Legality and Equity in Judicial Activity

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Abstract

The article tries to answer a very important problem faced by legal practitioners of all times, namely the problem of the relationship between equity and law. The perspective of a judge on this aspect is complemented by that of prestigious authors who have reflected on the most appropriate way of applying the law. In the article they are analyzed two major currents of interpretation of legal norms, which are still facing each other in the theory of law, namely textualism and purposivism, the first current claiming that the interpretation of the legal norms must be done exclusively on the basis of the text of the law, and the second that the legislator's intention or purpose must also be taken into account. It is also emphasized the risk that, through the interpretation of the law, judges will impose their views on state policy. Only equity can protect us from this risk, because it prevents arbitrariness.

Keywords: *judge; law; equity; interpretation; textualism; purposivism*.

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1. Introduction

During the Second World War a woman in Nazi Germany, to get rid of her husband, reported to the authorities that when he came home on leave from the army, he said several insulting words about Hitler. Since the laws in force at the time considered it a serious crime to make statements against the leadership of the Nazi state, the husband of the informer was arrested and sentenced to death under these laws. He was, however, not executed; instead he was sent to the front. After the fall of the Nazi regime in 1949, the woman was tried and convicted by a German court for committing the crime of unlawful deprivation of liberty (*rechtswidrige Freiheitsberaubung*). The court dismissed the woman's defense that her husband had been convicted by a court under a valid law, on the grounds that that law 'was contrary to common sense and sense of justice present in all decent human beings'.

Disagreeing with such a rationale, based on natural law, Professor H.L.A. Hart of Oxford University points out that the solution of convicting the woman on the basis of a later law, which applied retroactively, would have been preferable, because 'Odious

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as retrospective criminal legislation and punishment may be, to have pursued it openly, in this case, would at least have had the merits of candor. It would have been made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.'[2]

Expressing his disagreement with this point of view, Professor Lon L. Fuller[3] of Harvard University believes that in the case of the informer the decision of the German courts was correctly based on the fact that German law, which was the basis of her husband's conviction, did not constitute a valid right because 'a dictatorship which clothes itself with the tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system'.[4]

This controversy between the two great professors of law is eloquent in illustrating the essential question of the scope of the law and the answers given under this aspect by two great currents of thought that have crystallized over time: one which considers that the right is limited only to the law in force (the positivist school) and the other that claims that, in addition to the law, it also includes a series of perennial values, such as equity (the natural law school).

Serious studies have been done on 'Love and Human Rights'[5] or with regard to 'The politics of informality in criminal procedures'[6], which tries to analyze and train on important issues related to the consequences of law enforcement. It is generally accepted that 'the lack of education, training, and retraining may precipitate deadly circumstances for a routine law enforcement function'.[7]

But one of the most important problems that those who have dealt with the application of the law faced since there has been justice was how court decisions are perceived in society. The questions they asked themselves regarding the application of the law were generally related to the fairness of the judgments rendered, among the most frequent questions being the following: Does the court decision constitute the fairest application of the law to the facts subject to judgment? Does it represent an act of justice? How should the judge proceed if the applicable law is susceptible to multiple interpretations or when applying it in a certain sense would lead to an unjust act? Who determines the just or unjust nature of a court decision, and how do they do it?

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[2] Hart, Herbert Lionel Adolphus. "Positivism and the Separation of Law and Morality" *Harvard Law Review* Vol. 71 No. 4 (1958): 137–165.

[3] Fuller, Lon L. "Positivism and Fidelity to Law – A Reply to Professor Hart", *Harvard Law Review* Vol. 71 No. 4 (1958): 630–672.

[4] Ibid.: 660.

[5] Douglas, Benedict. "Love and Human Rights", *Oxford Journal of Legal Studies* Vol. 43, No. 2 (2023): 273–297, https://doi.org/10.1093/ojls/gqac034.

[6] Brodersen, Kei Hannah, Capus, Nadja, and Rosset, Damian. "The politics of informality in criminal procedures", *International Journal of Law, Crime and Justice* Vol. 74 (2023): 1. https://doi.org/10.1016/j.ijlcj.2023.100612.

[7] Rippy, Michelle, and Jackson Summer. "Education, (re)training, and traffic stops: Felonious law enforcement officer deaths in the United States", *International Journal of Law, Crime and Justice* 74 (2023): 1, https://doi.org/10.1016/j.ijlcj.2023.100618.

2. Justice and equity

Regarding the *factual situation* retained by the court, in order for the court decision to constitute an act of justice, it is necessary to have evidence based on which the conclusion is established as close as possible to reality. No matter how right the judge is, if there is no evidence or if the evidence is distorted, the pronounced decision will not be the right one. There is also the possibility that the same factual situation is appreciated by one as a mitigating circumstance, and by others as an aggravating circumstance. For example, it has been shown that 'Men depicted as frequent drinkers may be viewed as most blameworthy for their violence, even when intoxicated. This is significant, as this defense may be used in a court of law as an attempt to alleviate guilt from a person who has been accused of an assault.'[8] Of course, the importance of the case of the factual situation analyzed is also relevant. People, in general, and judges, in particular, 'were less susceptible to misleading information about the central details than about the peripheral details'[9].

However, for a fair application of the legal rule to the factual situation determined based on the evidence, the judge must have the ability *to interpret the law in the fairest possible way*. So, the matter of fairness in judicial activity is mainly related to this second aspect, regarding the interpretation and application of the legal rule to a factual situation determined by the evidence that could be administered, because modern justice works on the basis of written laws. The existence or absence of evidence to prove a certain factual situation also has a random element, which does not depend on the judge, while the interpretation of the law is the essential attribute of the court, being the most important instrument through which the act of justice is accomplished. As stated in the doctrine, interpretation is a link between the rule of law and equity (principle *aequitas*), being necessary to take into account the constantly changing requirements of life (*inter aequitatem et jus interposita interpretatio*).[10]

Equity and law have been talked about since ancient times when it was generally considered that the law is not limited to what the law provides. Aristotle claims that 'just is what is legal and what corresponds to equality, unjust is what is illegal and what is contrary to equality'[11], thus emphasizing that law is not limited only to what is in accordance with the law, but also that, in addition to this condition, the requirement of equity must also be met.

Because the relationship between the concepts of *justice* and *equity* is not very clear, and it is necessary to specify how they will be used in the future, it is essential to refer to the most important follower of Aristotle's thinking in the Middle Ages, namely Thomas Aquinas. The advantages and disadvantages mentioned by Thomas Aquinas on

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[8] Ross, Jody M., and Davis, Jedidiah. "Alcohol, gender, and violence: Factors influencing blame for partner aggression", *Behavioral Sciences & the Law*, Vol. 41 (2–3) (2023): 41–54. https://doi.org/10.1002/bsl.2604.

[9] O'Donnell, Rachel, and Chan, Jason C. K. "Does blatantly contradictory information reduce the misinformation effect? A Registered Report replication of Loftus (1979)", *Legal and Criminological Psychology* (2023): 4. https://doi.org/10.1111/lcrp.12242.

[10] Szabo, Imre. *Interpretarea normelor juridice*, Translated by George Bianu, Bucharest, 1964: 13.

[11] Aristotle. *Etica nicomahică*, Translated by Traian Brăileanu, Bucharest, 2007:96.

the matter of whether or not equity (*epiekeia*) is part of justice was exposed in his reference work Summa theologica[12]. He distinguishes between the narrow meaning and the broad meaning of the concept of justice and considers that if legal justice is seen as the letter of the law, equity (*epieikeia*) is not part of it, and if it is seen as the intention of the legislator 'which is stronger than the letter of the law', then equity (*epieikeia*) 'is the strongest part of justice'.[13] Therefore, whether or not equity can be considered a part of justice depends on the meaning we attribute to this latter concept, which can be limited to the letter of the law only or can be extended by also taking into account the intention or purpose of the legislator.

As will be shown below, these understandings of the notion of justice correspond to the two major currents of interpretation of legal norms, which are still facing each other in the theory of law, namely *textualism* and *purposivism*, the first current claiming that the interpretation of the legal norms must be done exclusively on the basis of the text of the law, and the second that the legislator's intention or purpose must also be taken into account. It should also be emphasized that the legislator's intention or purpose can only be the adoption of fair solutions for the members of society, in different parts of social life.

In the law of the European Union, it was proposed to adopt the theories from the constitutional law regarding the interpretation of the law, as they could help in a better understanding of the European norms. Referring to four theories about the law, in constitutional law, it was stated that 'his identification of four theories of law, positivism, idealism, culturalism, and pragmatism, which differ in their assumptions about how the law is operationalized, is particularly helpful in advancing understanding of legal theory as it pertains to the EU'.[14]

Although there are mentioned here four theories regarding the interpretation of the law, we consider their division into the two great theories previously mentioned – textualism and intentionalism (purposivism) – to be clearer.

3. Justice and utilitarianism

The most enlightened minds of mankind asked themselves questions about the relationship between equity and law, the clarification of this aspect being essential for the good organization of human activities and coexistence in society. In this regard, different systems of thought were conceived, through which an attempt was made to establish the dominant principle in the application of the law. Some thinkers considered that the most important aspect of the application of the law is the *consequence* that the judicial decision has and that a fair application of the law is that which produces a beneficial result for most people (*utilitarianism*). In this vision, the act of justice does not constitute an end in itself, but it aims to achieve another more important goal, such as social peace, without which it would be very difficult to conceive of coexistence between people.

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[12] Aquinas, Thomas. *Summa Theologica*, Vol. 3, Translated by Daniel Coman, Iasi, 2009:817–819.
[13] Ibid: 819.
[14] Craig, Paul, and de Búrca, Gráinne. *The Evolution of EU Law*, Oxford, 2021:3.

On the contrary, others have argued that *justice* is a purpose in itself, an implacable social reaction to the injustice produced by a previous unjust act and that its realization need not take into account the consequences. In this vision, justice is no longer linked to the achievement of another goal (e.g. social peace or others) but constitutes a law of nature that demands to be fulfilled even if there were no longer any person to perceive its fulfillment (*fiat justice, pereat mundus*).

These two currents were not born by chance in legal thought, but they overlapped over certain conceptions about the world and life. Thus, we can identify in the second vision – of justice as a value in itself – a conception of the world and universe in which they were seen as being composed according to a *principle of order*, and the act of injustice constitutes a disturbance of this original order. It is the view that has dominated most of human history, beginning with ancient polytheistic societies and continuing with monotheistic societies – Christian and Muslim – that identified justice with an attribute of divinity. With the secularization of human society – starting with the Age of Enlightenment – justice was no longer linked to a divine, supernatural presence, but was seen as a product of reason, useful for the social organization of people. The one who commits an act of injustice is no longer seen as someone who violates a divinity or an immutable order of the universe, but as a social parasite who must be removed because he disturbs social peace and the normal conduct of social activities.

Although from a metaphysical point of view the latter vision represents a descent of man from the pedestal of the master of the universe ('crown of creation') on which he sat, it has the practical role of promoting the idea of applying the law exclusively according to the purpose of the good organizations of human activity in society. But, like any demystification, it can also leave a feeling of emptiness in its wake, which risks being filled with other 'myths', some with particularly dangerous consequences for humanity (as were the myths of the superiority of a race or a social class). In addition, if justice no longer represents a value in itself, which has its root beyond the physical world, there is a risk that mankind will no longer want to make an effort to search for it and bring it to light. If all, judicial activity is strictly reduced to the achievement of a utilitarian goal – ensuring the good conduct of human activities in society – it is possible to remain unsanctioned for acts of injustice for which no one was injured or complained.

The two visions of justice presented above also facing each other on the more concrete ground of the *interpretation of the law*. Adherents of an idealistic vision of justice, namely those who are not content to consider that it represents a simple utilitarian act that ensures the development of human activities in society, generally believe that in the interpretation of the law the judge must take equity into account. For them, the law is not strictly limited to the written text, elaborated by the legislator (the letter of the law), but it is always supplemented with the value of equity so that the concrete application of the law should be made to achieve this permanent desire that equity represents. Adherents of the utilitarian vision of justice generally believe that the law represents only the text of the normative act, and in its application, the judge cannot be guided by other abstract and unclear concepts, such as justice or equity. From the

utilitarian point of view, the only aspect pursued in judicial activity is the best possible organization of the activities carried out by people in society, according to the rules that the people establish – through the laws adopted by their representatives.

When they have to interpret a difficult text from a legal norm, the judges who believe that the purpose of the law prevails, and not the literal meaning of the words in the text, will give priority to a more equitable solution, considering that this is the will of the legislator. For this, they will seek to identify this will of the legislator from the history of the respective law and the context of its adoption, appealing to a hypothetical, 'reasonable member of Congress': 'The judge will ask how this person (real or fictional), aware of the statute's language, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case.'[15]

The most important criticism brought by textualists against those who consider the law to be a living instrument – which evolves and must be interpreted in accordance with current social realities – is that, although they claim to only interpret the law, in reality, they modify it without having any competence in this regard. The existence of a possible delegation from the legislator to the judges is thus denied, to interpret the law evolutionarily, appealing to the spiritual nature of the law. It was stated that 'the legislative power is the power to make laws, not the power to make legislators. It is nondelegable.'[16] Consistent with this point of view it can be said that 'the proclamation of a principle of law, even if it concerns a jurisdiction based on principles or general provisions, still remains a formal interpretation and not a normative act, as the judge announces rather than imposes the law'.[17]

The risk of a subjective interpretation on the part of the judge exists in the case of any method of interpretation, both in the case of followers of interpretivism or purposivism (perhaps more often) and in the case of an interpretation based on the textualist method. Such a trap can only be avoided through an adequate statement of reasons, in which the judge explains his reasoning. As stated, 'The judge's need to write an opinion explaining his or her reasons for concluding helps guard against misinterpretation.'[18] Just as with witnesses, judges who had provided more detail in their decisions were also considered to be more credible, that is, more *objective* and *honest*[19]. However, it should not be forgotten that 'negative life events are experienced and expressed differently in different cultures, and that these influences how events are remembered and disclosed'[20]. For this reason, 'Future studies may include different

[15] Breyer, Stephen. *Interpreting Our Democratic Constitution*, New York, 2005:88.
[16] Scalia, Antonin. *A Matter of Interpretation*, Princeton, 1997:35.
[17] Shcherbanyuk, Oksana, Gordieiev, Vitalii, and Bzova, Laura. "Legal nature of the principle of legal certainty as a component element of the rule of law", *Juridical Tribune – Tribuna Juridica*, Vol. 13, Issue 1, March (2023): 22. DOI: 10.24818/TBJ/2023/13/1.02.
[18] Breyer, Stephen. *Making Our democracy Work. A Judge's View*, New York, 2010:101.
[19] Chlevickaite, Gabriele. "What matters for assessing insider witnesses? Results of an experimental vignette study", *The International Journal of Evidence & Proof*, Vol. 27(3) (2023): 202, DOI: 10.1177/13657127231178071.
[20] Vredeveldt, Annelies, Given-Wilson, Zoe, and Memon, Amina. "Culture, trauma, and memory in investigative interviews", *Psychology, Crime & Law* (2023): 14. DOI: 10.1080/1068316X.2023.2209262.

criminal cases – not only hate crime – to observe and interpret the knowledge terrain of criminal justice in different countries and societies. Similar events may be interpreted widely differently and be subjected to different treatments in the criminal justice system, which is a field worth exploring further.'[21]

Of course, this exposure of the two great points of view, embraced by the main schools of thought in the theory of law, is greatly simplified, and in any simplification, there is the risk of a distorted perception of the ideas presented. The currents and nuances presented in the literature are much more numerous and complex, but a thorough approach to them would go far beyond the scope of this endeavor, only a few ideas are necessary to establish the general framework of the debates on the activity of judges. It is currently said that 'we can move beyond approaches to the study of politics that focus on formal institutions of government (old institutionalism) and develop a more nuanced and sociologically informed view of institutions and their effects on society'[22]. Also, in certain areas of interpretation, there is now discussion about a 'principle of uniformity' which 'reinforces the need to promote convergence in interpretation, as this is the main objective given the diversity of national legal regimes'[23]. But such aspects require a separate approach, exceeding the scope of this article.

4. Equity and the law

Legal practitioners could argue that they do not identify any of the above-mentioned problems in the actual application of the law since no court decision makes explicit reference to any of these philosophical currents. Indeed, we would rarely find a reference in a court decision to any of these ideas, but this does not exclude their existence in the minds of judges or those who apply and interpret the law in concrete cases. How else could one explain differences of opinion about how the law should be interpreted in different situations? Judges and other legal practitioners know that differences of opinion are extremely numerous in practice and this difference in interpretation of the law cannot always be explained only by the difficulty of establishing the proper meaning of certain terms used in the norm.

On the contrary, there are many different interpretations in situations where the terms used in a certain legal text are clear enough, but there are other principles of law or other applicable legal texts, which would lead to contrary solutions if considered. Or, in such situations, the judge must establish a priority of one or another of the principles or texts involved in a case, and this can sometimes only be achieved by adopting one of the previous visions related to law and justice. A judge inclined towards the idealistic

[21] Solhjell, Randi. "How acts become hate crime: The police's documenting of criminal cases", *International Journal of Law, Crime and Justice* 72 (2023): 9, https://doi.org/10.1016/j.ijlcj.2022.100574

[22] Coaffee, Jon. "Discipline, morality and the façade of localism in action: The war on terror and the regulation of UK community resilience", *International Journal of Law, Crime and Justice* 72 (2023): 1. https://doi.org/10.1016/j.ijlcj.2019.100372

[23] Mimoso, Maria João, de Azevedo, Liz Corrêa. "The need for a harmonious interpretation of the rules applicable to international contracts", *Juridical Tribune – Tribuna Juridica*, Vol. 12, Issue 1 (March 2022): 71. DOI: 10.24818/TBJ/2022/12/1.05.

view of justice will seek to make a rather equitable decision, while another inclined towards the textualist view will try to abide as much as possible by the letter of the law, leaving unexplored the possible unfair consequence of the solution. Each of the two views of law enforcement is susceptible to criticism, and a theory that meets unanimity from this point of view has not yet been developed.

For example, in the case of the crime of rape, the intervention of the legislator was necessary in many countries to clarify all situations of lack of consent of the victim. Thus, it was emphasized that 'the discarding of proof of victim resistance and the explicit condition that without consent intercourse becomes illegal bring Cypriot legislation in line with legislation of other states that are considered to have adopted victim-centred approaches (i.e. England and Wales, Belgium, Denmark, Greece, Ireland, Luxembourg and Spain)'[24].

Most problems arise especially when it comes to the interpretation and application of the law in difficult cases (hard cases) or in new situations, in which the way of interpreting the text of the law has not been defined. But a possible reevaluation of a fixed way of interpreting and applying the law is not excluded when certain nuances of the case require the adoption of contrary solutions. This is also the explanation why our legislation allows the invocation of new exceptions of unconstitutionality regarding legal texts whose constitutionality was ascertained by previous decisions of the Constitutional Court of Romania. Even if the unconstitutionality of the text of the law would be invoked by reference to the same text of the Constitution that was previously examined, depending on the particularities of each case, the Constitutional Court of Romania may decide that the text of the law previously declared to be in accordance with the constitutional principles is unconstitutional in relative to the new arguments presented before it.

The explanation for the jurisprudential reversal of any court, which decides to adopt a different interpretation at a given moment of a legal text, is the same, leaving the impression of an arbitrary attitude. As it seems, just like in any science, also in the case of the science of law, the path that leads to finding out the truth (regarding the correct meaning of the law) is not a linear one, but a winding one, which sometimes involves returning to previously stated theses.

Trying to solve these inconsistencies in judicial practice through a coherent theory, the representatives of contemporary legal thought moved the discussion to the field of the relationship between law and morality. Some authors included in the broad category of positivists believe that law has no connection with morality, their vision is influenced by the strong momentum that natural sciences had in the 17th-19th centuries, based exclusively on empirical data. If these sciences claimed that there is nothing in the universe apart from what can be measured and analyzed with human senses or with technical means, even the science of law could no longer support the existence of other concepts apart from those resulting from the text of the law, limiting themselves exclusively to their analysis. It is not difficult to notice that the proponents of legal

[24] Constantinou, Angelo. "The exposition of rape in Cyprus: From the crime scene to the court room", *The International Journal of Evidence & Proof* Vol. 27(3) (2023): 184. DOI: 10.1177/13657127231179284.

positivism come from the ranks of utilitarian thinkers, the two currents mostly identifying themselves in terms of the essential features of the law and the way of its application.

Other authors, generally included in the broad category of jusnaturalists (followers of the existence of natural law, in addition to the positive law that resides in legislation), believe that the positive law must be subordinated to eternal and universally valid principles, which are of a moral nature and have priority over written law.

Some authors tried to reconcile the two currents, considering that natural law must intervene only when the written law is unclear or incomplete. Thus, a French jurist who contributed essentially to the codification of civil law believes that 'If there is a lack of law, custom or equity must be consulted. Equity is the return to natural law, in the silence, opposition or obscurity of positive laws.'[25] Although it seems a more balanced position, it does not solve the problem of priority between law and equity, in cases where the two would come into conflict.

For positivists, the quintessence of law is *the order* of the sovereign – whether he is a monarch or a parliament consisting of representatives of the people – while jus naturalists consider that law (order) exists in nature (just like physical laws), and the ultimate source of normative acts constitutes the natural right. The main stake of the distinction between the two ways of relating the right to morality is that in the case of positivists no derogation from the letter of the law is allowed in principle, while jusnaturalists believe that a law should not be applied if it contravened natural law norms (which are also moral norms).

One of the leading contemporary proponents of judicial positivism was Professor H.L.A. Hart, who believes that 'there must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out'.

Therefore, according to his theory, in the normative texts, the meaning of the general terms used by the legislator presents an undisputed core, which is easily identifiable, and the problems of interpretation appear only in terms of their *open texture*, where the meaning is no longer so easy to determine. For example, in the case of a law that prohibits the access of vehicles to a park, the meaning of the term 'vehicle' has an indisputable core – which includes the categories of cars, motorcycles, etc. – but it also has a periphery open texture – which is no longer so clear if the question of applying this ban to bicycles, police vehicles or ambulances arise.

Professor H.L.A. Hart claims that the appeal to morality is never needed to apply the law in cases where the meaning of the terms used by the legislator is not very clear (called by him, *'problems of the penumbra'*), because in reality in such situations the judge has only to find that the norm is incomplete and to solve the cases rationally, taking into account the social objectives 'We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims.'[26]

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[25] Portalis, Jean-Étienne-Marie, *Discours préliminaire du premier projet de Code civil* (1801) [Online] at https://mafr.fr/IMG/pdf/discours_1er_code_civil.pdf , accessed September 1, 2022.

[26] Hart, Herbert Lionel Adolphus. "Positivism and the Separation of Law and Morality," *Harvard Law Review* Vol. 71 No. 4 (1958): 137–165.

In a famous quote given to this author, Professor Lon L. Fuller[27], from Harvard University, shows that law contains its own implicit morality: 'Law, considered merely as order, contains, then, its own implicit morality,' which obviously didn't meet the Nazi laws. At the same time, it shows that law cannot be based on law, as an external morality is needed, which makes the law possible. 'There is a twofold sense in which it is true that law cannot be built on law. First of all, the authority to make law must be supported by moral attitudes that accord to it the competence it claims. Here we are dealing with morality external to law, which makes the law possible.'[28]

Regarding the doctrine of Professor H. L. A. Hart regarding the interpretation based on the 'core and the penumbra' of the meaning of the words that the legislator uses in the content of the law, Professor Lon L. Fuller shows that it is difficult to support this theory because it wrongly assumes that problems of interpretation are limited only to the meaning of individual words: 'The most obvious defect of his theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words.'[29]

On the contrary, the American professor claims that in the case of laws we must usually assign a meaning, not just to an isolated word, but to a sentence, a paragraph, or a whole page or even more of a text ('Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of the text.'[30]), being always necessary to identify the scope of the rule for its correct application. The positivist's fear of the teleological interpretation of the law and legal institutions and the fact that this would lead to excesses can be removed by the fact that any norm has a structural integrity. However, this structural integrity is what allows and sometimes even requires the judge to have a creative role in the application of the rule, but at the same time does not let him go beyond that structure: 'Within the limits of that structure, fidelity to law not only permits but demands a creative role from the judge but beyond that structure it does not permit him to go.'[31]

5. Equity and judicial activity

As can be seen, none of the two theories presented above excludes the creative role of the judge in difficult cases – insufficiently or contradictory regulated – even if they are in diametrically opposite positions regarding the relationship between equity and law. Legal positivism, supported by Professor H.L.A. Hart, believes that the judge must establish the incomplete nature of the rule and make an interpretation and application of it taking into account the 'social objectives' of the rule, and the followers of natural law, including Professor Lon L. Fuller, who believes that the judge does this by appealing to the 'implicit morality' of the rule.

The question of whether the judge creates law in difficult cases or merely

[27] Fuller, Lon L. "Positivism and Fidelity to Law", *Harvard Law Review,* Vol. 71 No. 4 (1958): 630–672.
[28] Ibid: 645.
[29] Ibid: 662
[30] Ibid: 663
[31] Ibid: 670

discovers it in existing rules and principles has also elicited different answers, depending on the theory adopted by those who have tried to give the answer. Positivists considered it obvious that if they must solve a question of law that is not explicitly regulated in legislation, judges create law because they have to solve the case. On the contrary, the followers of the natural law theory believe that the law is not limited to positive norms, but also includes a series of principles – which are the basis of the norms in force and complement them – and in insufficiently governed cases the judge only determines the applicable norm.

The American professor Ronald Dworkin uses to designate the latter term *'interpretivists'* (which he puts in opposition to the *'positivists'*) and claims that according to them 'When positivists claim a gap in the existing law, there is in fact only a space waiting to be filled by interpreting the announced rules to discover what the principles that justify those announced rules would recommend in the new case.'[32]

Interpretivism has been criticized by one of the most famous textualists at the Supreme Court of the United States of America, who believes that it is based on an equivocal use of the term' construction': 'Modern nontextualism is based in part on an equivocal use of the word construction, which is the noun corresponding to construe. When construing a statute, one engages in statutory construction, which has long been used interchangeably with the phrase statutory interpretation. […] Oddly enough, though, the noun construction answers both to construe (meaning "to interpret") and to construct (meaning "to build")'.[33]

Regarding the justification of the coercion that the state applies to individuals through the law, Professor Ronald Dworkin shows in the same claim that it is based on the *dignity of the individual*, which, according to a thesis, assumes that people are properly warned about this coercion (meaning the law that regulates coercion to be clear and previously published), and after another thesis that all those who are subject to a coercive regime are equal before the law in a profound sense. 'The first thesis is that once democracy is in place and human rights are respected dignity demands only fair warning of when the government will interfere in people's affairs… The second is that dignity makes a further demand: it demands what I will call egalitarian integrity. That is that all those subject to coercive dominion are equal before the law in a deep sense.'[34]

The application of state coercion is justified, therefore, either by *correctly warning* the citizens beforehand about the legal consequences of their actions – thesis close to legal positivism – either by ensuring their *deep equality* before the law – thesis close to natural law, which emphasizes more on the principle of equity. In both theses, judges cannot limit themselves to the application of legal texts, but in the case of the concept of fair warning, 'Judges must have discretion, even in a supposed code system, because codes cannot anticipate everything' and 'on the egalitarian view, supposedly

[32] Dworkin, Ronald. *The Rule of Law as a practical concept*, Transcript of speech delivered at Lancaster House, London, United Kingdom (March 2012): 5 [Online] at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL%282013%29016-e accessed 29 September 29, 2022.

[33] Scalia, Antonin, and Garner, Bryan A., *Reading Law: The Interpretation of Legal Texts*, St. Paul, 2012:13.

[34] Dworkin, Ronald. *The Rule of Law as a practical concept*: 9.

novel decisions are justified if they correct arbitrary rules or distinctions that cannot be justified in principle.'[35]

An indisputable necessity for the judge to decide in all cases follows from the above, regardless of whether or not there is a clear rule that regulates the situations in the cases he has to resolve. The Romanian Civil Code of 1864, which was closer to legal positivism than to natural law theory, explicitly expressed itself in this sense, providing in article 3 that 'the judge who will refuse to judge, under the word that the law does not provide, or that it is dark or insufficient, could be prosecuted as guilty of denial of justice'. We find in this the same idea of the followers of legal positivism, according to which the judge must decide on all cases, even if there is no explicit norm regulating the situation subject to judgment because legislation in the force cannot regulate everything. However, it is unclear whether the judge creates the right with this one occasion or identifies the right in a pre-existing norm – even if this is not explicit – and applies this one norm to the respective factual situation.

The main enemy of *equity* in judicial activity is people's differing inner convictions regarding it. For example, one successful litigator, before he became an authority on negotiating settlements, reportedly reflected, 'Sometimes I failed to convince the judge that my client should win, but I never failed to convince myself."[36] The problem is that, most likely, opposing parties think the same.

Also, equity in law enforcement could not be separated from social equity: "Judges and magistrates are often criticised for failing to take sufficient account of social factors such as poverty, social deprivation and victimisation when sentencing offenders. The implication is that the sentencing practices of the courts lack an important social dimension – that of 'social justice'; namely, the perception that the state's punishment of offending behaviour is fair and non-discriminatory. "[37] However, this is another, much more complex topic, which could be addressed separately.

6. Conclusions

Following the brief review of these concepts, the problem of the lack of an objective criterion based on which the judges can decide in such difficult cases, located in the "penumbra" of the concepts used by the legislator or which are insufficiently regulated in the rules, remained unclear.

Such a criterion could not even be identified, regardless of whether we were in the position of positivists or followers of natural law (interpretivists), because the life situations subject to judgment are so varied that they could not be contained in a single norm. A viable solution is for the judge to try every time to interpret and apply the law

[35] Ibid: 10.

[36] Jeklic, Mihael A. "Can you trust your lawyer's call? Legal advisers exhibit myside bias resistant to debiasing interventions", *Journal of Empirical Legal Studies,* Vol. 20 (2) (2023): 409–433. https://doi.org/10.1111/jels.12350.

[37] Henham, Ralph. "Re-thinking notions of evidence and proof for sentencing: Towards a more communitarian model", *The International Journal of Evidence & Proof* Vol. 27(3) (2023): 211. https://orcid.org/0000-0002-5631-0214.

in the fairest possible way and to justify the decision in such a way as to convince as many people as possible of the justice of the decision. That is why it will be impossible to remove the suspicions of arbitrariness brought to the judges by those who will not agree with the solutions pronounced, considering the subjectivity that characterizes the human being. However, no objective limits of equity can be drawn, but it must be followed by the judge in each case in which he finds that two or more principles or rules of law are in conflict, establishing which principle must prevail.

The European Court of Human Rights often uses the concept of equity in judicial activity, even if it does not explicitly present it as a concept of natural law, superior to positive law. Thus, the European Court has emphasized many times the importance of appearances in the administration of justice, ruling that it is necessary to ensure that "equity is visible". However, the Court specified that the perspective of the interested parties alone does not play a decisive role, as it is necessary in order to find a violation of the Convention that the apprehensions of the litigants regarding the fairness of the procedure can be considered as objectively justified (*Kraska v. Switzerland*, point 32).[38] It follows from this that equity is not a purely subjective concept, to be appreciated by each party according to its perception, but one based on "objectively justified" elements.

We live in an era – called by some postmodern, by other post-truth – in which aspects that until recently were considered immutable truths are discussed. This makes the activity of judges more and more difficult, which, due to the way the state is organized, requires the delivery of decisions that presume the truth. Given the current sensitivities and people increasingly low tolerance for arbitrariness, perhaps the system of appeals should be rethought, to ensure as effective a mechanism as possible to verify the fairness of the given solutions. One solution could be to call for a responsible community given that fair judgment is largely confused with common sense and judgment.

Or, as the philosopher René Descartes begins his work on the method by which one can reach the truth, "Of everything that exists in the world, common sense is the one that is equally distributed to all…"[39]. Therefore, the operation of the system of courts with juries was justified in many states for a long time, which was able to properly ensure the acceptance of the solution by the community, since it essentially represents a judgment of common sense. It remains to be examined whether this solution is still viable in the postmodern era, given that "The notion of common sense may lend itself to the idea of informality, and that is lauded as a strength of the courts, although it is challenged by the growth of virtual court proceedings."[40]

We must be aware of the fact that there is a risk that, through the interpretation of the law, judges will impose their views on state policy. Only equity can protect us

[38] European Court of Human Rights. *Guide on Article 6 of the European Convention on Human Rights* (2022): 50 [Online] at https://www.echr.coe.int/documents/guide_art_6_eng.pdf, accessed September 1, 2022.
[39] Descartes, René, *Discurs asupra metodei*, Translated by Cr. Totoescu, Bucharest, 2012:6.
[40] Welsh, Lucy. "Informality in magistrates' courts as a barrier to participation", *International Journal of Law, Crime and Justice*, Vol. 74 (2023): 9. https://doi.org/10.1016/j.ijlcj.2023.100606.

from this risk because it prevents arbitrariness. Equity only comes together with the caution (gr. *sophrosyne*) of the judge, who must always bear in mind that one of the purposes of the law is to make justice reign. However, "the statement of the purpose of the law is to cause justice to reign is not rigorously accurate. It ought to be stated that the purpose of the law is to prevent injustice from reigning."[41]

Returning to the case of the female informant, presented at the beginning of the article, it could be argued that equity is what also determined Professor H.L.A. Hart – a follower of legal positivism – to accept the "lesser evil" of the retroactivity of law based on which she should be condemned for her actions. The denunciation of her husband to the Nazi authorities, with the intention of causing him to be sentenced to death by the application of the deeply unjust legislation in force at the time, was considered a violation of a more important norm than the law in force at the time. Otherwise, the derogation in this case from the principle that constitutes the very essence of judicial positivism – the principle of legality – could not be justified.

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[41] Bastiat, Frédéric, *The Law*, London,1998:43.

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