, which was strictly procedural.[28] As Scalia so forcefully puts it:[29]

> "My favourite example of a departure from text – and certainly the departure that has enabled judges to do more freewheeling lawmaking than any other – pertains to the Due Process Clause (…). It has been interpreted to prevent the government from taking away certain liberties *beyond* those, such as freedom of speech and of religion, that are specifically named in the Constitution. Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process … the *process* our traditions require – notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking."

I would submit that *Roe* is also unacceptable from the viewpoint of even the broadest teleological approach. The Fourteenth Amendment is concerned with "due process" only, not with liberty. Its purpose is to provide a general procedural guarantee, not to impose substantive limits on the freedom of state legislatures to limit liberty. Therefore, *Roe* not only transgressed the text of the Due Process Clause, but also its purpose. This amounts to sheer law-making in interpretative disguise. The decision can only be understood on the background that the US Supreme Court, over a period of 150 years, has developed the concept of "substantive due process" as a vehicle for incorporating into the Due Process Clauses of the Fifth and Fourteenth Amendments fundamental rights which are not specifically mentioned in (other) provisions of the Constitution but are based on natural law philosophy.[30] However, if an unwritten, natural right of liberty is deemed to exist according to unwritten US constitutional law, then the unwritten Constitution is the basis on which it should be argued – the written Constitution should not be taken hostage.

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27 410 U.S. 113, at 221-222.

28 *Cf.* also the criticism of the constitutional basis of the decision in *Roe v. Wade* by D.P. Currie, *The Constitution of the United States. A Primer for the People*, 2nd ed., The University of Chicago Press, Chicago and London 2000, p. 53-54.

29 A. Scalia, *op.cit.* note 8, 1997, p. 24-25.

30 *See* e.g. J.E. Nowak and R.D. Rotunda, *Constitutional Law*, 5th ed., West Publishing, St. Paul 1995, p. 364 et seq (the chapter bears the title "substantive due process"), notably at p. 368, 393 and 399.

4.4 Assessment

The gap between textualism and a purpose-orientated approach, I submit, is smaller than on its face it would seem. To my mind, no sensible interpreter could challenge interpretations like those mentioned in section 4.1., and no sensible interpreter should defend an "interpretation" like that referred to in section 4.3. So the battle is really about interpretations like those mentioned in section 4.2. As far as they are concerned, and although this does not settle the dispute, I would suggest that the dividing line between interpretations like 4.1. and 4.2. is essentially one of degree rather than of kind. Once you take the first step away from strict textualism, because considerations of purpose so require, there is no compelling reason why you might not also accept the broader teleological approach which best realises the underlying purpose and spirit of the text.

5 The Concrete Meaning: Originalism v. Dynamic Approach?

The other great divide in the theory of constitutional interpretation is the (seeming) dichotomy between originalism and dynamic approach. *Originalism* in its pure form implies that a constitutional norm means exactly what it meant or must have meant when it was originally adopted. A *dynamic approach* implies that the specific meaning of a constitutional norm can and will change in accordance with the evolution of society.

Again, the question is: How real is the dichotomy? How far apart are originalists from those favouring a dynamic approach?

Originalism, historically, has been the orthodox approach of the US Supreme Court. Scalia is a sworn originalist rejecting the concept of a "living" or "evolving" constitution. Scalia deems it necessary to stay true to the original meaning of constitutional provisions and justifies this position as follows:[31]

> "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is sceptical that 'evolving standards of decency', always 'mark progress' and that societies always 'mature', as opposed to rot."

Original meaning, according to Scalia, is not necessarily synonymous with what the framers have stated in preparatory works as their specific intent – it is rather a question of what the norm, objectively, meant or must have meant when it was drafted.[32]

However, one might ask whether the process of (re)constructing original meaning is not often as creative and autonomous as dynamic construction, only without the candour of the latter? Scalia himself admits that original meaning is sometimes far from clear cut:[33]

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31 A. Scalia, *op.cit.* note 8, p. 40-41.

32 A. Scalia, *op.cit.* note 8, p. 38 et seq.

33 A. Scalia, *A Matter of interpretation* 1997, p. 45.

> "There is plenty of room for disagreement as to what original meaning was, and even more so as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text."

However, even if original meaning is sometimes a construction, Scalia considers the originalist disguise preferable to the obvious law-making involved in dynamic construction according to the perceived values of today's society. Scalia (very candidly) writes that:[34]

> "If the constitution must be updated by a means other than formal amendment, it would be far better to go about it the good old-fashioned way: by ignoring its original meaning even when while purporting to be faithful to it. There are worse things than hypocrisy…"

Illusion or not, the very rationale of originalism has been challenged in American doctrine. Scholars like Bickel and Dworkin have argued against originalism that it was never the (abstract) intent of the framers that original meaning should dictate the future construction of the constitution, especially not as regards basic rights.[35] In the words of Bickel, what the constitutional framers did when laying down basic rights was to "hand on certain broad convictions" to be observed by future generations. Dworkin conceptualises the same when he makes a distinction between the broad principle expressed in the rights provision (concept), which must be respected and upheld by subsequent interpreters, and the concrete content and reach of this principle (conception), which it is left to subsequent interpreters to define in accordance with society's development, who therefore should not necessarily take over possible assumptions by the framers in this respect.[36] On this analysis, Dworkin concludes that the dichotomy between originalism and dynamic approach is ultimately false.[37]

As early as 1819, the famous Chief Justice of the US Supreme Court, John Marshall, made a similar observation, underlining that:

> "[The Constitution was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs …. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."

A similar view is taken by Norwegian Eivind Smith, who may be a textualist but who is not a (strong) originalist. As regards "the proper meaning of constitutional provisions which, because of age or very general or vague

34 A. Scalia, *op.cit.* note 8, p. 318.

35 A. Bickel, *The Least Dangerous Branch*, The Bobbs-merril Company, New York 1962, p. 104 et seq; R. Dworkin, *Law's Empire*, Fontana Masterguides Press, London 1986, p. 355 et seq.

36 R. Dworkin, *op.cit.* note 7, p. 134 et seq; R. Dworkin, *Law's Empire*, 1986, p. 362 et seq.

37 R. Dworkin, *op.cit.* note 7, p. 136.

wording, have to be construed as some sort of legal standards of which the exact meaning depends upon the judge's appreciation of background factors like 'morality' or 'reasonableness'", Smith writes that:[38]

> "The meaning of such notions or appreciations is bound to change in society as a whole from one epoch to another. As far as he is authorised by the text of the Constitution, the judge cannot, on given occasions, avoid acting as society's authorised interpreter of such notions or appreciations."

The necessity of dynamic constitutional interpretation is also recognised in Danish theory.[39]

The German Constitutional Court also adheres to a dynamic approach in constitutional interpretation; as it stated in a landmark judgment from 1953:[40]

> "Anyway, the meaning of a constitutional provision may change, if, within its scope, new and originally unforeseen phenomena appear, or if known phenomena, by reason of their role in a development which has taken place, appear in a new light or meaning."

In the same vein, the Strasbourg Court of Human Rights has frequently held that[41]:

> "the Convention is a living instrument which … must be interpreted in the light of present-day conditions."

5.1 Dynamic Approach to Include New Phenomena

There is a narrow kind of dynamic approach which allows for a constitutional norm to cover phenomena, which did not exist and could not be foreseen when the provision was originally drafted. This is not interpretation against original intent but rather beyond it.

Freedom of Speech and New Technologies. Even originalist like Scalia accept that a constitutional provision may apply to new phenomena that did not exist at the time when it was framed. When faced with new phenomena one must, in the words of Scalia, follow the "trajectory" of the old norm; as an example of this, Scalia mentions the way the principle of freedom of speech applies to new communication technologies.[42]

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38 E. Smith, *The Legitimacy of Judicial Review of Legislation – a Comparative Approach*, in E. Smith (ed.), Constitutional Justice under Old Constitutions, Kluwer, The Hague 1995, p. 384.

39 *Cf.* J.E. Rytter, *Grundlovsfortolkning* in H. Zahle, (ed.) Grundloven. Danmarks Riges grndlov med kommentarer, Jurist- og Økonomforbundets Forlag, København 2006, p. 77-90 (81 with full references).

40 Entscheidungen des Bundesverfassungsgerichts, Vol. 2, 380 (401) – my translation from German.

41 *See* e.g. *Tyrer v. United Kingdom* (1978, ECHR Reports, Series A, Vol. 26, para. 31.

42 A. Scalia, *op.cit.* note 8 p. 45-46.

5.2 Dynamic Approach in Light of Changed Values or Conditions

Originalists will be more reluctant to accept a broader kind of dynamic approach, which allows for the meaning of a constitutional norm to change in accordance with society and its prevailing values.

Is the Death Penalty "Cruel and Unusual Punishment"? What Scalia objects to is the broad form of dynamic interpretation: that the original meaning and implications of a constitutional provision may change according to normative and sociological developments in society. For example, when the Eigth Amendment of the US Constitution prohibits "cruel and unusual punishment" this concept cannot, according to Scalia, include the death penalty even if today many would consider that punishment to be cruel. Why? Because it is clear from the constitutional context that the death penalty was not originally considered a cruel punishment, the existence of death penalty being explicitly contemplated by other provisions of the Constitution.[43]

To my mind, such an original assumption cannot bind subsequent interpreters. What is cruel punishment must depend on a present day assessment taking into account evolving standards of humanity as well as scientific realization concerning the impact on the human psyche of a death sentence.[44] What is binding on subsequent interpreters is that only "cruel" punishment is prohibited. The threshold of "cruelty" is clearly high. The prohibition could not be dynamically expanded to cover also, say, "harmful" punishment, because that would transgress the text as well as the abstract intent of the framers. The framers intended only to outlaw "cruel" punishment, but it must be left to the posterity to assess what is (now) considered cruel and what is not.

Is Life-Sentence Compatible with "Human Dignity"? I thus prefer the approach of the German Constitutional Court which has recognised that, due to the development towards an ever more humane penal system, life-sentence is now only compatible with Article 1(1) of the German Constitution concerning the protection of "human dignity", provided that the person sentenced is given a real prospect of release in his lifetime.[45]

Is Physical Punishment of School Children "Inhuman or Degrading Treatment"? In the same way, the Strasbourg Court in 1978 held that due to the legal and normative development which had taken place, physical punishment of school pupils was no longer compatible with Article 3 of the ECHR prohibiting "inhuman or degrading treatment or punishment".[46]

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43 A. Scalia, *op.cit.* note 8, p. 46.

44 *Cf.* the US Supreme Court in *Rhodes v. Chapman*, 452 U.S. 337, at p. 346.

45 *See* "Life-sentence" decision, 1977, Entscheidungen des Bundesverfassungsgerichts, Vol. 45, 187 (229).

46 *Tyrer v. United Kingdom* (1978), ECHR Reports, Series A, Vol. 26.

5.3 Assessment

Surely, what was originally intended to be the general norm must be binding on the future, whereas original assumptions as to its concrete content and implications are not. A dynamic approach seems ultimately required for broad constitutional provisions to preserve their original normative function and purpose and thus their authority, because the constitution is meant as an overall legal framework for an ever-changing society. Dynamic interpretation seems especially necessary as regards constitutions which by reason of a difficult procedure or a traditional reluctance to amend them cannot easily be formally amended. A dynamic approach, furthermore, opens constitutional interpretation to influence and inspiration from international developments – including transnational and international case-law (ECHR).

6 The Push from the International Context

The European Court of Justie and the European Court of Human Rights have displayed judicial activism to a much larger degree than has been tradition in many national European legal systems.[47] The basis of this active interpretative style is the Vienna Convention on the Law of Treaties (1969), which requires an objective interpretation of treaties, the primary source of interpretation being the text of the treaty provision in its context and in the light of the purpose of the treaty as a whole; as provided in Article 31(1):

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

This interpretative approach is also, necessarily although at times slowly, affecting national courts with more restrictive legal traditions of interpretation, such as the Danish courts.[48] The impact from international courts and their style of interpretation on national courts is likely to increase even further, since in the long term, national courts cannot uphold two watershed approaches to legal interpretation, one applicable to the implementation of supra-/international obligations and another one for "original" national law, including the national constitution. There has to be, and it is in the nature of legal thinking to pursue, consistency within the legal system.[49]

47 *Cf.* e.g. T. Koopmans, *Sources of Law – the New Pluralism*, in Liber Amicorum Ole Due, GADs Forlag, København 1994, p. 194 et seq.

48 *See* J.E. Rytter, *op.cit.* note 8, pp. 77-90 (83) with further references.

49 *Cf.* B. Gomard, *Juraen under forandring og udvikling*, Ugeskrift for Retsvæsen 1993, Afd. B, s. 392.

Thus, a Danish Governmental Report on the Judiciary from 1996 in dealing with the growing relevance of ECHR and EC-law and the impact of those legal systems on the (constitutional) role of Danish courts, stated among others that:[50]

> "This development contributes, moreover, to a change in the role of the courts – a role by which the courts, to a larger extent than previously, are called upon to exercise an autonomous, law-making function. Consequently, it is to be expected that the judges must adopt a broader style of interpretation and a sources-of-law approach, which to a certain extent goes beyond and thereby in part differs from the current one."

7 Concluding Remarks

First of all, I believe the preceeding discussion has shed light on certain points which – to a large extent regardless of one's personal position(s) in the debate – are of general relevance:

- The philosophy of constitutional interpretation is not a choice between either a textualist-originalist approach or a teleological-dynamic approach. Whereas the textualist and the originalist approaches seem often to be perceived as somehow intrinsically linked, there is no logical basis for such a link; even though the two may often come together, one may well adhere to textualism, while rejecting originalism. It seems more difficult to favour a broad purpose-orientation, yet reject a dynamic approach; the former seems to imply the latter.[51]

- The choice between textualism or purpose-orientation and between originalism or dynamic approach is often not a matter of one instead of the other, but rather a matter of degree. There is a narrow kind of purpose-orientation that even sworn textualists subscribe to and there is a narrow kind of dynamic approach that even originalists will embrace. In short, no sensible interpreter would completely reject purpose-orientation and a dynamic approach.

Secondly, in the course of the preceding discussion I have also indicated or at least hinted at my own position on the different issues pertaining to constitutional interpretation:

- In interpreting the text of any broad constitutional provision it is certainly relevant, I would say necessary, to consider the purpose and spirit of that provision seen in the context of the constitution as a whole. The text and the meaning which it can reasonably be said to have defines the outer limits of interpretation, except only for that normative content which may

50 *Domstolsudvalgets betænkning*, Governmental Report No. 1319 (1996), p. 176 – my translation from Danish.

51 *Cf.* J.E. Rytter, *op.cit.* note 1, p. 157.

not be explicitly covered by the text but which, according to its purpose, is necessarily implied by it – i.e. a content without which the relevant provision would not function in accordance with its purpose.

- Interpretation cannot transgress both the text and the underlying purpose of the norm to which that text gives expression, since that would transgress the limits of "interpretation" and amount instead to constitutional law-making, the competence of which is not bestowed upon judges.

- Within these limits I favour a dynamic approach rather than originalism when defining the specific meaning and implications of a constitutional norm. It is not only, or even primarily, because original meaning is often impossible to discover or subject to various interpretations. As a matter of principle, I believe a dynamic approach is crucial to the continued functioning of the constitution in accordance with its purpose and thus in conformity with the abstract intentions of those who framed the constitution and the people who originally adopted it. The original intention of the framers is binding as regards the general normative content of a constitutional provision but not as regards its specific implications.

- Purpose-orientation and a dynamic approach, within said limits, is also called for by reason of the international context within which constitutional interpretation operates in Europe: The Luxembourg and Strasbourg Courts have long applied such an approach. In the long term, this necessarily affects national constitutional interpretation, since it is in the nature of legal thinking to search for consistency within the legal system, including in terms of interpretative style.