The 'Meta'-significance of Scalia's *A Matter of Interpretation*: Reflections on a Theory and Ethics of Judicial Legislative Power¹

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Abstract: The article focuses on a metatheory of legal interpretation as provided or implied in Antonin Scalia's famous essay *A Matter of Interpretation*. It is not so much textualism itself what is being analysed here as its theoretical and philosophical foundations. Following this route, the article reveals a complex ideological framework of intersections between domains of democracy, common law, *stare decisis*, *jusnaturalism* and *juspositivism*. By moving judicial legislative power to the forefront, the analysis opens up the existence of two rather different, if not opposite, legislative strategies in the contemporary government: a regular one, exercised by its political institutions (parliament being the main one), and a specific one, exercised by the judiciary. The article proceeds with a critical analysis of two justifications of the latter—one more formal and another more substantial. Finally, the article develops a basic practical hierarchical structure of principles or rules that should settle down legislative powers by neutralising the apparent fundamental contradiction in Scalia's essay (i.e., being pro-democrat and pro-liberal at the same time).

Keywords: *Antonin Scalia, A Matter of Interpretation, judicial legislation, legal interpretation, stare decisis*

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1. Introduction

One of the prominent Antonin Scalia's publications is his essay usually abbreviated as *[A] Matter of Interpretation* (hereafter in the text called 'the Book')². The Book has generated a vast discourse of numerous papers, essays and many other textual outcomes, taking it as their critical/analytical target; also, Scalia himself was far from saying the final word in the scholarly field with this work. However, the Book remains and could be regarded as a cornerstone or a pillar publication in the whole of his academic legacy. And that is not because of its being a directly methodological (or, in other words, more technical) work on the matter of interpretation. The significance of the Book is that therein Scalia raises above the direct presentation of the technicalities of the methodology of legal interpretation and mostly articulates the whole matter of interpretation at the general ideological—or 'meta'—level.

This 'meta'-articulation of *matter* is marked with the sign of democratic radicalism in relation to judicial/court power. Starting with the *democratic* defence of general textualism, it develops into a defence of Scalia's type of *semantic* originalism as a specific instance of his textualism applied to specific American constitutional jurisprudence (especially having in mind the age of the text of the Constitution). In other words, *everything and everywhere* should be done to fence courts out from any possibilities of intrusion into a process of law-creation. Definitely, this approach remains relevant in the context of the global convergence of common and continental law traditions. Especially from the perspective of the latter, as converging with the former.³ The Book allows to discern certain lessons and warnings for the continental/civil law tradition which, if we follow Scalia's democratic logic, makes more sense as being focused on the law adopted by a democratic legislator. However, there may still be a reason for the common law in our 'democratic' world and the path to this reason, a bit paradoxically, may lie exactly in Scalia's critique of the common law and *stare decisis*.

The aim of this article is to follow this path by placing the analysis of Scalia's approach in the Book in a broader theoretical-philosophical and, later, practical-ethical context. The outcome of this strategy will be the initial

² It is the title of the book of the series of articles and essays, in which Scalia's has a separate title for it, see Scalia, 1998, pp. 3–47.

³ Lithuania could be good example of this process, as here this convergence was accelerated by the jurisprudence of the Lithuanian Constitutional Court through the entrenchment of the binding force of precedent. See especially court rulings: Ruling on the compliance..., 2006; and Ruling on the compliance..., 2007.

deepening of the problem of common law and *stare decisis* by showing its even more radical inadequacy than Scalia has covered in a democratic environment. In some sense, it may be considered as an elaboration of Scalia's critical argumentation by providing an additional thesis, which is definitely not in the favour of common law and, especially, *stare decisis*—i.e., the idea of the inadequacy of different legislative strategies in courts and in parliaments.

However, perhaps a bit paradoxically, this kind of relentless theoretical defeat of the common law and *stare decisis* may open up a path of reasoning for their survival. First of all, even though being, at first glance, leading to a deadlock, the theoretical consistency allows “calling things by their names”—disclosing and emphasising the political nature of *stare decisis*. Secondly, a theoretical deadlock may also appear as the starting point to step into the other dimension (platform) of reason, in Immanuel Kant's terms, i.e., the domain of practical reason or ethics, where common law and *stare decisis* may find their rational place. Finally, an understanding of the complicated ideological configurations covered therein should be helpful for the continental law tradition that now tries to accommodate the facets of the common law, in order for the former (i.e., continental law) not to be perturbed with the *déjà vu* experiences of the problems of the latter (i.e., common law).

2. 'Meta' vector of the Book

In order to clearly conceive Scalia's position in the Book, we should clarify on which theoretical level he is predominantly working therein. He explains not so much *how* courts should interpret law but *why* they should interpret it in the way that he proposes. That is, he predominantly works at a meta-theoretical level. Or, in other words, what he presents is not so much the theory (or methodology) of interpretation but more (1) *theory of* (2) *a theory of* interpretation, the latter remaining not very well or elaborately explained. That is why he has later been critically attacked as not being very clear about what exactly he is defending under the concept of 'textualism'. But his concern is not so much *how* textualism should work but *why* we should apply it at all.

Of course, then his exposé in the Book presupposes a broad philosophical field and is related to the deepest ideological layers of legal philosophy, where

it interconnects with the fundamental oscillation between *jusnaturalism* and *juspositivism*. That will be revisited at the very end of this article but now let us focus on the other aspect of a shallower plane. From the general perspective, it is rather clear that Scalia fits into the linguistic-turn-determined modern ideological landscape⁴ as for him law is fundamentally the matter of language: it (1) comes into existence (is created) as the matter of text/language and then (2) has to be handled as the matter of text/language. From this perspective, Scalia's main goal and ideological and critical program is to isolate courts from the first process (i.e., law creation/legislation) as much as possible, to present with the corresponding methodology of legal interpretation (i.e., textualism) that would help to achieve this aim. All that is based on a simple argument that law should come into existence on the premises of the democratic legislator and nowhere else, including courts. Accordingly, he is "content to leave the common law, and the process of developing the common law, where it is", because it is "playing king" while "judges are no longer agents of the king" (Scalia, 1998, pp. 7–10).

3. *Stare decisis*, common law, and contemporary democracy

A closer contextual look at what exactly Scalia offers to "leave where it is" leads to the insight that it is not so much common law as a whole but, more precisely, the doctrine of *stare decisis* as "an absolute prerequisite to common-law lawmaking" (Scalia, 1998, p. 7). But that makes a rather big difference. *Stare decisis*, in some sense, is a relatively new⁵ and peculiar dweller in the legal world. First of all, as Mary Ann Glendon comments in the Book, civil-law systems started to turn their sights exactly to this doctrine after they confronted growing bodies of vast and not always consistent democratic legislation and, subsequently, incoherent judicial practice.⁶ That is, it is understood as a tool not so much enabling judicial legislation but,

⁴ It is also very much the landscape of modern legal philosophy, starting from John Austin's influence on H. L. A. Hart (1961, pp. vi–vii) and ending with the influence of the Vienna circle's logical positivism and, particularly, Ludwig Wittgenstein on Scandinavian realists (for the best short analysis of that see Freeman, 2008, pp. 1043–1045).

⁵ Especially if juxtaposed with common law tradition as a whole; see further.

⁶ See Glendon, 1998, pp. 101–103. Also, historically it could be considered a kind of a *déjà vu*. At some point, civil-law tradition courts—the same as common-law tradition courts at the dawn of modernity and domination of positivism (see further in the main text)—understood that they inevitably create law and immediately turned their sights to the doctrine of *stare decisis*.

it being inevitable (because of deficiencies in parliamentary legislation), as disciplining it. But what is more important is that, historically, the doctrine of *stare decisis* is not intrinsic to the common law tradition as such. Quite the opposite, it is what, in some sense, fundamentally transformed (if not perverted) this tradition in the 18th–19th centuries:

In the last two hundred years there has been a movement in Anglo-American law to make case law more like statutory law. In the mid-eighteenth century, in the writings of Blackstone, judicial decisions are treated as evidence of the law, not as the law itself. This is the way Continental European lawyers think about case law today. The English positivist movement of the nineteenth century generated the idea that judicial decisions were not just evidence of the law, but conclusive on the law. Thus emerged the idea of *stare decisis*—the principle that precedents must be followed as binding law. (Fletcher, 1996, pp. 69–70)⁷

Accordingly, *stare decisis* is the product of positivisation and, this way, a fundamental change of common law and, also, relatively new to it. Authentic (or pre-modern) common law tradition is anti-positivistic and, if we add historical dimension here, clearly and intrinsically tied to the conception of natural law. In Hans Kelsen's or even H. L. A. Hart's logic, in the authentic version of this tradition law originates from what *is*, especially as factual substratum of our social/common life.⁸ As George P. Fletcher points out “in the early stages of English law, the power of Parliament to intervene and change the accrued customs of time was cloaked in ambiguity. It was commonplace in medieval statutes to begin with an apologetic preamble stating that because the common law was controverted, it was necessary for Parliament to intervene.” (Fletcher, 1996, p. 66) Accordingly, in the premodern common law neither courts nor parliaments created law. How exactly it originated (or how such mentality was possible) it is now more of a mystery.

⁷ Cf. also: “the activity of legislation, and hence its differentiation from adjudication, comes about only as the result of the growing acceptance of law as an expression of the command of the sovereign rather than as a reflection of an unchanging pattern of custom” (Loughlin, 2003, p. 22).

⁸ Hans Kelsen's understanding of *is* (as opposite to *ought*) is very unsocial; he conceives *is* as what “can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality” (see Kelsen, 1967, p. 3 *et seq.*). But if we would merge this approach with his “positivist ally” H. L. A. Hart's conception (or, more precisely, the conceptual version) of the rule of recognition as a particular kind of social practice (for that see Wacks, 2012, p. 84 *et seq.*), then social *is* as the place of the emergence of law could make sense, of course, once again disclosing the complexity and ambivalence of H. L. A. Hart's “positivist” conception (by the way, it also is very relevant that H. L. A. Hart was the resident of common law tradition).

Thus, the common law with which Scalia deals is the one profoundly transformed by the positivistic influence, the main exponent of that being *stare decisis* itself. In this context and this sense, Scalia aims at stopping this “outcome of transformation” but not by advocating for the return to authentic common law (in logocentric modernity that might be impossible anyway) but by advocating for the cancellation of *all* common law, which now (in modernity) could be understood only as turning judges into legislators and *stare decisis* being a tool or method to *de facto* entrench the judge-made law, to make it a *law*.

Of course, in the context of Scalia’s democratic logics, *stare decisis* does not make so much sense. If a law is only what is created by a democratic legislator—it is not what it intends and expresses in the minutes of the committees, it is not what courts do, even by judicial interpretation of law (following Scalia’s strict logic, it is also not law)—why do we need *stare decisis*? The one and only guiding light for the judge is democratically adopted law. And if democratic legislator would be perfect—it would create completely clear, gapless, coherent law, then *stare decisis* would make no sense in any form, even in the form of following of judicial interpretation of law, as there would be nothing to interpret.

4. Two legislative strategies in/on the contemporary government

The last sentence of the previous section could be easily tied to certain naiveté-type idealisms albeit rather seriously articulated by some well-known modern legal philosophers.⁹ In reality, democratic legislator is not only deficient, but it may leave discretion to courts.¹⁰ In this context, Scalia

⁹ Here we could mention the admirer of mechanical or administrative jurisprudence Jeremy Bentham or the idealist of a state dominated by bureaucracy and officials Max Weber, see Wacks, 2012, p. 63 (on Bentham) and p. 173 (on Weber); Freeman, 2008, p. 842 (on Weber). In both cases, in the projected end of historical development, judiciary should become if not redundant then, in some sense, invisible as a part of the activity of governing. Judges should turn into insensible bureaucrats blindly applying law as it is in its perfection.

¹⁰ For instance, by deliberately left indeterminate adjectives in statutes. A good example in this case is the regulation of the circumstances mitigating criminal responsibility in the Lithuanian Criminal Code. As such circumstances it provides for “very difficult financial situation” (*labai sunki turitinė padėtis*) or a “state of extreme stress” (*didelis susijaudinimas*) leaving it for the courts to explain in every concrete situation what that exactly means and, by that, to adopt corresponding legal precedents to be followed by the courts. See the Criminal Code of the Republic of Lithuania, 2000, Art. 59; see also the clarification in fn 11.

reflects on “preferential rules and presumptions” of legal interpretation making “a lot of trouble” (Scalia, 1998, p. 28) by their indeterminacy and *de facto* turning the courts into a legislator made by a democratic legislator itself. Scalia clearly has no favour in that as it may be considered “simply incompatible with democratic government, or indeed, even with *fair* government” (Scalia, 1998, pp. 17 & 35).

However, ‘fair government’ is a more general term than just ‘democratic government’. It is related to all the fabric of government in general. Thus, an important question is how it would be *fair* for the courts (as a part of government) to proceed in these initially unfair situations? That should be one of the crucial questions of the metatheory of legal interpretation. First of all, we should ask whether courts’ proceedings in those situations have any chance to totally escape intrusion into the process of the creation of law? Scholarly coherence should lead to only one conclusion—it *is not*.¹¹ Any attempt to keep saying that it is never law-creation but always adjudication or just *something different* what the courts do¹² would be the extension of the same naiveté but now with more serious consequences, which Scalia, in some sense, points out. That is, this way courts not only attempt to “play king” as a regular king but to “play a bigger king”—the one that could create even eternal laws, absolute values for the society—and we may call it “playing God”.¹³ That is where the doctrine of *stare decisis* plays a crucial role.

In other words, if we nevertheless accept that courts create law, the second consequential question is how courts’ legislation should differ (if at all) from

¹¹ A simple example is enough to show this. Let us compare two linguistic nexuses and their subsequent articulations as a matter of the activities of governing. First of all, there are two legal acts adopted by the Lithuanian parliament: Law of the Republic of Lithuania on Safe Traffic in Car Roads (2000) and the already mentioned Criminal Code (2000). Both contain certain rather unclear generalities inside—that traffic in car roads should be *safe* or that a *very difficult* financial situation is considered to be a circumstance mitigating criminal responsibility. However, when the Lithuanian government (II branch) adopts the detailed Rules of Road Traffic (2014) which, in some sense, say/explain/elucidate/interpret in detail what exactly ‘safe traffic’ means, nobody very much cares to understand it this way, i.e. as a matter of interpretation of law. It could be understood this way but there is no need for such understanding, such, so to say, “rehabilitation” of what the second branch does. All are satisfied that the second branch adopts/creates law, albeit of lesser hierarchical level, because that is what this branch—as a political segment of government—is allowed to do (see also fn 18). But when courts (the third branch) say/explain/elucidate/interpret what a “very difficult financial situation” means—then suddenly it becomes different. Now it turns to be important to understand/rehabilitate what the courts do as interpretation/elucidation of a higher law but not as a creation of a new one. *However, in both cases, the logical/linguistic relation between parliament laws and what the administration or courts did as a matter of language is the same.*

¹² In many respects, this is an allusion to the ‘right-answer thesis’ of Ronald Dworkin.

¹³ Scalia could have been more radical there.

the one made in parliaments? Moreover, do courts *know*¹⁴ anything about the phenomenon and methodology of legislation at all? As Glendon points out, for a long time American legal profession “has [completely] neglected the art of legislative drafting” (Glendon, 1998, p. 96). And it is not very well confirmed that this situation is different in the civil-law tradition, especially what concerns practicing lawyers (not scholars).¹⁵ Essentially in both traditions, when lawyers (especially judges) are confronted with the necessity to intervene in *de facto* law-creation process, they act peculiarly. Philosophers or theoreticians there could be more consistent and directly notice what is going on (i.e., judicial lawmaking). However, their articulation of this process is usually rather mysterious; in such situations they could speak, for example, about a judicial reference to *Volkgeist*¹⁶ or ‘situation sense’¹⁷. But practitioners usually avoid looking at it this way and turn their sights directly, and primarily, to *stare decisis* as a certain guiding light in the face of deficiencies of the existing law.

Setting aside the problem of the democratic legitimacy of judicial legislation as such (in whatever form—as playing king or playing God), what we should, in the first place, notice here are two very different legislative strategies in two branches of government—the first¹⁸ and the third one. Because if in the latter the principle of *stare decisis* governs the development of jurisprudence then, in and through courts, strong inertial mechanism starts to function in the totality of the legislative process of the modern state. And the question is whether it (i.e., this judicial legislative inertia besides just judicial legislation as such) is in the right place there?

If we would recall H. L. A. Hart, the rules that govern legislative process (i.e., rules of legislation) he otherwise calls “the rules of *change*” (Hart, 1961, p. 95 *et seq.*). In other words, the whole essence here is to enable change, not to hinder it but, on the contrary, accelerate it. And courts, of course, *may* change their law/precedents. In the jurisprudence of the Lithuanian

¹⁴ This means that is not only the matter of theoretical knowledge but also of a practical one—the matter of corresponding skills.

¹⁵ It is a distinct feature of this tradition that courts therein are not accepted or conceived as creating law but only as applying it, it itself being created exceptionally by a democratic legislator.

¹⁶ Attributed to F. K. von Savigny, see Freeman, 2008, p. 1049 *et seq.*

¹⁷ Attributed to Karl Llewellyn, see Freeman, 2008, p. 994.

¹⁸ In fact, it could be taken in combination with the second branch of government, otherwise called administration. Both branches represent the so-called *political* segment of government, while courts (the third branch) allegedly should remain apolitical. The second branch, albeit governed by hierarchical Kelsenian type of logic, of course, *does* participate in legislation and Hart’s aspect of *change/dynamics* here is, at the very least, as much present as in the first branch.

Constitutional Court, for example, we may find the permission to do this (see Ruling on the compliance..., 2007). However, the Court immediately adds that:

The practice of courts of general jurisdiction in cases of corresponding categories has to be corrected and new court precedents in these categories may be created only when it is unavoidably and objectively necessary, when it is constitutionally grounded and justified. Such correction of the practice of courts of general jurisdiction (deviation from the previous precedents, which had been binding on courts until then and creation of new precedents) must in all cases be properly (clearly and rationally) argued in corresponding decisions of courts of general jurisdiction. No creation or reasoning of a new court precedent may be determined by accidental (in the aspect of law) factors. It is such correction—only when it is unavoidably and objectively necessary, and when it is properly (clearly and rationally) argued in all cases—of the practice of courts of general jurisdiction (deviation from the previous precedents that had been binding on courts by then and creation of new precedents) that must be respectively ensured by the Court of Appeal of Lithuania and the Supreme Court of Lithuania within their competence. (Ruling on the compliance..., 2007)

This approach could only be understood as an additional strong factor of inertia, leading to the situation where courts get involved in the activity of the creation of law only unwillingly, avoiding it in all cases possible. How then we could reconcile two so different strategies/vectors in relation to the emergence of law in the modern state? In the first branch of government it emerges freely, actively, without much of hesitation and avoidance of innovations; law is changed or made anew not when it is absolutely and objectively necessary (at the very least, such mentality is not followed there) but when something better (as a matter of law) is thought to be discovered without any *stare-decisis*-type of obstacles. While in the third branch of government, it moves at the pace of a turtle, rarely and unwillingly; and when the precedent is nevertheless created, it is conserved for a long time or sometimes almost indefinitely (having in mind the so-called 'eternity clauses' in constitutional jurisprudence).

In this context, and after making this clarification, the question of a democratic legitimacy of judicial lawmaking becomes even more pressing. Courts appear not only to be creating law but creating law that, in some sense, is more powerful than the one created by parliaments—law that is

much more difficult or even impossible (at least by regular non-revolutionary means) to change.

5. Theoretical arguments in favor of a peculiar judicial legislation

5.1 Equality before the law and legitimate expectations

Of course, certain arguments of essentially theoretical nature could be given in favour of allowing courts to make law, even though in this peculiar way. The first is more *procedural* one, i.e. it could be said that the necessity for the *stare decisis* (as entrenching judicial ‘clarifications’ of law *as law*) stems from the principle that persons should be treated equally before the law and, therefore, have certain legitimate expectations. But, first of all, these are the principles of the *application* of law but not of its creation. Legitimate expectations and equality before the law appear *only after* law is created. However, these principles do not govern the creation of law itself which is based on completely other logic (even having in mind the logics related to the hierarchy of norms)¹⁹.

Then the real problem is that *in the same case* courts could do both—adjudicate and legislate. To solve this problem, we should separate the two processes and do it even in the same case, i.e. by adopting the approach that a new law/rule made by a court should be applied only to the future cases (not the one solved) but *stare decisis* should not hold from changing the rule. And we could think of some exceptions to this rule (for example, if a new rule imposes a weaker sanction than an old one then a new rule may be applied already in the case solved; i.e., this way we would transfer the retroactivity exception related to parliamentary legislation to courts’ legislation; and so on). To summarise, this procedural argument is rather weak and could be solved easily.

¹⁹ The hierarchical aspect, of course, adds a certain *vertical/synchronic* aspect to the legitimacy of law. But the principles of equality before the law and legitimate expectations are in their essence of *horizontal/diachronic* nature; the logic here is that of ‘before/after’ than that of ‘above/below’.

5.2 Counter-majoritarian effect

Another argument in favour of allowing courts to make law is more profound and *substantial* one. The problem is what to do with the so-called counter-majoritarian *positive* effect that the courts' *peculiar* legislation, veiled as based on *stare-decisis* and *this way* resistant to majoritarian influences adjudication, creates? In other words, there is something *good* in this disconcert between two modes of legislation—parliamentarian and the one done by courts as the courts, this way, defend an individual/human from the possible atrocities of the omnipotent majority.

The main problem is that therein everything is very much artificial/fictional. To understand this, we should take a little detour. As already stated, when courts create law, because of the existence of the *stare decisis* doctrine, they make it for a long time or even forever (as 'eternity clauses' in constitutions) and parliaments legislate based on completely other logic. This other logic may be the one reflected by, for example, Roscoe Pound, i.e., that of the balancing of conflicting social interests (see, e.g., Freeman, 2008, pp. 849–854). However, the Pound government *as a whole*, i.e., including courts (Freeman, 2008, p. 850), participates in this balancing process because what is most important is the result—the so-called consensus model of society (Freeman, 2008, pp. 852–854). Accordingly, even courts, following this logic, could be freer in their legislation and the principle of *stare decisis* could play here more of a secondary role.

Such an approach may find its roots in certain episodes of Anglo-Saxon legal-political history. As Martin Loughlin reveals, at the emergence of modern political-constitutional framework in England, two rather opposite aims were pursued: one was the separation of powers and, another, "the unity of the office of government", which otherwise could be called "acting of the bodies of government in concert, like an orchestra" (Loughlin, 2003, p. 24). Loughlin also points out that "after the Restoration and the Revolution of 1688, the course taken was not that of dividing and separating power but of maintaining the formal unity of the office of government" (Loughlin, 2003, p. 24). Thus at the heart of our constitutional framework we have two opposing values/aims/vectors: (1) to separate powers, which could be called 'government-separation vector'; and (2) to make those powers act in concert, which could be called 'government-orchestration vector'.

Let us turn our sights to the 'government-separation vector'—that is, the place where democracy comes in and separates courts from the political

domain as lacking democratic legitimacy. Starting from this ideological point, they must not legislate and *stare decisis* here makes absolutely no sense because there should be no courts' legislation (or making precedents) in relation to which *stare decisis* could function. But, as already told, courts sometimes *do* legislate. Then we should turn our sights to the 'government-orchestration vector'. However, here *stare decisis* steps in and functions much more as a disorchestrating factor than vice versa. That is because it introduces very different legislative logics—not based on the balancing of social interests with the view that it must be done as best as possible now and that the legislative decision could be corrected in the future without restraints but based on the constant looking back how courts legislated before with the aim to find there any precedents and with the view that what will be decided as *new* now will be the decision forever. As already stated, this logic programs not a *change* but *conservation*.

However, this conservation program is rigorously advocated in the context of constitutional adjudication by stating that exactly therein, the mission of courts is to defend the individual or the /human against the majority. At the end of his essay, Scalia emphasises this mission from the positive side and, as Dworkin reveals, by that he is profoundly controversial (see, generally Dworkin, 1998). At the beginning, when he writes on the democratic unacceptability of judicial legislation, he is more a radical democrat in relation to the role of the judiciary. However, coming to the end, when he concentrates on constitutional adjudication and the more he lingers on and accepts the problems of his textual approach, he appears to be closer to taking a more liberal position.²⁰ At a deeper level, behind all that is a well-known paradox of the coexistence of democracy and liberalism²¹ but, as much as it is a paradox, it is not so much the matter of a coherent theory. It is the case of an ideological turmoil which metaphorically could be called the "battle of demons", and which, therefore, is more the matter of our minds (especially of those who govern) but not that of reality.

²⁰ It should be noted, though, that in the Book, Scalia is relatively coherent on textualism and the pro-democratic line of argumentation up till the end. The pro-liberal position was taken by him (especially *when it was deemed politically necessary*) more in his jurisprudence where he was also occasionally blamed for betrayal of his original textual/pro-democratic position, which he even himself may have recognised (especially notable is his position in case *Bush v. Gore* [2000] and the context surrounding it).

²¹ Probably the most prominent author who centralised and radicalised this paradox is Carl Schmitt. Especially see Mouffe, 1998, pp. 160–163: "Schmitt asserts that there is an insuperable opposition between liberal individualism with its moral discourse centered around the individual and the democratic ideal which is essentially political and aims at creating an identity based on homogeneity".

The paradox (another one) which could help start articulating the artificiality here is the paradox of democracy itself—i.e. that in democracy, the ruler (people) and the ruled (also people) coincide. To solve this “problem”, we separate, and this way invent or “make to exist”, two apparently distinct subjects/concepts: (1) *people* as a ruler and (2) not so much people but a *human* (or an individual) as ruled. This way, democracy (with parliaments) stands on the side of people and liberalism (with courts) stand on the side of a human. That is a perfect platform to start, or, more exactly, imagine the battle and rather many contemporary philosophers submit themselves to this mythical imagery where usually people/the majority (with state and its government) are turned into a demon rather than an angel. For example, Loughlin writes that human rights “define a zone of individual autonomy which government must not invade” (Loughlin, 2003, p. 127; accordingly, government is conceived as an invader). Or let us take the even more warlike formulation by Giorgio Agamben: “the rights won by individuals in their conflicts with central powers simultaneously prepared a tacit but increasing inscription of individuals’ lives within state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves” (Agamben, 1998, p. 121). But that is *artificial imagery* even though the whole aforementioned governmentality (parliaments v. courts) is based on that. What is real behind that is just *one or another legislative activity weighting one or another, more or less numerous interests of real human beings*.

The fact is that the constitutions of modern democratic regimes themselves were adopted by majorities or, in other words, they are the outcome of the democratic process. In this respect, *human rights* are also so-called social interests, they are important for the people/society. Also, they are usually not absolute, we could weight some rights/interests against the other, consider some as more important than others. But, in this context, ‘we’ is just a majority of a certain period. Another ‘we’, as time passes, may think very differently, as happened, for example, with slavery or racial segregation in the US. Some say that (1) this way, constitutionalism programs the conflict of majorities²² but others may say that (2) behind all this is simple moral relativism²³, both “problems” being resolved by the certain nature of constitutional text and jurisprudence which, in itself, could be tied to

²² The older the constitution, the sharper this conflict becomes. American legal scholarship, as focused on the oldest living written Constitution and constitutional jurisprudence, is abundant in reflection on that.

²³ This aspect is more than abundantly discussed and lingered on in the vast ideological domain of legal positivism.

more or less radical views in legal scholarship²⁴. But the most *politically* accurate generalisation still might be this rather old statement by Hannah Arendt—that “many attempts to frame a new bill of human rights [...] have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are” (Arendt, 2003, p. 34). In other words, human rights—as something general/eternal/universal—is not only a still unclear *conception* but—now as a *phenomenon*—it is also not clearly separated from the state’s protection and sovereignty. The main (if not the only) method of the differentiation of human rights from citizens’ rights is implemented inside the state—its governmental structure—and therefore is more a procedural one, i.e., related to the liberal mission of courts. Accordingly, in this larger scale, constitutional conservatism, together with/helped by *stare decisis*, is not so much a judicial/legal but more a *political* method, as it has a clear political function: to entrench (or even maybe *to make*) eternal/universal rights and the most basic principles of society. But—as much as it is a *political* process, even the concept of a ‘living constitution’, so much attacked by Scalia, may have its place in the minds of judges affected by the ‘majority v. human battle’ imagery and courts being the guard of the latter (i.e., human) with their exceptional qualities making them fit for this role.²⁵ As explained by Alexis Tocqueville, “lawyers provide ‘the most powerful existing security against the excesses of democracy’. Lawyers acquire ‘certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude’.” (As cited in Loughlin, 2003, p. 129). In this light, *stare decisis* is only a *political* habit of order up to the point when this order becomes clearly unacceptable and constitutions should be let to live.

²⁴ For example, in the 1980s, Sanford Levinson proposed the view that the meaning of the US Constitution is as fluid as that of differently interpreted Shakespeare’s dramas (see generally Levinson, 1982). This *law as literature* approach was further elaborated in Critical Legal Studies school and is still viable today as one of the legitimate approaches to the phenomenon of law.

²⁵ To make an analogy in this respect with the jurisprudence of major European courts, it should be noted that such an approach is far from being alien there. For example, the European Court of Human Rights repeatedly reinforced the status of the European Convention on Human Rights as being “a living instrument” allowing the Court to step into *de facto* legislative activity and develop its jurisprudence in a certain direction when it is deemed to be politically necessary. Another good example is the jurisprudence of the European Court of Justice (ECJ) where, for a long time, teleological (purposive) interpretative approach has been prioritised, especially in interpreting primary EU law, accelerated by obsessive articulation of legislative aims in preambles of legal acts (cf. also fn 10 and its context), the application of the principle of *effet utile* in ECJ jurisprudence, demonstrating its (i.e., jurisprudence’s) political nature and significance.

6. From the meta-theory to the meta-ethics of the role of judiciary in contemporary governmental framework

Finally, at the most fundamental theoretical level—which is, more indirectly, touched upon in the Book—the issue at stake is that of the origins of law. By criticising common law, Scalia appears to take more a positivist direction in this respect and, thus, is far from being novel.²⁶ In other words, he is another “mourner” of the common law and natural law, both being intrinsically interrelated, despite many attempts to revive the latter in modernity²⁷.

This never-ending oscillation between *jusnaturalism* and *juspositivism* (logocentrism being at its core) is profoundly marked by bi-directional inertias. One of the best descriptions of the ‘bifurcation-point’ for the development of legal philosophy in one direction or another has been articulated by Carl Schmitt:

For a legal order to make sense, a normal situation must exist, and he is a sovereign who definitely decides whether this normal situation actually exists. All law is ‘situational law’. The sovereign produces and guarantees this situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state’s sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state’s authority. The decisions part here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law. (Schmitt, 2005, p. 13)

From this point we could move our thought to two very different directions. However, if we would take one path—for example, that of *jusnaturalism*—it would be hard to evade the inertias of another path (i.e., that of *juspositivism*). That could be proved by realist Llewellyn’s presumption of the reason of community or sociologist Pound’s idea of the “brooding omnipresence in the

²⁶ Here we can take into account Jeremy Bentham’s critique of common law (or, as it has been referred, “Judge & Co”) and sympathy to administrative or mechanical (i.e., not interpretative) jurisprudence, see Wacks, 2012, pp. 62–63 or Max Weber with his idea(l) of gapless law and rule of bureaucracy (including judges as bureaucrats), see Wacks, 2012, pp. 171–173.

²⁷ And these are not only explicit attempts but also hidden under the labels of the other schools of legal philosophy as ‘realism’ or ‘historical jurisprudence’. We could remember Carl von Savigny with the idea that law “was not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be found in the people’s national spirit” (Freeman, 2008, p. 1079) or Karl Llewellyn with his ideas of the situation sense and approval of the *Grand Style* adjudication by community, the latter idea paralleled with the aforementioned idea of Savigny, see Freeman, 2008, pp. 992–995.

sky” being essentially the same reason of community. Moreover, if we take another path—i.e. we make the human/sovereign decision and not situation as the starting or original point of law, as Schmitt and also Scalia did—then it is not only important that here the inertias of *jusnaturalism* are inevitable. More important is *why* they are inevitable, and this question hides the fundamental problems of logocentrism itself. In Scalia’s approach, those problems are more “on the surface”. They are not touched upon in depth but are reflected in simple recognitions that laws sometimes have flaws or that sometimes a democratic legislator may deliberately “make other legislators” those ‘others’, occasionally being courts themselves (see above).

But at a deeper level we should ask whether we know well enough how making or creation of law happens in democracy, i.e., in or by human being’s/ beings’ mind(s)? That is, in order for the dictatorship of democracy to work, we should know how majority exactly dictates the law. That in itself should be a methodologically clear process. But it is not clear, especially from the perspective of epistemology. Here it is enough to remember the suspension of the question of how a theory/law comes into a human mind by Karl Popper (1965, pp. 31–32). Or, as a more radical epistemological approach, we could consider the example of epistemological anarchism by Paul Feyerabend.²⁸ From this philosophical perspective, textualism is very much nonsensical. To draw an analogy with the Popperian axiom that any scientific law is falsifiable—any human/social law is *ipso facto* also flawed. Not so much that it is bad as a matter of normative lacunae or collisions but that it could be always better in relation to how it contributes to the general aim of *salus populi* (same as any scientific law could be better (or more holistic) in the description of the world that surrounds us). Thus, a democratic legislator is never an ideal legislator and to blindly follow what it promulgates simply makes no sense in the light of the general aims of the state.

However, in order not to completely neglect (as naïve or nonsensical) or *maybe* misunderstand Scalia’s program, we should consider the possibility that, at the uttermost *theoretical* level, we reach the domain of what is not so much “theoretical”. Maybe, at this point and in Kant’s terms, we leave the field of pure reason and enter that of practical reason or, more generally, ethics. It means that, as we reach this end, the meta-*theory* of legal interpretation becomes impossible and, as a chameleon, it turns into meta-*ethics*. If we would not make this step, the oscillation between *juspositivism* and

²⁸ See generally Feyerabend, 1975. On how Popper’s approach programs that of Feyerabend, see Berkmanas, 2014, p. 131 *et seq.*

jusnaturalism (at least in this context) would be condemned to be constant and any decision in favour of one or another position²⁹ will be unjustifiably arbitrary, rhetorical, or contingent one. But the practical meta-'theory'/ethics of legal interpretation, based on the series of ethical and practical decisions and laws, may be possible.

For that we have to change our general methodological position, also bearing in mind that we are dealing with specific, partly non-theoretical phenomenon—bi-dimensional *human/people*. As a part of nature/*physis*, of course, we “are not exempt from the laws of nature” (Sandel, 2010, p. 117). But, “if our actions were governed solely by the laws of physics, then we would be no different from [...] a billiard ball” (Sandel, 2010, p. 117). Therein lies the core of the critique of *jusnaturalism*, however, therein also lies absolutely no prerequisites to *juspositivism*. Accordingly, then there is no way out but to completely change the domains of articulation/rationalisation, also, agreeing with Kant about a human's aforementioned exceptionality. As we cannot conceive of a human as just a “billiard ball” then “we must be capable of acting according to some other kind of law, a law other than the laws of physics” (Sandel, 2010, p. 117). This is the law of (or articulated by) practical reason which is not instrumental, and which legislates *a priori* (Sandel, 2010, p. 118). This approach would allow framing the totality of Scalia's ideology, as articulated in the Book, into a certain hierarchical general framework of *a priori* laws/principles that would settle down the legislative powers and strategies of the contemporary government in a more coherent unity.

Following this pattern, we could remember Isaac Asimov's famous three principles of robotics.³⁰ They are formulated in the manner of hierarchy which also represents an attempt to constrain an exception very much as a matter of Schmitt's political-legal logic.³¹ The third rule depicts the general landscape of validity *except* if we rise to the level of the second or the first rule, and if we rise to the level of the second rule, it becomes valid, *except* if we rise to the level of the first rule. To transpose this logic to our situation, the parliamentarian/representative dictatorship of democracy institutes the general landscape of validity as a matter of the most basic—third-level—

²⁹ For example, this could be the *decision* of human/sovereign but not the dictate of “mother nature” or “situation” that is the original point of law.

³⁰ It should be noted that, in this article, the only thing taken from Asimov's approach is the formal/logical aspect of the formulation of the three principles. There is absolutely no substantial application of this approach leading to any relation to robotics as such.

³¹ What I had in mind is the well-known problem of a state of exception centralised in Schmitt's *Political Theology*, see Schmitt, 2005, p. 48.

rule: regular laws/statutes adopted in a regular democratic procedure shall be the basic/main domain of law. This domain is positivistic in its essence, therein Scalia's textualism (his positivist-democratic program) would be very much in its place, the intensity of the dynamics of law would be relatively high, resembling the Popperian idea of intrinsic falsifiability (here as a matter of societal invalidation) of law. The intrusion of courts into legislative process therein could be justified only in the case of legislative deficiency (as lacunae or collisions) or deliberate delegation of legislative powers to courts but without *stare decisis* restraints unchangeable by a regular democratic legislative procedure. At the level of the second rule, we should find human rights and the general framework of government as regulated by a regular contemporary constitution of a democratic regime; here the inertial mechanisms of peculiar judicial legislation already could step in. Finally, at the level of the third rule we should find the most fundamental legal/ethical principles of society (as democracy itself, rule of law, checks and balances, the most important/absolute human rights and the like), those worthy of becoming eternity clauses in constitutional jurisprudence. It is obvious that this level is the domain of what is not positivistic, what is the least dynamical and the least socially invalid-able and what, in some sense, implements Scalia's liberal program at its utter end with the *political* backup of *stare decisis*.

From this perspective, Scalia appears to be like a priest but, although perhaps not *a true* priest, he might still be considered to be *a good* priest. He advocates for the program of "democracy and liberalism" for the society and the courts' role aligned with this program. It is not an easy task to complete³² to explain Scalia's apparent *theoretical* controversies. However, as stated, maybe what he tries to articulate (especially as a holistic whole) is not so much the matter of theory but more that of ethics of legal interpretation functioning as some kind of integrative "meta-ideological rhetorical umbrella" under which we could start crafting "democracy-plus-liberalism", enabling methodologies of legal interpretation.

³² In this context, we could remember the problem of fracture between liberalism and democracy as radicalised by Schmitt, 2005.

7. Conclusions

1. In his *Matter of Interpretation*, Scalia explains not so much *how* courts should interpret law but *why* they should interpret it the way that he proposes, i.e., the way of textualism and semantic originalism as its specific instance. Accordingly, he works considerably and apparently at a meta-theoretical level.

2. Scalia's main goal and ideological and critical program at the meta-theoretical level is to isolate courts from the process of lawmaking. This is done by the critical attack on the judicial lawmaking in common-law tradition and the doctrine of *stare decisis* as its fundamental prerequisite.

3. Historically, the doctrine of *stare decisis* is not what is intrinsic to common-law tradition. It is the product of positivisation and, this way, a fundamental change of this tradition in the 18th–19th centuries. Accordingly, common law, with which Scalia deals, is transformed/unauthentic and the main exponent of that is *stare decisis* itself. In this context, Scalia's critical program could be understood as a certain elucidation of *stare decisis* as being an unsuccessful tool to adapt common-law tradition to the democratic and positivistic environment—in such an environment it (i.e., *stare decisis*) really makes no sense; but on two conditions: if (1) democratic legislator is perfect and (2) if it retains all legislative power in itself.

4. As those two conditions *in reality* are not satisfied, courts cannot escape taking part in the lawmaking process. Scalia's focus on the doctrine of *stare decisis* in this context allows to discern two rather different legislative strategies in contemporary governmental structure. The first strategy represents the regular and also the dynamic mode of legislation corresponding to H. L. A. Hart's logic of the rules of change and exercised mainly by the legislative branch of government. However, in the second instance, the application of the principle of *stare decisis* in the development of jurisprudence leads to the strong inertial/conservative mechanism in the totality of the legislative process. This way, courts could be understood not only as “playing king” but as “playing a bigger king” or even “playing God” (i.e., when creating eternity clauses in constitutional jurisprudence).

5. The advocacy of such a “kingly/Godly” role of judiciary through the principles of the equality before law and legitimate expectations is weak as they become valid only after law is created. Thus, they govern the application of law, but not its creation.

6. On the other hand, *stare decisis* could be justified as the political habit of order exercised by judges with the aim to defend against the contingencies of the majoritarian will and, this way, stabilise the fundamental values and principles of society.

7. Finally, Scalia's approach is condemned to remain controversial if we would remain at a purely theoretical level where the oscillation between two main rivals of legal philosophy—*juspositivism* and *jusnaturalism*—appears to be constant. Being pro-democrat and, this way, criticizing common law, Scalia is pro-positivist; but occasionally accepting pro-liberal justification of a special role of a judiciary, Scalia is pro-naturalist. In order to reconcile those domains and, thus, rehabilitate Scalia's *Matter of Interpretation* we should leave the domain of the theoretical/pure reason and step into that of practical/ethical one in Kant's terms.

8. The hierarchy of the three principles/rules should lay the foundation of the meta-theory (or meta-ethics) of the role of the judiciary in contemporary government. The dictatorship of democracy should institute the general landscape of validity as a matter of the most basic—third-level—rule. It should be the main platform to implement Scalia's pro-democratic program. At the level of the second rule, we should find the human rights and the general framework of government as regulated by a regular contemporary constitution of a democratic regime. Finally, at the level of the third rule, we should find the most fundamental legal/ethical principles of society worthy of becoming eternity clauses in constitutional jurisprudence. Going from the second- to the third-level implementation of a pro-liberal program should gradually intensify.

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