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Statutory Interpretation and the Rule of Law in Ireland

PhD

2014

Cathal Curran

School of Law, Trinity College Dublin

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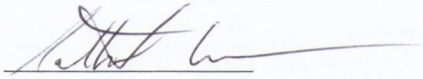

Cathal Curran

Date: 30/4/14

Summary

This PhD thesis addresses the theory that the default preference for literal interpretation in the statutory context instantiates a formal conception of the rule of law. This claim is reflected in the Irish constitutional framework, which centres on the law making role of the legislature and envisages a restrictive interpretative role of the courts in light of this. The theory holds that in their reticence to depart from the literal rule judges comply with the rule of law, ensuring both non-arbitrariness in adjudication and the predictability of law by channeling the literal implications of statutory texts and not their own biases or values. I will argue that this claim cannot be substantiated. This will be based on an analysis of a number of key issues to the interpretative theory outlined. These include a rejection of the claim that the constitutional framework requires literal interpretation, and the suggestion that interpretative practice is, in reality, constructive in nature. Central to this argument will be an analysis of the rule of law ideal itself - what the ideal means and what is necessary for its existence in a legal system. The thesis will engage with contemporary academic debate on the ideal to identify a conception of the rule of law that is both discrete and analytically useful, and which can be applied to the statutory context. Thereafter the constitutional foundations of statutory interpretation will be examined, as will the core precepts denoted by that constitutional structure. This analysis will direct the criticisms which follow. Central to this critical analysis will be an examination of the literal rule itself, and how departures from literalism are rationalised under the prevailing theory. The thesis will claim that, contrary to the prevailing doctrine, purposive interpretation acts as the default interpretative mechanism of the courts. In order to demonstrate this claim the thesis will inspect a number of "borderline" cases of the High and Supreme Courts, which will concentrate on the central precepts of the interpretative doctrine previously identified. The reality of interpretative practice in the courts will verify the weaknesses observed in the prevailing account of statutory interpretation and underline the claim that statutory purpose is central to the articulation of statutory meaning. The thesis will also engage with academic debate on interpretative practice in adjudication. This analysis will propose a more sophisticated account of interpretation than that offered under the prevailing theory, with the central claim being that statutory interpretation proceeds along purposive or constructive lines, and is necessarily creative in nature. However, the potential for arbitrariness is limited by the resort to the intention or aims of the statute. It will be argued that this account of interpretative practice is a more compelling account of interpretative practice than the literalist conception of interpretation posited under doctrine. Finally, an attempt will be made to reconcile this non-literal conception of interpretation with the conception of the rule of law favoured at the outset of the thesis. The conclusion will be that instantiating a non-substantive account of the rule of law is impossible in light of the vagaries of interpretation, but by ensuring that interpretation is text reflective limits are placed on interpretative discretion and arbitrariness, orientating our interpretative practices towards such a conception of the ideal.

Acknowledgments

I have no doubt that without the patience and advice of my supervisor Dr Oran Doyle this thesis would not have been realised. I am extremely grateful to him for all of his time, guidance and encouragement throughout my doctoral study. His insights provided the impetus for many of the analytical arguments proposed in this thesis. I am also indebted to him for impressing upon me the idea that PhD study involved more than the writing of this thesis. From the beginning of my PhD Dr Doyle's advice gave me the confidence to pursue teaching duties and various other activities I became involved in at my time at the Law School.

I wish to thank the Director of Postgraduate Teaching and Learning Professor Neville Cox. His rigorous examination of the ideas in this thesis during my confirmation process was appreciated and very helpful. Also, in my second year I experienced financial strain which threatened my continuation on the PhD register. Both Dr Doyle and Professor Cox advised me to persevere and I am very grateful to them and the Law School for recommending me for a Trinity College Dublin Postgraduate Studentship. I am also grateful to the Law School and Arthur Cox for awarding me the Arthur Cox Teaching Fellowship for the Legislation and Statutory Regulation module, which helped flesh out much of the practical ideas in this thesis. In this regard I would like to thank Professor Yvonne Scannell for encouraging me to engage and discuss some of the ideas raised in my research with her students as part of my teaching responsibilities for her course. I also wish to thank Dr David Prendergast for the help and friendship he has extended to me throughout my stay in the Law School. He was always on hand to offer good advice and ideas whenever I needed them, which was often.

I have presented papers on research conducted for this thesis at workshops held in the Law School. 'Dworkin's Substantive Conception of the Rule of Law' was presented at an Irish Jurisprudence Society workshop, 26 May, 2011. The ideas discussed in this workshop developed many of the arguments presented in chapters 1 and 6. 'Statutory Interpretation and the Rule of Law Ideal', a presentation for the Postgraduate Lunchtime Seminar at the Law School, 21 March, 2012, outlined one of the core claims in the thesis, the tension between the ideal and the interpretative practice of the courts, informing chapters 3 and 4. 'Very Fine Lines: Statutory Interpretation and the Role of Literalism and Purpose' a paper presented at the Trinity College Dublin Constitutional Law and Policy Group, 14 June, 2012, considered many of the criticisms of the prevailing approach to statutory interpretation, and informed chapters 2, 3 and aspects of chapter 5. I am very grateful to those who both attended and offered insights and advice at these presentations. I found the critique and commentary of the participants very helpful, contributing massively to many aspects of this thesis. In particular, I wish to thank Donal Coffey, Eoin Daly, David Prendergast, John O'Dowd, Garret Barden, David Kenny, John Kenny, Brian Flanagan, Brian O'Beirne, Oran Doyle, Andrea Mulligan, Aislinn Luceroni, Alan Brady, Estelle Feldman and Yvonne Scannell.

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Introduction

The phrase "the rule of law" is synonymous with the notion that the state and officials of the state should be subject to the law. While the ideal has evolved significantly, the core of the rule of law lies in the notion that states should aspire to governing by rules and not through the arbitrary whim of men. Indeed, a wide range of ideas have been subsumed within the ideal, but the organising principle remains, and is reflected in Lord Acton's classic statement that "power tends to corrupt, and absolute power corrupts absolutely." It is widely accepted that these complementary ideas speak to the notion that government and government officials should play an active part in instantiating the rule of law in legal systems by ensuring the clarity and predictability of law. Implied in this is the idea that legal rules are applied transparently. Yet, it is inevitable that there are areas of law which necessarily pull against this organising principle. One such example is the irreconcilable tension that exists between these "rule of law" features and the judicial function. In saying that there is a necessary tension between the rule of law and the interpretative role of the judge, it would be naïve to suggest that the courts must interpret in a mechanical fashion. However, the fact that judges must interpret the law necessarily cuts against the central theme of the ideal that it is the law, and not the man, that must rule.

The nature of our legal system, particularly in light of our constitution, presupposes that there will be areas or conflicts of law that are not easily determinable, or which might not be legislated for. As such, the rule of law is ill-suited to constitutional or common law legal systems, where the courts are routinely required to make law in settling legal disputes. The unenumerated rights jurisprudence of the Irish courts is one such example. Yet, while it is implausible to argue that a legal system such as ours is capable of complying with the rule of law in every last detail, there are particular aspects of the legal system which suggest a suitable application of rule of law theory. A notable illustration is in the area of statutory interpretation. Unlike constitutional interpretation, which tends to involve vague concepts and a degree of judicial activism as a matter of course, the area of statutory interpretation is said to situate the role of judge as a conduit, applying

statutory meaning already determined by the legislature in its constitutional role as supreme law-making authority. Thus, in contrast to the area of constitutional law, where judges are acknowledged to be making law, statutory interpretation is said to cleave closer to the rule of law ideal as rules are promulgated in advance and are applied clearly. This application of the rule of law implies a rule-bound conception of the ideal that is central to this thesis.

In Ireland, there is an established theory of statutory interpretation commonly espoused by judges and canonical academic texts such as *Byrne and McCutcheon on the Irish Legal System* and David Dodd's *Statutory Interpretation in Ireland* which warrants being called the "prevailing theory" of statutory interpretation. The prevailing theory holds that the room for judicial activism is restricted due to the premium placed on the literal interpretation of clear statutory language. The legal certainty guaranteed in routine instances of statutory interpretation is said to aid rule of law compliance. Under the prevailing doctrine judges must show deference to the intentions of the legislature by applying the literal implications of the statutory text, and are not permitted to engage in policy making through activist or creative interpretation. In situations where the statutory text is unclear, ambiguous or absurd, the courts must engage in a purposive interpretation of the statute as a means of finding what the legislature intended the statute in question to achieve. This requires the courts to consider the statutory text as a whole; that is, the courts must consider the unclear, ambiguous or absurd statutory language in the context of the statutory text itself and apply the intention of the legislature in light of such a reading. This theory of statutory interpretation not only communicates an interpretatively formal conception of the judicial function, but underlines the core rule of law values outlined above, ensuring that it is the prerogative of the law making legislature and not the judge in question that is applied. In essence, the law and not the judge rules through an insistence on literal interpretation and legislative supremacy.

The thesis will analyse this discrete application of the rule of law ideal in the Irish context. It is proposed that conceiving the rule of law as a matter of limited application preserves the values inherent in the ideal, and for this reason the application of a limited conception of the rule of law to the field of statutory

interpretation warrants discussion. Yet, as noted, there is an irreconcilable tension housed in the relationship between the interpretative duty of the judge under the prevailing doctrine and his ability to formally comply with or instantiate rule of law principles. In the most significant case on the issue, *Derek Crilly v T. & J. Farrington Ltd*[1], Murray J adverted to this tension, underlining the dangers that legislating from the bench has for the rule of law in any legal system:

> The interpretation of legal texts such as statutes has presented problems from the earliest times to the present day. Plato urges that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. These two anecdotes simply highlight the historical tension which still exists between the search for the *'true intent'* of a statute and legal certainty. That such tensions should persist to the present day is not surprising when one considers ... first there is the law, then there is interpretation. Then interpretation is the law. This simplified reference to the judicial process emphasises that when courts apply a statute the interpretation which they give it has ultimate authority.[2]

The endeavour to guarantee the formal interpretation of statutory language under the prevailing doctrine is not difficult to understand in light of Murray J's statement above. The prevailing theory of statutory interpretation thus locates the requirement of literal interpretation and judicial modesty as central to rule of law compliance. While this thesis will show that the formal conception of the rule of law identified under the prevailing doctrine is a correct application of the ideal on its own terms, the central argument lies in the analysis of the interpretative theory required under that formal conception of the ideal. The conclusions drawn in this thesis will rest on whether the inevitability of judicial interpretation entirely reduces the notion of rule of law compliance.

The argument

This PhD thesis will propose three inter-related arguments:

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[1] [2002] 1 I.L.R.M. 161.

[2] Murray J in *Derek Crilly v T. & J. Farrington Ltd* [2002] 1 I.L.R.M. 161, at 184.

1) the formal conception of the rule of law, purportedly instantiated in the routine statutory interpretations of the Irish judiciary, is the only analytically discrete conception of the rule of law ideal but is ultimately unattainable,

2) the prevailing theory of statutory interpretation in the Irish context cannot work on its own terms, as it misrepresents the actual practice of the courts in the attempt to instantiate the conception of the rule of law in question, and

3) the default interpretative approach of the Irish courts is purposive as opposed to literal.

The first claim represents both an affirmation of the restricted application of the rule of law proposed in accounts of the ideal by Lon Fuller and Joseph Raz, and, correlatively, a rejection of the all-encompassing conception of the ideal proposed by Ronald Dworkin. The second claim relates to an analysis of the core tenets of the prevailing doctrine of statutory interpretation, from the default interpretative position afforded to the literal rule, to the rationalisation of departures from literalism under the prevailing doctrine. The third claim is a necessary conclusion which arises on foot of the second claim, which fundamentally alters our understanding of the processes of statutory interpretation in the Irish context. The thesis will also claim that the basic judicial activism involved in any instance of statutory interpretation dilutes the claim that statutory interpretation instantiates "the rule of law", thus addresses the fears outlined by Murray J above. I will attempt to tackle the tension housed in the notion that the rule of law requires the law to exist in clear and predictable terms with the reality that judges have some creative licence in their interpretative capacity.

When the term "the rule of law" is discussed people invariably have different ideas about what the phrase means. This clouds our understanding of an already vague concept. It has been the aim of this research to find whether the rule of law has a discrete application, or whether it has been reduced to a fashionable phrase bandied about by politicians and economists in the discussion of issues that, more appropriately, could be filed under the labels "governance" or "human rights". Thus, in the attempt to prevent the rule of law from becoming a jurisprudential curio it will be situated at the forefront of this tension between the

authority and legitimacy of law and the necessarily creative nature of the judicial interpretative lens. I will argue that we should not have to alter our conception of what the rule of law is in order to ensure its viability in light of the nature of interpretation, but also contend that we should not mislead ourselves about interpretation out of a need to feel better about questions of legitimacy and the authority of law.

Admittedly, it is claimed the rule of law has innumerable applications and there is an abundance of standpoints from which to engage in an analysis of the ideal; as it is relevant to discussions concerning theories of democracy, the separation of powers, the burgeoning administrative state and even human rights issues. However, this thesis proposes that the conception I prefer is reflected in the prevailing theory of statutory interpretation and that the present analysis of rule of law theory in an Irish context is deserving of concentrated research.

Outline

The thesis consists of an application of legal and interpretative theory to practice. In order to substantiate the three inter-related claims above it combines an analysis of legal and interpretative theory with an examination of the assumed interpretative approach of the superior Irish courts in the statutory context. Yet the thesis also scrutinises that interpretative approach in practice, with the twin aims of finding whether the assumed approach is correct, and whether legal and interpretative theory can shed any light on the practice if is not.

Chapters 1 and 2 are intertwined, insofar as the interpretative approach of the Irish courts in the area of statutory interpretation is identified as a constitutional justification for the conception of the rule of law chosen in chapter 1. This, in turn, informs the interpretative scheme outlined in Chapter 2. Chapter 3 analyses the foundational precepts of the constitutionally mandated interpretative approach outlined in chapter 2, criticising these in turn, and proposes an alternative view of the prevailing theory. Chapter 4 analyses a range of cases of the Irish superior courts, pinpointing the inaccuracies of the interpretative approach outlined in chapter 2, and rationalises interpretative decisions in light of the criticisms in chapter 3. Chapter 5 engages a number of interpretative theories in the attempt to

offer a more sophisticated theoretical account of the interpretative practice than that offered under the prevailing account. Chapter 6 considers whether the interpretative account posited on foot of the analysis of both theory and practice is reconcilable with the non-substantive conception of the rule of law identified in chapter 1.

Chapter 1 is split into four main themes. The first theme concerns the vague nature and historical context of the rule of law and discusses the evolution of the ideal in light of these issues. The historical analysis of the rule of law serves as a context in which to view the ideal in its contemporary manifestations, underlining the dichotomised its nature. This provides the focus of the other themes in the chapter. The second theme concerns a discussion of non-substantive conceptions of the rule of law and why I regard them as the most effective conception of the ideal. This considers a range of non-substantive accounts and hinges on the claim that legal clarity, stability and predictability are core rule of law values, and that a conception of the ideal must focus on these principles if it is to communicate a working theory of the ideal. This notion of the rule of law is restrictive in its conceptualisation of the judicial role in its orientation towards these principles. This leads to a consideration of the third theme, the competing substantive conceptions of the rule of law, which claim that the rule of law must have an effect on the content of the law, and that the judicial role cannot be conceptualised as restricted in the effectuation of this substantive content. I reject these claims because the conceptions proffered on foot of them dilute the essential aspects of the rule of law. The last theme considers whether in order for the rule of law to be at all realisable, legal rules must be conceptualised formally, or whether rules are necessarily elastic and allow must engage active judicial involvement.

Chapter 2 proceeds on foot of a postscript as to the constitutional value of the rule of law in chapter 1. It consists of two themes. The first concerns the application of the non-substantive conception of the rule of law favoured in Chapter 1 to the area of statutory interpretation, the constitutional foundations of which are premised on such an understanding of the rule of law. This entails a description of the underlying precepts of the prevailing account of statutory interpretation; the default position of the literal rule, the relationship between literalism and intent,

and how the effectuation of this relationship in routine instances of statutory interpretation promotes legislative supremacy and the separation of powers, and consequently instantiates a non-substantive conception of the rule of law. The second theme relates to the underlying postulates of the interpretative scheme presupposed under this constitutional framework. This entails a discussion of the operation of the literal rule and how it effectuates legislative intent. The prevailing theory assumes an interpretatively formal state of affairs, implying that courts apply statutory meaning in abstraction from the resort to any external indicators of meaning. The interpretative duty of the courts in instances where statutes are incapable of evincing literal meaning will also be considered; outlining the respective roles of purposive interpretation and the interpretative criteria. The systematic approach to interpretation proffered under this account is taken to act as a presumptive instantiation of the rule of law as it purports to comprehensively insulate judges from engaging in arbitrary forms of interpretation. Chapter 2 also ends with a postscript, in which I outline some tentative objections to this theory, prior to engaging in a substantive critique of the prevailing approach in chapter 3.

In Chapter 3 I reject this prevailing account of statutory interpretation. In revisiting the constitutional foundations outlined in Chapter 2, I argue that these are merely received wisdoms and, critiquing these in turn, show that they obscure a necessarily creative picture of interpretation. I begin by rejecting the isolationist account of literal interpretation outlined under the prevailing theory. This centres on the notion that the prevailing rationalisation of how courts depart from literal interpretations essentially negates that very concept of literalism. Using hypothetical examples to analyse the non literal, text oriented, tests of uncertainty, ambiguity and absurdity it is shown that purposivism lies at the root of statutory interpretation. Indeed, the absurdity doctrine proves that the courts must have regard to statutory purpose in order to formulate the interpretations they regard as "literal" under the prevailing account. This leads to two intertwined submissions. First, that statutory purpose and a consideration of the context of the case are the default interpretative position of the court, and second, given its status as the end of statutory interpretation, statutory purpose and legislative intent are intertwined. This necessarily entails that the prevailing theory is incorrect in the inter-

relationship it assumes between literalism and intent. Finally, Chapter 3 contests the notion that the interpretative criteria are compulsory interpretative devices in formulating statutory meaning. It is claimed that, given the underlying resort to purposive interpretation in considering the context of the case and the consequences of the application of the statute, such criteria are implicitly considered to the extent that they are relevant.

Chapter 4 continues the themes explored in chapters 2 and 3. It begins with an analysis of the literal rule as applied in practice in order to show that the prevailing account of the literal rule is incorrect in the interpretative formality that it presupposes. The rationalisation of the literal approach offered in Chapter 3 proposes that the courts in practice operate on much less restrictive terms than. Rather, in analysing the "classic statement" of the literal rule in practice, the thesis shows that the courts are far more purpose oriented than is presented in theory. Chapter 4 then proceeds to analyse interpretation in light of the tests of unclear, ambiguous and absurd statutory language. Applying the criticisms of the prevailing theory in Chapter 3 to these tests, it is shown that the courts do not interpret solely in reference to the text as context in the absence of clear statutory meaning. This entails analysing the reasoning processes of the judiciary in particular instances to illustrate how, in each occasion they consider the application of the statute in abstraction and the likely consequences of such in determining legislative intent. This analysis, and a consideration of the absurdity doctrine in practice, belies the notion that the courts are insulated from discretionary or activist forms of interpretation.

Chapter 4 then analyses the role of purpose as the default interpretative mechanism, examining how the courts routinely defer to statutory purpose in arriving at the meaning of presumptively clear statutory language, and the nature of the purposive "approach". In line with chapter 3, it is suggested that purposive interpretation and legislative intent are oriented towards each other, the former operating at a level of generality, whereas the latter assists the courts in applying this general statutory purpose to the statutory text. The final section of Chapter 4 deals with the interpretative criteria in practice. This outlines how the interpretative criteria are routinely referred to in practice but rarely, if ever, discussed at length by

the courts. The claim in Chapter 3 that the criteria cannot act as interpretative determinants is examined in the context of conflicting judicial interpretations of the same statutory provision. Along with this analysis, a discussion of the landmark case which considered the role of the interpretative criteria in the Irish context appropriately illustrates their passivity.

Chapter 5 engages in an analysis of a range of interpretative theories in order to propose an alternative theoretical exposition of the interpretative practice than offered under the prevailing account. It beings with a rejection of literalist and originalist conceptions of objective meaning, the notion of meaning implied in the default resort to literalism and objective intent under the prevailing theory. It is proposed that interpretation and the articulation of meaning imply a co-dependent relationship between the interpreter and the text, and that the interpreter necessarily produces meaning at some level. This is rationalised in light of the relationship between text and reader and the role of context in this relationship. Gadamer's hermeneutic theory is used to illustrate that the text plays a fundamental role in guiding interpretation, but meaning is ultimately conditioned by the context in which the reader and the text exist. A brief consideration of the nature and role of context in interpretation follows this. Yet, in light of the balance between contextual, creative interpretation evinced in the decisions of the court in Chapter 4, I argue that textual restraint is a feature of the Irish interpretative practice. Chapter 5 then engages in an analysis of number of theories which point to the constraining role of the text in interpretation. This considers whether rules of legal procedure and practice are capable of objectifying interpretations so as to attenuate concerns over arbitrariness and relativism in interpretation.

However, in illustrating that none of these theories is a satisfactory approximation to the Irish experience, Chapter 5 considers the role of purposive interpretation in the constructive theory of Ronald Dworkin. This analysis is necessary given the claim in this thesis that purposive interpretation is a defining feature of the Irish approach to statutory interpretation and considers the defining features of Dworkin's theory that to interpret law is to impose purpose on it. While this discussion highlights the salient aspects of Dworkin's theory in considering whether constructive interpretation is an accurate account of the Irish practice, it is

argued that the interpretative licence proposed by Dworkin is too activist in its approach, and that to propose constructive interpretation as an accurate account of the Irish practice would be incorrect, as it does not assign any import to the text in the articulation of legal meaning. This leads Chapter 5 to a discussion of intentionalist theories of interpretation, notably that proposed by Joseph Raz. I argue that the text-oriented drive of intentionalism offers a good account of the Irish practice, but that the underlying resort to purpose evinced through the thesis calls for a hybrid between the constructivist and intentionalist approaches - a creative interpretative approach that is grounded in imposing purpose on the text, but which resorts to an intentional reading of it, as a means of attributing significance to what is set out in the text.

Chapter 6 asks whether it is possible to resolve the creative position that the thesis takes on interpretation with the non-substantive conception of the rule of law outlined in Chapter 1. The first consideration is whether statutory interpretation is ultimately inconsistent with the non-substantive conception of the rule of law. This necessitates finding whether the account of interpretation arrived at in Chapter 5 must be altered, given that the creative lens envisaged therein is utterly irreconcilable with the rule of law. However, this is rejected, as the interpretative theory posited in Chapter 5 offers a more compelling account of interpretative practice than that envisaged under the prevailing theory. Thus, to "literalise" our interpretative practice would be tantamount to negating the work done in this thesis in proposing an alternative account of statutory interpretation. This leaves two options, both of which are considered. Either we alter the ideal to fit interpretative practice, or we accept that the non-substantive conception of the rule of law is immiscible with an activist conception of the judicial function. In considering both of these alternatives, I argue that the second is the lesser evil. This requires a brief recapitulation of the arguments against substantive conceptions outlined in chapter 1 and a consideration of the notion that, even though our interpretative practice might not be perfectly rule of law compliant, we can at least aspire to orientate our interpretative practice towards the values inherent in the non-substantive conception of the rule of law.

Chapter 1 The Rule of Law

1.1 Preliminary Note

At the heart of this thesis lies a discussion as to the nature of the rule of law; what it aspires to achieve, what it achieves in fact, and what is necessary for the ideal to be instantiated in a legal system at all. This chapter will elaborate on these issues by outlining a number of debates on the rule of law ideal. Indeed, if I am to substantiate my initial claim that the Irish approach to statutory interpretation purports to uphold a particular conception of the rule of law, it is necessary to consider that conception, and alternative conceptions of the ideal, in some detail.

My analysis will initially broach the relative indeterminacy that surrounds the phrase, which has become ubiquitous in jurisprudential and general legal commentary in recent years. Thereafter, the first point of departure will be to convey a brief intellectual history of the ideal, offering a context in which contemporary notions of the ideal are to be conceptualised. This historical discussion will centre on the aims of the ideal, and how various interpretations of the rule of law emphasise different aspects of the ideal in its application. I will also consider whether these different emphases impute an inexplicable tension at the core of the ideal.

Secondly, I will consider competing conceptions of the rule of law. This will centre on a discussion of the distinction between what I call non-substantive and substantive conceptions of the ideal. I will argue that the focus on structure and clarity under non-substantive conceptions is necessary if we are to identify a discrete conception of the ideal, as the principle based focus of substantive conceptions dilutes the form of the ideal - the notions of predictability, clarity and stability that are renowned rule of law values.

Thirdly, I will argue that in order for the non-substantive conception of rule of law to prove workable (and, ultimately applicable to an area of law like statutory interpretation) we must conceive adjudication in the main as the application of clearly drafted legal rules. However, I will also show that principled adjudication,

as illustrated by "hard cases" while not rule bound can at least be rule of law compliant, insofar as such adjudication is not manifestly arbitrary.

Fourthly, I will briefly consider whether the tensions at the centre of the ideal make it unattainable. Finally, I will show the way in which the rule of law is identified as a constitutional principle in the Irish legal system. This will establish a necessary context from which I will proceed to analyse whether the non-substantive conception of the rule of law is instantiated in the interpretative practices of the Irish courts.

1.2 A Conceptually Elusive Ideal

The rule of law is a politico-legal ideal that has its roots in ancient Greek political philosophy. There are a range of requirements essential to rule of law compliance in a legal system - among them the ideas that laws cannot be retrospective, that they must be public, that they must be general in scope, and that there must be an element of stability to the law.[3] As a necessary corollary, these requirements demand that the application of law remains faithful to the rule or text in question, in order to ensure the predictability of law. This framework is said to insulate law from arbitrary State interference, as it is claimed that governments cannot act beyond their legal remit in instances where the law is clear.[4]

It has been suggested that in order to understand the scope of the rule of law it must be conceived as a "historical-institutional" concept.[5] That is, having evolved historically the ideal has corresponded to changes in the nature of and relationship between legal institutions, and should be interpreted in that context. It is claimed that the term "the rule of law" bears a "general normative meaning"[6] and

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[3] A range of theorists have outlined what contemporary rule of law compliance entails, and what characteristics of a legal system constitute the rule of law. For example, Lon L. Fuller in *The Morality of Law*, John Rawls in *A Theory of Justice*, John Finnis in *Natural Law and Natural Rights*, Joseph Raz in *The Authority of Law* and Ronald Dworkin in *A Matter of Principle*.

[4] For a thorough presentation of the historical context and a theoretical overview of the rule of law see generally: Brian Z. Tamanaha, *On The Rule of Law: History, Politics Theory*, (Cambridge University Press 2004).

[5] Gianluigi Palombella, 'The Rule of Law and its Core', in Gianluigi Palombella and Neil Walker eds, *Relocating the Rule of Law* (Hart Publishing 2009) at 17.

[6] This "general normative meaning" is a core point of discussion as to the nature of the concept. There is significant debate as to whether the rule of law is an ideal that has wide-ranging ideological value, or whether its uses and value is less universal, but valuable nonetheless. This debate will be discussed at length below.

discussion of the ideal should not be extricated from this historical institutional basis from which the concept has evolved[7], as the rule of law is to be regarded as something of value. This normative characteristic is said to enshrine a moral quality in legal systems which instantiate the ideal, such that the values inherent in the rule of law become part of the fabric of law itself.[8] Even at this vague conceptual level, the rule of law reveals incompatible schemata as between the goals of ensuring justice and focusing on the clarity of law. This complicates matters when discussing the aim of the ideal, given that, generally, clarity and predictability in law must be sacrificed to a degree where the goal of ensuring justice in the individual case is the ultimate end of legal systems.

Jeremy Waldron has described the rule of law both as a "contestable concept"[9] and a "theatre of debate"[10]. Those labels are appropriate, given that the key rule of law features have, over time, evolved quite significantly. There is a strong historical link between the rule of law and the political theory of liberalism, indeed, the phrase "a government of laws and not of men", ascribed to John Locke, has become synonymous with the ideal. [11] Yet the historical foundations of the rule of law are quite general in nature and cannot be reduced to one principal factor; rather, it is something which has developed incrementally. Thus, the ideal evades unqualified definition and refers to "a cluster of ideas", including among other things the principle of legality and the administration of justice.[12] Twining has noted that the ideal has "attracted so many shades of meaning... that it is doubtful

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[7] Palombella, *Relocating the Rule of Law*, at 17. Andrei Marmor, however, has noted that conceptualising the rule of law as a an overall normative ideal presents the danger that it must as a result be necessarily oriented towards the good, which is not necessarily the case. See, Andrei Marmor, 'The Ideal of the Rule of Law' available at http://lawweb.usc.edu/users/amarmor/documents/RuleofLawBlackwell_1_.pdf, last accessed (7/05/13).

[8] Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, (5th Ed, Bloomsbury Professional, Dublin, 2009), at 25.

[9] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.

[10] Jeremy Waldron, "The Rule of Law as a Theatre of Debate", in Christine Burley (ed), *Dworkin and His Critics*, , (Blackwell Publishing, 2004).

[11] See also Aristotle, *Nicomachean Etihcs*, Ch VI 1134a23 - b8. Raz has suggested that this link has been of no use analytically, serving only to give effect to a tautologous conception of the ideal, see Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law*, (Oxford University Press, 1979) at 211.

[12] Luc B. Tremblay, *The Rule of Law, Justice, and Interpretation*, (McGill-Queen's University Press, 1997), at 23.

whether it has much coherence or analytical significance."[13] Indeed, it has been suggested that, despite the fact that the ideal remains "an exceedingly elusive notion", most people seem to be in favour of it - even if there is no universal agreement as to what the rule of law amounts to or stands for.[14]

This conceptual indeterminacy mystifies the notion of rule of law compliance, infusing the subject with many unresolved, if not potentially unresolvable, questions. These range from debates as to the nature and authority of legal 'rules' within the scheme of the ideal,[15] tensions between the aims and the requirements of the ideal and democratic legitimacy[16] - particularly in light of what might be termed "activist" judicial interpretations - and observations concerning those occupying positions of state power and the limitations on that power in light of the supremacy of law.[17]

Within these preliminary remarks are conflicting notions as to the purpose of the ideal and the values it represents. Central to this conflict is the incompatibility of the rule-bound nature of positive law with claims that indistinct, general principles are inherent in the ideal. For example, it has been proposed that the rule of law is directed at ensuring fidelity to the rules of legal systems and defines such as rules *per se*.[18] However, others claim that the doctrine guarantees the fundamental and political rights of citizens and is intrinsic to modern liberal democratic states.[19] At the centre of this debate lies one of the underlying predicaments of legal philosophy: whether we conceive of the law as simply a government of rules, or whether it necessitates morality and substantive justice. It is these observations which prove central to the theme of this thesis - if the rule of law is universally acclaimed, but a nebulous concept nonetheless, is there something of a legal myth at play?

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[13] William Twining, *General Jurisprudence, Understanding Law from a Global Perspective*, (Cambridge University Press, 2009) at 333.
[14] Tamanaha, *On The Rule of Law: History, Politics Theory*, at 3.
[15] Frederick Schauer, 'Rules and the Rule of Law', (1991) 14 Harvard Journal of Law & Public Policy, at 652.
[16] Margaret Jane Radin, 'Reconsidering the Rule of Law', (1989) 69 Boston University Law Review, at 804 -805.
[17] Tamanaha, *On The Rule of Law: History, Politics Theory*, at 9-10.
[18] Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law*, (Oxford, 1979) at 212 - 214.
[19] Ronald Dworkin, 'Political Judges and the Rule of Law', in *A Matter of Principle*, (Harvard University Press, Cambridge, Mass, 1985).

In order to analyse the tension between these competing claims it will be necessary first to map some of the ideas which contributed to the rise of the rule of law as a cornerstone of modern statism. An exhaustive historiography of the ideal is beyond the scope of this thesis; therefore, I will select only a small cross-section of influential writings on the subject.

1.2.1 A Brief Intellectual History

In ancient Greece the supremacy of law guaranteed under democratic principles was said to protect the law from the capricious interference of statesmen.[20] The idea of the separateness of law, based on the inherent connection between law and reason, enshrined within the ideal the requirement that laws and not men must rule in order for there to be a just state.[21] This established a particular model of government by rule, notionally reducing the potential for a tyrannical state or sovereign if it was subject to the same rules as the citizenry.[22] Aristotle may well have coined the phrase, writing that "the rule of law ... is preferable to that of any individual".[23] Plato, while not explicitly mentioning the term "the rule of law", stressed the necessity for law to prove authoritative in respect of those controlling state power, discerning something that would become a central tenet of the ideal:

> Where the law is subject to some other authority and has none of its own, the collapse of the state ... is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state. [24]

Classicist ideas such as these provided the foundations for what would become the stand-alone doctrine of the rule of law. Aside from the basic notion that law must be sovereign, or at the very least amount to a substantive limitation on the powers of the sovereign, a significant aspect in the evolution of the concept of the rule of law was the link between the ideal and the political theory of liberalism. The tri-partite

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[20] Tamanaha, *On The Rule of Law: History, Politics, Theory*, at 7.
[21] Aristotle, *Nichomachean Ethics*, 1134 a23-b8 (translated by David Ross, Lesley Brown, (Oxford World Classics, revised edition, 2009).
[22] Tamanaha, *On The Rule of Law: History, Politics, Theory*, at 7-8.
[23] Aristotle, *The Politics*, 1287a17-20, translated by Trevor Saunders and T.A. Sinclair (Penguin Classics, 1981).
[24] Plato, *The Laws*, IV (715d), translated by Trevor Saunders (Penguin Classics, 1970) at 174.

separation of powers theory is considered a seminal component of the rule of law.[25] In setting out this prerequisite in *Spirit of Laws*, Montesquieu's separation of the legislative, executive and judicial arms of government was prescient in underlining the significance of the interpretative aspect of law under rule of law theory, given Voltaire's apposite, if not cynical, analysis that to interpret laws is almost always to corrupt them[26]:

> ...there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined to the legislative, the life and liberty of the subject would be subject to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[27]

This framework identifies the rule of law as a political ideal attainable by fettered government institutions - a central theme of the rule of law as envisaged in modern commentary. While the restricted judicial function conceived under the separation of powers was an influential component of rule of law theory, other classical writings are as influential, in terms of the application of rule of law theory to the law itself. The writings of John Locke, in particular, proved significant in shaping the ideal. One of Locke's central theses was the declaration that States must not act illegally - denoting that the State must operate in accordance with, and maintain strict fidelity to legal rules:

> Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, and tie themselves up

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[25] This trait can be observed almost universally in scholarship which traces the historical origins of the rule of law. Despite Carolan's recent argument that observing such a tri-partite conception of the separation of powers in legal systems is implausible given the proliferation of the modern administrative state, I will continue with this classic conception of separation of powers theory. See generally, Eoin Carolan, *The New Separation of Powers*, (Oxford University Press, 2009).

[26] Jean-Louis Halperin, 'Legal Interpretation in France Under the Reign of Louis XVI', in Yatsutomo Morigiwa, Michael Stolleis, and Jean-Louis Halperin eds, *Interpretation of Law in the Age of Enlightenment: From Rule of King to Rule of Law*, (Springer, New York, 2011) at 28.

[27] Baron de Montesquieu, *The Spirit of Laws*, J.V. Pritchard ed, vol.1, (Bell and Sons, London, 1878) (Book XI, s.6) at 163.

> under, were it not to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet.[28]

Thus, for Locke, compliance with identifiable legal rules was the most effective means of avoiding an unjust sovereign and Hobbes' dystopian 'war of each against all' - the inevitable consequences of the state of nature. In this context, then, the rule of law – historically at least –manifested a considerable political quality, addressing concerns as to the just or unjust nature of a given State and the relationship between institutional structure and the maintenance or control of state power. However, Locke's observations as to the necessity of 'settled standing laws' introduced concerns as to the form of the law itself to interpretations of the ideal and proved immensely influential in terms of the evolution of the rule of law.

English jurist A.V. Dicey's formulation of the rule of law as a discrete legal doctrine is regarded as a *locus classicus* of the phrase.[29] In *Introduction to the Study of the Law of the Constitution*, Dicey outlined three requirements necessary for the rule of law to exist, namely that (1) no person can be punished except for a breach of law or in accordance with law; (2) every person is equal before the law; and (3) the rule of law is a product of the decisions of the ordinary courts.[30] It has been asserted that these conditions further underlined the strict relationship between the rule of law and the separation of powers[31], as governments were said to be answerable for the arbitrary exercise of any form of State power.[32]

However, the conceptual make-up of the ideal is not attributable to these few historical examples. There have been other formulations of the rule of law in continental political philosophy; for example, under the German *Rechsstaat* and *l'Etat du Droit* in France. Indeed, there are purported links between the ideal and historical canons concerning the rights of man, such as chapters 39 and 40 of Magna

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[28] John Locke, "Of the Extent of the Legislative Power", in Peter Laslett ed, *Two Treatises of Government*, (Cambridge University Press, 1988) at 337.
[29] Michael Neumann, *The Rule of Law, Politicising Ethics*, (Ashgate, 2002) at 1.
[30] AV Dicey, *Introduction to the Study of the Law of the Constitution*, (Liberty Fund, Indianapolis, 1982) at 110-116.
[31] Morton J Horwitz, 'Legal Realism, The Bureaucratic State, and The Rule of Law', in *The Transformation of American Law 1870-1960, The Crisis of Legal Orthodoxy*, (Oxford University Press, 1992) at 225-226.
[32] Paul R. Verkuil, 'Separation of Powers, Rule of Law and the Idea of Independence, (1989-1990) 30 William and Mary Law Review, at 303, cited in David Gwynn Morgan, *The Separation of Powers in the Irish Constitution*, (Round Hall Sweet & Maxwell, 1997).

Carta 1215 - the rights of liberty and justice - and the doctrine of *habeas corpus*.[33] It is also claimed that the values asserted as inherent in the ideal permeate many politically significant enactments throughout the course of western history. This is said to include even such recent instruments as The Universal Declaration of Human Rights and, as such, has infused the rule of law with overarching substantive aims.[34]

Notwithstanding these latter claims, however, it has been suggested that to conceptualise the ideal as to indelibly link it with "the Good" is to dilute the analytical uses of the ideal, it being only one of a number of values that are present in any legal system and not a supervening value as such.[35] This is a notable bone of contention in divergent modern rule of law scholarship, yet it will suffice to note provisionally that, since its inception, there have been a wide range of competing claims as to what comprises the rule of law, what the ideal stands for, and what it aspires to. Friedrich Hayek's conception of the ideal in *The Road to Serfdom*[36] argued that the rule of law represented the desirability of a fixed system of legal rules in protecting individual freedom. This conception provides an essential backdrop to instrumental or "non-substantive" conceptions of the rule of law which focus on fidelity to law, by highlighting the importance of legal officials following and applying rules of law clearly; as opposed "substantive" conceptions which focus on the justice and fairness of decision making - both of which will be the focal point of later sections.

For Hayek a legal system in compliance with the rule of law allowed for foresight of the limits of legal activity, enabling citizens to plan their lives according to a distinct line between the private sphere and state interference.[37] This was necessary to Hayek's conception of political liberalism - emphasising the connection between the rule of law and the political and economic ideals of *laissez faire* individualism, locating the "inexorable logic" of the rule of law in its commitment

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[33] Tom Bingham, *The Rule of Law*, (Allen Lane, 2010) at 10-33.
[34] Ibid at 33, see also Aristotle, *Nicomanchean Etics*, 1134a23-b8.
[35] Raz, *The Authority of Law*, at 223.
[36] FA Hayek, *The Road to Serfdom*, (London: G. Routledge & Sons, 1944).
[37] TRS Allan, *Constitutional Justice*, (Oxford University Press, New York, 2001) at 15.

to the non-arbitrariness of the State.[38] Horwitz describes the Hayekian theory of the law as that of the liberalist, non-interventionist state, identified by a system of general rules applied by an impartial judiciary - a rule-bound conception of the rule of law.[39] However, Hayek's theory fails to account for the dissonance in an account of a system of general, formal, rules that are to be applied evenly in a state seeking to give effect to substantive justice.[40] This criticism of non-substantive conceptions is a common motif in most substantive conceptions of the ideal and will be considered at length in later sections of this chapter.

In light of this brief account of the foundations of the ideal, it is clear that there has been a long standing, historically situated debate as to the exact nature of the ideal. Indeed, questions as to whether the rule of law speaks to the formal structure of rules and legal systems, or whether it concerns substantive justice under those legal systems have filtered through to modern commentary. Thus, throughout its history we are able to identify a dichotomous conceptualisation of the rule of law, both notions representing plausible applications of the ideal. This discrepancy is important, as it allows us to identify the theoretical bases of conceptions of rule of law that we recognise in contemporary debate on the subject. [41] However, this conceptual indeterminacy has to be analysed if we are to apply the rule of law to concrete practices in our legal system.

1.3 Competing Conceptions of the Rule of Law

As alluded to above, modern academic debate on ideal can, somewhat crudely, be dissected along "non-substantive" and "substantive" lines. Much of the discussion agrees somewhat generally in relation to the form of the ideal. However, there is considerable discord as to whether the rule of law is an ideal that entails merely form, or whether its form necessarily entails substance. As noted, this discussion

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[38] Morton J Horwitz, *The Transformation of American Law 1870-1960, The Crisis of Legal Orthodoxy*, at 229.
[39] Ibid.
[40] Ibid.
[41] A pertinent example of this dualist conceptualisation of the rule of law, and real life instantiations of both rigidly non-substantive and substantive conceptions of the ideal in one country is modern day South Africa, in both Apartheid and Post-Apartheid legal systems. For a discussion of the rule of law in this context see generally, David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth Reconciliation and the Apartheid Legal Order*, (Hart Publishing, 2003) and David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South Africa in the Perspective of Legal Philosophy*, (2nd Ed, Oxford University Press, 2006).

has resulted in a dichotomous conceptualisation of the ideal. Thus, the rule of law manifests itself in non-substantive conceptions - emphasising the clarity, generality and stability of the rules of a legal system, how these attributes affect the law and the place of the rule of law in light of these requirements; and substantive conceptions - which reject a strict, rule-bound, approach to law, engaging individual and political rights and allowing for the invocation of justice and morality in judicial decision making.[42]

For the purposes of clarity and consistency these labels will be used. Most expressions of the rule of law run along these lines, despite the fact that there exist myriad discussions of the rule of law which employ different terminologies for very similar subject matter.[43] As outlined, non-substantive conceptions regard the form or structure of the ideal as their focal point - a means of finding a limited use and application for the ideal. These articulate a minimised legal doctrine, avoiding the charge levelled at many substantive conceptions of the rule of law; that is, communicating a "complete social philosophy"[44] through including all-encompassing considerations within the remit of one ideal. In broad terms, the substantive approach to the rule of law is aimed at instilling within the ideal concerns such as morality, individual rights and substantive justice. Substantive conceptions claim to avoid the injustices which might result from a stringent rule-bound approach to law.[45]

These divergent attitudes to the ideal are justifiable in relation to one's conception of the judicial function. Where a judge adjudicates beyond a particular expressed legal rule, for example in cases concerning unenumerated constitutional rights, compliance with the rule of law is vociferously contested. If a case is decided on foot of a non-posited legal or moral proposition, from the perspective of the non-substantive conceptualist this entails that the law is vested in something that is not

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[42] Radin succinctly differentiates between the competing conceptions: "The instrumental (non-substantive) version holds that Rule of Law is a prerequisite for any efficacious legal order. The substantive version holds that the Rule of Law embodies tenets of a particular political morality." See Radin, 'Reconsidering the Rule of Law', at 783.

[43] Non-substantive conceptions of the rule of law have been referred to as "formal" (Raz), "instrumental" (Radin), "thin" (Tamanaha) and "procedural" (Fuller). Substantive conceptions, when not termed "substantive" are usually referred to as "thick" conceptions.

[44] Raz, *The Authority of Law*, at 211.

[45] Dworkin, *A Matter of Principle*, at 11.

rule-specified, breaching the traditional "rule of laws and not of men" criterion, and may be an example of judicial legislation. Scalia, for example, has argued that such forms of decision-making are not rule of law compliant, as they go beyond the formal content of legal rules.[46] This account of the rule of law has been criticised by substantive theorists as requiring an unrealistically mechanical theory of adjudication. Substantive theorists such as Dworkin suggest that recourse to background moral propositions is a necessary feature of a rule of law compliant legal system[47], and argue that such a conception of the judicial function is necessary to achieve justice in the particular case, as substantive rights are "said to be based on, or derived from, the rule of law".[48] The ramifications of such an account for democratic legitimacy and the principle of legislative supremacy centre on the political consequences of investing an unelected judiciary with untrammelled law-making power. Yet, Endicott, for example, argues that such considerations are ultimately beside the point, given that finality in adjudication is a necessary condition of the rule of law. Rather, Endicott argues that emphasis should be compliance with the law itself[49], and not on how we conceptualise the position of the judge.

Thus, both sides of the debate communicate plausible accounts of the ideal, focusing on the form and substance of the rule of law; yet these respective accounts have polarising effects on what is assumed as legitimate or just judicial interpretation. However, the rule of law does not have to be conceptualised specifically in terms of the judicial function. Indeed, it has been suggested that compressing the rule of law into the purview of "judge -and-court-centred systems of thought"[50] has somewhat restricted debate in the area, intimating an exclusively adjudicative ideal,[51] which is not necessarily the case.

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[46] Antonin Scalia, 'The Rule of Law as a Law of Rules', (1989) 56 University of Chicago Law Review 1175. However, it is arguable that to conceive the rule of law as simply "a law of rules" is detrimentally restrictive and impairs the application of the ideal in a similar, yet diametrically opposite, manner to equating the rule of law to what Raz termed "the rule of good law".

[47] Dworkin, *A Matter of Principle*, at 11.

[48] Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", [1997] Public Law 467.

[49] Endicott, 'The Impossibility of the Rule of Law', at 10.

[50] Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, at 219.

[51] Endicott, The Impossibility of the Rule of Law, at 14.

In light of these complications, varying non-substantive and substantive conceptions of the rule of law will be analysed, and thereafter linked to a constitutional justification of the rule of law ideal particular to Ireland. It is in this context that the interpretative rules of statutory interpretation - boundaries for the courts in discerning legislative intent - are said to be informed by institutional competences, the separation of powers, and particularly the issue of legislative supremacy under the constitution. The prevailing description of the processes of statutory interpretation rationalises the interpretative lens of the judge as operating within a discrete interpretative framework, focusing on linguistic and legal certainty, with the rule of law as informed by legislative supremacy at its centre. Whether this provides a justifiable description of the rule of law in the Irish context will be the focus of the next chapter. First, however, it is essential to analyse both non-substantive and substantive conceptions of the ideal, such that we can identify which conception is more descriptively appropriate to this feature of the Irish legal system.

1.3.1 Non - Substantive Conceptions: Attention to Structure

Lon Fuller's theory of "legality" in *The Morality of Law*[52] may be the modern progenitor of non-substantive conceptions of the rule of law. Fuller's conception has been described by TRS Allan as identifying the "precepts of formal justice that enable the law to be correctly and readily ascertained and applied by both private citizen and public official"[53], a necessary aspect of non-substantive conceptions of the ideal. Under Fuller's theory, for the rule of law to be present in a legal system, a number of principles must be complied with:

> 1) there must be general rules; 2) they must be promulgated; 3) they must not be retroactive; 4) they must be clear; 5) they must not be contradictory; 6) they must not require the impossible; 7) they must not be changed too frequently; 8) there must be congruence between the law as written and in practice.[54]

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[52]Lon L. Fuller, *The Morality Of Law,* (Revised Ed, Yale University Press, 1969).
[53] Allan, *Constitutional Justice*, at 6.
[54] Fuller, *The Morality Of Law,* at 46-91, John Gardner has claimed that Fuller was aware that there was more to the rule of law than the eight desiderata; that the ideal requires more than just the law to do

On observing these principles, Fuller proposed that the rule of law would be reflected in the rules of a legal system, and that the legal system could be legitimately so called if law possessed these precepts.[55] The eight principles are something of a reference point for many subsequent expressions of the rule of law, and are noticeable in both non-substantive and substantive conceptions. In communicating the requirements of the rule of law, the first seven desiderata relate to the construction of the rules themselves, whereas the last, and in Fuller's estimation the most important, relates to the idea that the law (rightly said to be law if it satisfies the first seven requirements) must at all times be reflected in the decisions of courts and official action in general. This framework marries both historical requirements that law should be manifest in clear rules and that it not be open to arbitrary influence of those exercising state power.

However, Fuller made an ancillary – albeit controversial - claim in communicating these requirements, stating that compliance with the principles of legality would reflect a procedural morality in that legal system.[56] Fuller argued that along with the formal structure, which denotes the point at which the rule of law can be said to exist, there is a procedural morality entailed as a necessary result of that structure. That is, Fuller argued that on instantiating this model, a legal system, or law itself, could be described as just and establishing a necessary connection with morality as there was an "internal morality" to that legal system - a by-product of conforming to the eight desiderata.[57] The internal morality of the legal system originates in legal fairness - how law is adhered to and identified in the legal system. Thus, Fuller held that on instantiating the ideal, the legal system is necessarily a just one, achieving "perfection in legality"[58].

It has been argued that this articulation of the rule of law is substantive in character due to Fuller's added focus on law's internal morality; however, Waldron suggests that this is not the case, given that it merely sets out "formal and structural" preconditions necessary for the existence of a legal system. For Waldron

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"all the work in securing the rule of law", see John Gardner, 'The Supposed Formality of the Rule of Law', in *Law as a Leap of Faith*, (Oxford University Press, 2012), at 195.

[55] Fuller, *The Morality Of Law*, at 39. See also Raz, *The Authority of Law*, at 223.

[56] Ibid, Fuller, at 43.

[57] Ibid, at 42.

[58] Ibid, at 41.

a truly substantive conception of the rule of law accounts for the aspects of the legal system which display the inherent fairness of the procedures in that system[59], which is absent from Fuller's conception. This claim will not be further considered here, except to remark that, aside from Fuller's novel claim as to procedural morality, non-substantive theorists generally identify something of value in the ideal, a by-product of which has been described by Simmonds as "the interstices of liberty".[60] This regards the rule of law as affording individuals a degree of certainty with which they can live their lives. Thus, formal structure, in itself, is identified as a thing of value.[61] Regardless of all of these claims, it is important to note that, even though Fuller's conception of the rule of law might be taken as somewhat definitive of the non-substantive position, his theory of legality preceded the debate between non-substantive and substantive positions.

1.3.1.1 Raz's "Formal" Conception

In *The Rule of Law and Its Virtue* Joseph Raz articulated what he described as a "formal" conception of the rule of law. Building on the structure denoted under Fuller's theory of legality and in an attempt to minimise the scope of the ideal, Raz noted additional principles central to his conception of the rule of law - related particularly to the administration of justice[62] - downplaying the significance of other historically situated aspects of rule of law theory. Raz's theory does not necessarily equate the rule of law with the good; indeed, he is of the opinion that it is just as capable of serving evil ends:[63]

> If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful

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[59] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43, Georgia Law Review, at 8.
[60] Nigel E. Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism', (2004) 63 Cambridge Law Journal, 98, at 103-104.
[61] However, in analysing Fuller's conception of legality, Potsema has argued that Hart, even, supported a "characteristically positivist understanding" of the rule of law, whereunder his advertence to "rule bound reasoning" in the penumbra betrayed a certain need for judges to be guided by legal rules, even when they are over/under inclusive. Such considerations for Potsema derive from the "fidelity to law" afforded by rule of law "values". Thus, there does not have to be a strictly formalist sensitivity to the rule of law. See, Gerald J Potsema, "Positivism and the Separation of Realists from their Scepticism", in Peter Cane ed *The Hart Fuller Debate in the Twenty First Century*, (Hart Publishing, Portland, Oregon, 2010) at 268.
[62] Raz, *The Authority of Law*, at 217.
[63] Ibid, 224-226, Raz likens the rule of law to a knife - sharpness is an inherent virtue of knives, but they are just as capable of seriously injuring someone when misused, as they are capable of cutting a piece of bread, at 225.

> function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree ... It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality ... human rights of any kind or respect for persons or for the dignity of man.[64]

This rejection of conceptions of the rule of law which purports to serve both formal and substantive ends is instructive. Raz's understanding of the ideal refers to the rather straightforward notion of the ordering principle of law - that laws exist and that people should be ruled by them[65], and that there are other values present in legal systems which, on occasion, may displace the rule of law.[66] He identifies the canonical phrase, "a rule of laws and not of men" as one of the principal reasons why there is much ambiguity in relation to the concept. That is, understood as a political theory, the ideal is often conceived of in a "narrower sense" outlined in the historiography above - the idea that governments or law-makers should also be subject to the law.[67]

However, to argue that actions made by the government must be legally grounded or based in law is tautologous, given that governmental actions not authorised by law would be illegal, and not really acts of the government per se.[68] This necessitates some human interaction with the law. To suggest that the rule of law requires otherwise is inaccurate, as the rule of law does not denote an autopoietic system of legal rules formally self regulating or self-applying. Thus, Raz is correct to point out that legal officials must, in some manner, interact with the law, and that it is not inimical to the rule of law to have such interaction.[69]

Like Fuller, Raz's conception holds that certain principles are essential if the rule of law is present in any legal system. Raz demarcates eight principles of his

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[64] Ibid, at 211.
[65] Ibid, at 212.
[66] Ibid, at 228.
[67] Ibid.
[68] Ibid, at 214.
[69] Ibid, at 212.

own[70] - although he allows for additional principles, marking substantial differences between the two theories[71]:

(1) All laws should be prospective, open and clear.

(2) Laws should be relatively stable.

(3) The making of particular laws (particular legal orders) should be guided by open, stable clear and general rules.

(4) The independence of the judiciary must be guaranteed

(5) The principles of natural justice must be observed.

(6) The courts should have review powers over the implementation of other principles.

(7) The courts should be easily accessible.

(8) The discretion of crime-preventing agencies should not be allowed to pervert the law.[72]

These principles ought to be borne in mind when considering the value and uses of the rule of law. In outlining a limited in scope and analytically discrete conception, Raz underlines the "basic idea" of law - that it is capable of guiding people effectively in the living of their lives, and that the principles of the rule of law should always be construed in that light.[73] Thus, an analysis of the the virtue of the rule of law must be considered in terms of its ability to fulfil this task.[74]

The rule of law cannot simply be conceptualised as present or absent in a legal system. In order to understand the application of the ideal it is useful to consider the issue of conformity to the rule of law as a matter of degree; that is, it is not a binary concept - some legal systems will uphold it more so than others. [75] The question of degree also applies to single laws, in that some laws will be obeyed in a

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[70] Ibid, at 214 - 219.
[71] Other additional principles that are central to Raz's conception of the rule of law include: the observation of principles of natural justice (fair hearings, absence of bias); the principle of judicial review; easy access to the courts; and finally that crime-prevention organisations should not be allowed pervert the courts of justice or legal processes.
[72] Neumann, *The Rule of Law, Politicising Ethics,* at 10.
[73] Raz, *The Authority of Law*, at 219.
[74] Ibid, at 226.
[75] Ibid, at 215.

more precise form than others.[76] Indeed, Fuller noted this issue in the case of his theory of legality. No single desideratum can be instantiated totally, and the vagaries of law and interpretation often require breaches of some desideratum to redress lapses in compliance with others.[77] Noting the significance of "degree" removes from analysis of the ideal the notion that it is a supervening value to be adhered to and identified at all times in legal systems - indeed, Raz notes that "maximal possible conformity" to the ideal is not to be desired,[78] as the principles inherent in the ideal necessarily pull against one other.

However, it is understandable how Fuller's contention that the rule of law concerns the "morality of aspiration"[79] may be distorted into an assertion that rule of law principles can never be departed from, or that the ideal must be inherently substantive by virtue of the fact that it must be strived for.[80] Such claims only distract attention from the actual values inherent in the ideal, as alluded to above - maintaining the publicity and certainty of law, and the benefits to individual freedom from arbitrary state interference that accrue from such.[81] Thus, the rule of law on Raz's account is to be construed as a "negative value"; that is, the law creates a risk of absolute arbitrary power through the State and it is the role of the rule of law to diminish this, through ensuring protection of the organising principle of law.[82]

1.3.1.2 Rawls' Conception of the Rule of Law

In *A Theory of Justice* John Rawls outlines a conception of the rule of law based on his concept of "the principles of justice"[83] and tied to the idea of personal liberty,

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[76] Ibid.
[77] Fuller, *The Morality Of Law*, at 104.
[78] Raz, *The Authority of Law*, at 222.
[79] Fuller, *The Morality of Law*, at 5.
[80] N.E. Simmonds, *Central Issues in Jurisprudence, Law, Justice and Rights*, (2nd Ed, London, Sweet & Maxwell, 2002) at 228.
[81] Raz draws a distinction between the Hayekian form of individual freedom which applies here and other "political" more expansive forms of freedom, arguing that the rule of law does not necessarily protect individual freedom. However, I disagree with this claim, as the protection of legitimate expectations under the formal or non-substantive conception is, in itself, something of value.
[82] Raz, *The Authority of Law*, at 224.
[83] John Rawls, *A Theory of Justice*, (Revised Ed, Oxford University Press, 1999) at 206-220, Rawls lists the principles of justice as "First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.", at 53.

claiming that a particular legal system is more just than another if it "more perfectly fulfils the precepts of the rule of law."[84] Rawls' theory of the rule of law outlines a system in which clear, understandable public rules underscore the legitimate expectations of individuals, while emphasising the centrality of due process in this arrangement.[85] Rawls claims that the idea of "formal justice" or "justice as regularity" is present in a system which exhibits a "regular and impartial" organisation of publicly knowable rules, and that this feature of legal systems has become recognisable as the rule of law.[86] He communicates requirements necessary to legal systems if they are to fulfil the idea of justice as regularity, not dissimilar to Fuller's eight desiderata of the inner morality of law, or Raz's formal requirements. These include the notion that "ought implies can"[87] - that is, there must not be a duty to require the impossible under the law; that like cases be treated alike[88] - there must be congruence and consistency; and that there are no offences without law[89] - there must be pre-existing general rules which are promulgated, clear and prospective. Rawls also states that the precepts which define "the notion of natural justice"[90] must be present for the rule of law to exist.

Rawls' conception therefore identifies the structure of the rule of law as the inherent virtue of the ideal. While this notion of the ideal is encompassed within a broader concept of justice argued for by Rawls, and necessarily entails a value to the rule of law in order for it to fit within that theory of justice, Rawls' understanding of the rule of law is premised first and foremost on the requirements of the rule of law which can be identified in those theories already discussed. Neumann regards this conception of the rule of law as representative of the "thick end" of the spectrum of non-substantive conceptions, stating that Rawls promises a moral content through the formal requirements, which he regards as realising natural justice in a legal system. However, this comprises a relatively small moral content on that basis

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[84] Ibid, at 208.
[85] Ibid, at 206.
[86] Ibid.
[87] Ibid.
[88] Ibid, at 208 - 209.
[89] Ibid, at 209.
[90] Ibid, at 210.

alone[91], and is comparable to the value recognised by Raz as implied by the fact of observing the core principles of the ideal.

Thus, a common feature of non-substantive conceptions of the rule of law is the notion that the ideal supplements legal clarity, instilling necessary requirements as to the form of the rules in the legal system, which, in turn, holds benefits for the citizenry. Particularly in the context of Raz's conception, the focus is placed primarily on the ability of clear, general rules to lend a degree of order to people's lives. Thus, the rule of law is an instrument to measure the success or failure of a legal system in regulating and facilitating this form of autonomy. However, the ideal does not just relate to the rules of the system - obvious prerequisites are required if the rule of law is to exist at all, such as an independent judiciary and procedural due process. Yet, it nonetheless implies that the judiciary is obliged to apply those rules even-handedly and not engage in arbitrary decision making.

1.3.1.3 Waldron's Allocation of Substantive Content to Form

In *The Concept and the Rule of Law,* Jeremy Waldron suggests that the bi-focal aims of formal structure and substantive justice contributes to the general lack of understanding of the rule of law, and should be addressed by requiring "procedural fairness" as a necessary element of the ideal.[92] For Waldron, ensuring substantive justice in the procedural administration of law requires observing several "morally motivated criteria", including the requirement of general rules, fidelity to fair procedures, "the identifiability of law", publicity, and the need for law to be oriented towards the public good.[93] Under this conception the structural principles of the rule of law, such as those outlined by Fuller and Raz, are said to address the common good and imbue an inherent procedural fairness in legal systems in which they are instantiated.

Waldron thickens the substantive content of the formal structure adopted by Fuller and Raz by intimating a necessary connection between the morally motivated precepts he outlines, and the fundamental role they play in the administration of

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[91] Neumann, *The Rule of Law, Politicising Ethics*, at 6-9.
[92] Waldron, 'The Concept and the Rule of Law' at 8-10.
[93] Ibid, at 41.

justice.[94] Thus, this conception of the ideal claims that, not only do the principles of the rule of law contain value in themselves, they enshrine in the legal system an underlying fairness which is a necessary aspect of the ideal. The rule of law understood thus does not merely provide for settled expectations, it is inherently valuable because it ensures that legal procedures aim to instil justice in the content of law. This is a fundamentally different claim to that forwarded by Raz.

As outlined, Raz's conception of the rule of law classifies the ideal as one of a myriad of values that can exist in legal systems. It is rationalised as a negative value capable of effectuating great evils, given the danger immanent in a co-ordinating instrument such as law. Waldron rejects this aspect of Raz's argument along with rule-bound scope of non-substantive conceptions, stating it is the misapplication of political power that causes law to give rise to evil, rather than the rise of evil being an inherent danger of law.[95] Under a conception of the ideal as proposed by Waldron, law could not give rise to systemic evil or injustices, as the focus on procedural fairness purportedly ensures that such evils could not arise in the first instance. This undercuts the idea that the rule of law ensures formal predictability, given that the justice of the case requires deviation from a determinate legal rule.[96] Where safeguarding principles such substantive justice is proposed as an inherent aspect of the ideal, the significance of the formal aspects of rules and legal certainty are diluted. Thus, the content proposed under a conception like Waldron's outlines the legal procedures and structures required in order to maintain the morally motivated ends of law, as reflected in certain social goals.[97]

This conceptual framework not only identifies the structure of the rule of law as something of value, but attaches inherent value to the consequences of ideal in its application to the context of the law itself. Thus, Waldron's conception of the rule of law necessarily intimates a reflexive relationship between the content of law and the rule of law by insisting on the orientation of legal procedures towards just outcomes.[98] Waldron places great emphasises on the guarantee of procedural

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[94] Ibid, 20 - 41.
[95] Ibid, at 11.
[96] Ibid, at 8, 31.
[97] Neumann, *The Rule of Law, Politicising Ethics*, at 6.
[98] Waldron, 'The Concept and the Rule of Law, at 55.

fairness in rejecting non-substantive conceptions of the rule of law. However, this is an obvious facet of legal systems, something which Neil McCormick refers to as "the arguable character of law".[99] Law is not immutable, but this does not necessarily imply that legal officials cannot comply with the ideal without having some notion of fairness - a degree of fairness is achieved to the extent that the rules of the system are complied with. Waldron's claim implies that in order for non-substantive conceptions of the rule of law to prove workable, the rule of law must insist on a law of rules. However, the focus on publicity, stability and clarity under rule-oriented, non-substantive conceptions of the rule of law is a means of limiting uncertainty - it does not aspire to remove the possibility of such. Waldron's ascription of a significant substantive content to the ideal is unconvincing, as it identifies the substantive content to the rule of law as lying in procedural due process. Yet procedural fairness is already recognised as a principal aspect of the ideal under other non-substantive conceptions, particularly under Raz's account.

Thus, Waldron's conception of the rule of law does not amount to a substantive conception of the ideal, even though he labels it so. The formal attributes that have been identified as distinct rule of law values are implicit in his theory - he merely argues that these features necessarily imbue the ideal with substantive aims. However, this does not necessarily engender a distinct ideal, it simply proposes that there are distinct benefits for legal systems which incorporate these features. This merely elaborates further on the non-substantive position, it does not entail a discrete conception of the rule of law in itself. In order to further flesh out the dichotomy between non-substantive and substantive conceptions, I will consider some illustrations of substantive conceptions of the rule of law in order to choose between the competing formulations, and thereafter identify the account of the ideal which can be appropriately applied to a feature of our legal system.

1.3.2 Substantive Conceptions: A Focus on Content

There are a range of theorists who present varying substantive conceptions of the rule of law. While conceptions like Waldron's above list identifiable non-substantive

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[99] Neil McCormick, Rhetoric and the Rule of Law, in David Dyzenhaus ed, *Recrafting the Rule of Law: The Limits of Legal Order*, (Hart Publishing, 1999) at 164.

rule of law features for the instantiation of an ideal albeit with a different focus, I will consider whether these requirements are essential to the rule of law as a concept.

TRS Allan argues that the rule of law is an essential feature of constitutional justice and is dependent on the principles of procedural fairness, equality and the separation of powers. Building on Fuller's inner morality of law, Allan argues that the ideal is centred on the issue of "consent". This requires that the law must be accepted by individuals as "morally justified" in light of the requirements of the common good.[100] For Allan, the ideal entails that the content of law and official action are morally justifiable.[101] Therefore, Allan introduces considerable substantive content to the ideal, parting with the traditional rule-bound focus of the rule of law, as he regards moral justifiability and not legal certainty and predictability as the organising principle of the ideal on such a reading.[102] Allan's theory requires that the legal system is both legally and morally just, rejecting the various positivist desiderata outlined under non-substantive conceptions for the instantiation of the ideal.[103] This signifies quite a departure from the stated formal structure of the ideal, claiming that a commitment to a morally justified law enshrines the rule of law as the "internal morality" of legal systems. Thus, Allan's conception exhibits the above features of consent and non-arbitrariness as the true essence of the rule of law. Nevertheless, Allan identifies issues like the generality of law, procedural due process and congruence as being essential to rule of law compliance.[104] In a similar fashion to Waldron's conception of the ideal, then, the focus is placed on how the rule of law represents a means by which law achieves a standard of fairness and justice. However, this emasculates the rule of law as a standalone concept, diluting our ability to apply the ideal to a consideration of the successes or failures of legal systems in allowing individuals to co-ordinate their lives in line with the rules of the system.

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[100] TRS Allan, *Constitutional Justice*, at 6.
[101] Ibid.
[102] TRS Allan, 'The Rule of Law as the Foundation of Judicial Review', in Christopher Forsyth ed, *Judicial Review and the Constitution*, (Hart Publishing, Oregon, 2000), at 415.
[103] Ibid.
[104] TRS Allan, *Constitutional Justice*, at 32-36.

1.3.2.1 Does the Rule of Law Necessitate Form?

Comparing Allan's approach to the ideal to the various formal conceptions above substantive conceptions of the rule of law do not necessarily espouse a great deal of formal structure, concentrating instead on the by-products of procedural fairness. Indeed, Ronald Dworkin's "rights conception" of the rule of law as articulated in *Political Judges and the Rule of Law* marks a notable departure from the combination of form and substance. Dworkin attempts to reconcile non-rule based adjudication with the ideal, arguing that there exists a palpable link between the "rights conception" and the ability of the judiciary to make what he refers to as political decisions where legal rules are not determinative of disputes. Such decisions involve judgments which go beyond the legal "rule-book" as Dworkin calls it, and are based on the background moral and political rights of parties to legal disputes.[105] Thus, Dworkin claims that judges may leave the "rule book" of the law and refer to background moral principles under the rights conception, legitimately invoking politically-rooted reasons for decision; as such background moral rights arise from the community's attempt to arrive at a moral consensus.[106] Dworkin holds that judges are justified in making political decisions once there can be a distinction made between political arguments, which assert the individual rights of citizens, and arguments concerning public or political policy making, which relates to the public interest or the common good.[107]

While some merit can be observed in Dworkin's attempt to reconcile decision making in hard cases with the positivistic notions of non-arbitrariness arising under the rule of law, this novel account pulls fundamentally against historically integral features of the ideal.[108] Indeed, such a conception of the rule of law profoundly downplays the role of form under the ideal. The "rights conception" represents an extremely thick variety of substantive approach, communicating an ideal which offers no assistance analytically as the characteristics which heretofore have been identified as distinct aspects of the rule of law are

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[105] Dworkin , *A Matter of Principle*, at 9.
[106] Ibid, at 16.
[107] Ibid, at 9.
[108] Indeed, Marmor has noted that such a claim really only amounts to the position that the rule of law is valuable because the content of law can be shown to be good. But this is a claim about law and not the rule of law as a discrete entity. See Marmor, 'The Ideal of the Rule of Law', at 4.

absent.[109] This renders the theory untenable as an account of the rule of law because under Dworkin's conception (and in his jurisprudence generally), the importance of settled legal rules is downplayed, resulting in an ideal that, as Craig has noted, becomes "more or less ... a synonym for a rights based theory of law and adjudication."[110] Such an excessively thick substantive conception of the rule of law espouses "a substantive theory of justice"[111], not a useful re-imagining of the rule of law ideal. It is doubtful whether the rule of law orientates towards such theories of justice. Indeed, this uncertainty confirms Raz's claim that in the attempt to expand the rule of law to activist forms of adjudication such descriptions of the ideal offer nothing other than a "complete social philosophy". This is because the rights conception undermines the notion that the law should be capable of guiding human conduct, the organising principle of the rule of law.[112] Andrei Marmor has noted how the distinct rule of law features, which are absent in Dworkin's account, enable us to observe the value of the rule of law, and whether it is upheld to a high degree in a legal system:

> ... if feature x is functionally necessary for A to fulfill its designated task y, then having x is functionally good for A. For example, to the extent that knifes are made to cut, and assuming that in order to cut a knife must be sharp, then the sharpness of the knife is functionally good; a sharp knife is a good knife. This must be true of the rule of law as well. To the extent that certain features are functionally necessary for law to guide human conduct, and to the extent that the law purports to guide human conduct, these features of the rule of law make the law good, that is, good in guiding human conduct.[113]

Thus, in outlining the "rights conception" as an alternative to the rule book Dworkin overlooks the centrality of promulgation, which occupies a fundamental place in rule of law theory, to individual liberty. In extending the rule book to

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[109] It is possible that this conception of the rule of law represents a theoretical precursor to the novel interpretative political ideal of "Integrity", as discussed in *Law's Empire* (Fontana Press, 1986), which necessitates recourse to such political forms of decision making.
[110] Craig, 'Formal and Substantive Conceptions of the Rule of Law', at 466.
[111] David Dyzenhaus, "Recrafting the Rule of Law", in David Dyzenhaus ed, *Recrafting the Rule of Law: The Limits of Legal Order*, (Hart Publishing, 1999) at 6.
[112] See Andrei Marmor, 'The Rule of Law and Its Limits', (2004) 23 Law and Philosophy, at 7.
[113] Ibid.

background moral rights which are derived interpretatively by judges, the rights conception jettisons the aversion to arbitrariness in decision making that a high degree of legal determinacy seeks to enshrine. Such background rights are not determinate; rather, due to the dependence on the interpretation of the judge in their articulation, they are very unstable. Insofar as Dworkin argues that there is a right answer in every case, this means that there is a right answer in principle available to a particular judge. The possibility for arbitrariness on the application of such a theory does not require further elaboration. Consequently, the centrality of judicial interpretation in Dworkin's theory undermines the publicity, clarity and predictability of law.[114] Nor is there any involved analysis of the normative work that the ideal performs in instances of adjudication where political forms of decision are necessitated. It is merely implied that the rights conception allows for such forms of adjudication. Yet Dworkin's suggestion that the rule of law represents an "interpretative value" [115] may be accurate, insofar as he identifies issues of interpretation as the driving source of debate surrounding the ideal.[116]

I claim that unlike Allan's and Dworkin's conceptions, the underlying value of the rule of law is independent of any theory of justice - in the instrumental role of legal clarity, stability and publicity in providing for security against arbitrary state action. This is most clearly represented in the notion that rules should be as clear as possible. In introducing an interpretative dimension to the theoretical framework of the rule of law, Dworkin's rights conception undermines the idea of stability, and in this way may be seen to interfere with the core value of the publicity of law. Also, it must be argued that the primary rationale for such "rule book" conceptions of the rule of law is the attempt to minimise indeterminacy in adjudication, not eradicating it completely, as Dworkin suggests, given that, ultimately, that is an impossible task. Waldron's theory, for example, although purporting to assign a considerable substantive content to the ideal, merely succeeds in underlining the importance of the formal requirements of the rule of law in ensuring its

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[114] Dworkin, *A Matter of Principle*, at 17. As a means of underlining the role played by rules in allowing judges to come to their political decisions, Dworkin argues that judges cannot refer to principles that are incompatible with the rule book ; yet it is difficult to square this underlying role attributed to determinate rules with the expansive notion of adjudication presented in his argument.

[115] Ronald Dworkin, *Justice in Robes*, (Belknap/Harvard, 2006), at 169.

[116] For an account of Dworkin's writings on the ideal see, Jeremy Waldron, 'The Rule of Law as a Theatre of Debate', in Justine Burley ed, *Dworkin And His Critics*, (Wiley-Blackwell, 2004) at 320.

instantiation. Thus, the significance of the desiderata or preconditions of the rule of law cannot be downplayed when we speculate as to the nature of the ideal. This forces us to consider whether such a thick substantive theory the rule of law represents anything other than a morally rhetorical device.[117]

1.3.2.2 Gardner's Critique of the Formal Character of the Rule of Law

In a recent essay John Gardner has criticised what he describes as the "supposed formality" of the rule of law ideal.[118] Gardner finds the ascription of the label "formal" to Fuller's conception of the ideal and, by extension to conceptions such as Raz's, peculiar. Gardner's main difficulty with formalistic accounts of the rule of law lies in his argument that formal conceptions of the ideal are identifiable in terms of what they do not address - "the actual content of the law itself."[119] Gardner is of the opinion that when analysed in relation to the notion of "content" there is not much to Fuller's theory, or other formal conceptions, which classifies them as formal as such. That is, Gardner finds it impossible to separate the form of a law from its content, arguing, for example, that a law that is impossible to obey only has to have its content changed to be possible to obey.[120] In light of this, Gardner argues that all of Fuller's eight desiderata are inseparable from law's content, and, as such, cannot be used as operative requirements for a theory postulating the "formality" of the rule of law ideal.[121]

In light of this criticism, Gardner claims that Fuller's desiderata and the internal morality of the law, in fact, speak to the content of the law and have "little to say about which form of law is the best choice for giving law that content."[122] Central to this criticism is the "negative" orientation of formal conceptions of the rule of law. That is, Gardner finds it unhelpful to consider conceptions of the ideal in terms of what they do not do, yet regards the converse proposition, substantive conceptions, as "notoriously unhelpful" because the label "substantive" is unclear as to what exactly is prescribed.[123] Indeed, Gardner rejects the longstanding

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[117] Tremblay, *The Rule of Law, Justice, and Interpretation*, at 24.
[118] See Gardner, *Law as a Leap of Faith*, at 195.
[119] Ibid, at 198.
[120] Ibid, at 199-201.
[121] Ibid.
[122] Ibid, at 200.
[123] Ibid, at 201.

distinction between formal and substantive conceptions of the rule of law because he believes the Fullerian desiderata cannot be separated from their substantive implications, particularly the final desideratum, congruence, which includes a whole range of features of procedural due process.[124]

Gardner's response to these failures is to propose a novel interpretation of Fuller's conception of the rule of law, which he labels the "modal conception."[125] The point of the modal conception is to reject the legalistic conceptualisation of Fuller's theory, in speaking to the distinction between "means" and "ends" - looking to the purpose of the enterprise of law and the ends it serves.[126] That is, the modal conception holds that the rule of law should concern the 'aims of legal rules' on the one hand and how to go about serving those aims by the use of legal rules on the other."[127] Gardner sees no point in distinguishing the rule of law by reference to the way law goes about subjecting people to rules, because the very nature of law suggests that is a means to an end in any event - a "direction of purposive human effort."[128] Gardner's argument here is that proponents of the "form versus substance" dichotomy, such a Craig, are incorrect in thinking that Fuller's concern with the rule of law focuses on the by-product of the desideratum, the internal morality of law.[129] Rather, he claims that analysis of Fuller's theory should focus on Fuller's claim that the "distinctive means" that the rule of law provides in the end of subjecting the conduct of individuals to legal rules.[130]

Thus, Gardner's claim that Fuller's account of the rule of law is not "formal" lies in the belief that the ideal is not discrete primarily because of its "functional" use in ensuring that a legal system complies with legal rules. Rather, he holds that if the rule of law is to be a discrete legal entity it must be conceptualised as "a specific social technique *for* subjecting human conduct to the governance of rules."[131] The "modal" conception, therefore, denies that the rule of law should be conceptualised as a means through which law protects legitimate expectations, as this is to conflate

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[124] Ibid, at 203-204.
[125] Ibid, at 205.
[126] Ibid, at 206.
[127] Ibid, at 205.
[128] Ibid, at 207.
[129] Ibid, at 205-206.
[130] Ibid, at 206-207.
[131] Ibid, at 208.

means and ends; that is, there is no way to separate the desiderata for law's internal morality from the ends which law effectuates[132]:

> Presenting 'playing by the rules' as *itself* the purpose is mistaking the means for the end, a classic legalist mistake. It follows, I think, that the rule of law cannot be interpreted this way (as a matter of everyone's being guided by the law) except at the price of no longer qualifying as valid moral ideal.[133]

Yet Gardner's description of the ideal as a "moral" one necessarily assumes this position. Arguing that the form of something produces benefits and arguing that that thing is inherently valuable, as illustrated in the Marmor quote above, are two different positions. Thus, while Gardner claims to offer a novel interpretation of the ideal by extricating the issue from the form versus substance debate, there are some problems with his account.[134] The theory diverges between two main claims: first, that there can be no distinction between the supposed form of the ideal and the substantive content that it may or may not serve as the desiderata necessarily imply some form of substantive value and affect the content of the law to a degree[135]; and secondly, there is a common misconception that the rule of law requires a formal structure to explain how the rules of a legal system can be effectuated efficiently, as we cannot separate the means/ends of law, in light of the first criticism.

However, Gardner's argument is no different from Raz's foundational claim that the rule of law manifests as a "negative virtue"[136] – that is, it acts as a limitation on the types of evil to which the law gives rise. Indeed, Gardner concedes that the rule of law is just as apt to serve evil ends and good ends.[137] Yet his argument that the formal and substantive aspects of the rule of law are inseparable necessarily pulls against this acknowledgment, because it is implicit in this argument that it is

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[132] Ibid, at 211.
[133] Ibid, at 212 (emphasis in original).
[134] One of the main issues that the theory suffers from is that Gardner does not define exactly what the modal conception sets out to establish. Instead he argues (at 211) that because of law's inherent modality, the rule of law is a modal ideal. In light of the wide range of applications of the term, it is not necessary to look up a dictionary to identify the inherent ambiguity of such a statement.
[135] Paul Craig makes this point in communicating TRS Allan's substantive conception of the rule of law in *Law, Liberty and Justice, The Legal Foundations of British Constitutionalism* (1993), so Gardner's criticism of formal conceptions on this ground is hardly new. See Craig, 'Formal and Substantive Conceptions of the Rule of Law', at 481.
[136] Raz, *The Authority of Law*, at 222.
[137] Gardner, *Law as a Leap of Faith*, at 218-220.

the formal aspects of the ideal that are, as Hart put it, "compatible with very great iniquity."[138]

Thus, Gardner's argument is self-defeating, insofar as it is implied that the formal characteristics of the ideal are capable of effectuating evil in abstraction from the content of the law itself. Gardner's claim that the rule of law cannot be categorised as formal does not unhinge the formal aspects of the rule of law. Rather, it merely implies what has already been accepted in this thesis - that there is value to the formal aspects of the ideal by dint of the fact that the rule of law can illustrate the degree to which a legal system is, in fact, ruled by law. Indeed, in essence, Gardner's argument concerns nothing grander than a debate over appropriate nomenclature in the context of the rule of law ideal, insofar as his chief claim is that he finds it incorrect to characterise the ideal as a "formal" issue as such. However, for the purposes of this thesis, the nuances between the various labels used to describe the ideal are not sufficient enough to warrant further detailed analysis.

1.4 The Importance of Legal "Rules"

In light of the differing conceptions of the rule of law, it will be necessary to briefly consider the importance of legal rules to the concept, as they are both "reflective and constitutive of social order".[139] Under non-substantive conceptions we have seen that the form of legal rules is essential to instantiation of the ideal if people are able to guide their lives according to the law. However, non rule-based forms of decision making are ubiquitous in legal systems, most commonly observed in "hard cases". Thus, choosing between competing conceptions of the rule of law hinges on a particular conception of the judicial function and what are regarded as legitimate or arbitrary forms of decision making. The question of whether these decisions are rule of law compliant is significant given that, if we are to accept that such forms of decision-making are and can be envisaged as consistent with the ideal, this shifts rule of law concerns beyond the formal characteristics of legal rules.

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[138] See Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller', (2008) 83 N.Y.U. L. Rev. 1135, at 1152.

[139] Sean Coyle, 'Positivism, Idealism and the Rule of Law', (2006), 26 Oxford Journal of Legal Studies, 259.

This is particularly important in light of my claim that substantive conceptions of the ideal offer no concrete assistance in communicating what the rule of law is about and in furthering our understanding of the manner in which legal rules represent a distinct value in legal systems. For example, substantive conceptions offer little analytical value in an analysis of the minutiae of a discipline like statutory interpretation, yet are attractive to political activists given the rhetorical purchase of such a loaded phrase. Thus, it will prove instructive to focus briefly on rules in the adjudicative domain - to determine whether penumbral decisions conflict with the rule of law features already outlined, and if it is possible to instantiate the ideal beyond decisions in the core.

Considering judicial interaction with rules of law, Schauer has argued that rule-based forms of decision making are not necessarily more rule of law appropriate than other forms of decision-making. Schauer identifies two forms of decision-making: rule-based decision making, wherein the decision is compelled by the general rule itself[140]; and particularistic decision-making, where the rule does not provide the judge with independent reasons for decision and he must go beyond the rule to find the right result.[141] Under Schauer's argument, the realm of particularistic decision-making is not necessarily in breach of rule of law principles. He argues that a varied approach to Fuller's desiderata might allow particularistic decision-making to gain the status of rule-of-law-compliant law, given that this form of decision-making allows for "rule-sensitive particularism" - that is, a decision under which the rule, albeit not determinative, still provides the judge with a guiding principle in light of which other determining factors must be taken into account. Schauer argues that if we conceive of the desideratum as "largely transparent rules of thumb... providing predictive guidance for the normal case", instead of principles essential to the existence of both law and legal systems, the Fullerian conception might allow for non-rule-bound modes of decision-making.[142]

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[140] See Schauer, 'Rules and the Rule of Law', (1991) at 648-650: "Rule-based decisionmaking, consequently, exists just when and insofar as decisionmakers treat prescriptive generalisations as providing reasons for decision in accordance with the generalisation *qua* generalisation".
[141] Ibid, at 649.
[142] Ibid, at 656.

Thus, Schauer argues that legal decisions do not have to be conceived as rule-bound in order to comply with the rule of law; rather, the theory of rule-bound decision making, particularistic decision making and rule-sensitive particularism suggest a decisional spectrum, which is rule of law compliant to varying degrees:

> ...law is distinguished from other forms of public or authoritative decisionmaking not by its heavy use of outcome-determining rules laid down in advance, but by the use of procedures designed to ensure that legal decisionmaking is not merely the ad hoc imposition of personal will or the practice of politics.[143]

Thus, even though Schauer acknowledges that not all forms of decision making are rule bound, he regards the fact that there are procedural rules and institutional balances in place to offset this fallout as an important aspect of the rule of law. Indeed, as outlined above, the reality of interpretation implies that there will always be a cost to the realisability of non-substantive conceptions of the rule of law. However, Schauer's argument confirms that even non-rule-based forms of adjudication are apt to conforming to the rule of law, ensuring that adjudication is still capable of instantiating the rule of law to quite a high degree when conceptualised in abstraction from the rule paradigm.

Thus, it is important to note that rule of law compliance might not necessarily require absolute fidelity to legal rules in adjudication. If we take Raz's claim that the rule of law is only one of myriad values in a legal system, and can be displaced in light of other imperatives, Schauer's argument is not without merit. The fact that a decision may not necessarily be compelled by a legal rule is a moot point - as a restricted concept concerning the ordering principle of law, the rule of law cannot remedy the deleterious effect that the natural features of adjudication have on claims about rule formalism. For example, Potsema, has argued that Hart, even, supported a "characteristically positivist understanding" of the rule of law, as his advertence to "rule bound reasoning" betrayed a need for judges to be guided

[143] Ibid, at 657.

by legal rules, even when they are indeterminate.[144] Thus, there does not have to be a strictly formalist sensitivity to the rule of law when considering whether the adjudicative processes comply with the ideal, yet by the same token, this does not imply that the principled forms of adjudication as proposed under Dworkin's conception are necessarily rule of law compliant.

However, the prevailing theory holds that this principled feature of adjudication does not apply to the interpretation of statutory law, given that the legislative text alone is said to determine the scope of the rule. That is, Posner has noted that the "fundamental difference" between common law and statutory forms of interpretation lies in the fact that common law necessarily entails a conceptual system, whereas statutory interpretation is predominantly textual. Thus, interpretation is central to the statutory realm, wherein it is merely "peripheral" to the common law form.[145] This implies that the phenomenon of interpretation is text-centric, and that common law forms of decision making derive from a consideration of the various applications of a rule in a given context.[146] Indeed, the divergence between the literalist approach to statutory texts and non-literal, common law forms of interpretation will be a major feature of the examination of statutory interpretation in the Irish context that will follow.

1.5 Is the Rule of Law a "Necessarily Unattainable" Ideal?[147]

In the above sections I have identified a series of tensions which relate to the nature the rule of law. I have argued that for the purposes of identifying and envisaging a concrete application of the ideal, the non-substantive account is the preferable option. Yet I have adverted to the fact that by their very nature adjudication and judicial interpretation cut against the features that make the rule of law a recognisable ideal. This implies that there are a range of inconsistencies as to its application. Indeed, given its history, the phrase "the rule of law" could legitimately be said to relate to any of the following issues - democratic legitimacy,

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[144] Gerald J Potsema, "Positivism and the Separation of Realists from their Scepticism", in Peter Cane ed, *The Hart Fuller Debate in the Twenty First Century*, (Hart, Oxford and Portland, Oregon, 2010) at 268. Such considerations for Potsema derive from the "fidelity to law" afforded by rule of law "values"

[145] Richard A. Posner, *The Problems of Jurisprudence*, (Harvard University Press, Cambridge, Mass., 1990), at 247.

[146] See Coyle, 'Positivism, Idealism and the Rule of Law', at 261.

[147] Endicott, 'The Impossibility of the Rule of Law', at 1.

liberalism, the establishment of a law of coherent rules, individual and human rights, natural justice, and the need to curb excessive governmental force. The ideal thus represents a fusion of the ideas that laws rule and that states must govern responsibly in light of them, synthesising two conflicting ideas of law; that of "law" and "right", which are uncomfortably housed within one ideal.[148] This inherent tension forces us to pose a difficult question: if what we assume as the rule of law is ultimately a matter of contention, can it be observed at all?

It has been suggested that this theoretical uncertainty underlies a supposed "impossibility" at the core of the rule of law, concerning neither its content nor construction, but in the failure of legal officials to observe the ideal.[149] It is possible that the rule of law is fundamentally unattainable due to the fact that it can never be fully instantiated, as legal rules of themselves cannot be formally realised, and necessitates some human interaction with the law in order for it to apply.[150] Whether this betrays arbitrariness in the application of law is debatable, but absolute arbitrary power is conceived by many as the antithesis of the ideal. Thus, concerns as to application of law are central to the viability of the ideal in practice. Bearing this in mind, Tremblay has argued that the fact that there is no posited account of what the rule of law is in any legal system - that is, the absence of a rule of law "rule" - makes it such an indefinite and divisive topic. [151] Yet, in light of my arguments above, the lack of any such rule should not hinder the ability to recognise the presence of the rule of law in a legal system. What has been suggested, then, is that we conceive of the rule of law, not in absolute terms, but rather as an ideal which is "technically opposed" to arbitrary government. [152] That is, the ideal allows the courts to make decisions which go beyond a mere formal application of

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[148] Palombella, *Relocating the Rule of Law*, at 27.

[149] Endicott, The Impossibility of the Rule of Law', at 1. This will prove a major aspect of the thesis in my analysis of judicial interpretation in subsequent chapters. Interestingly, it should be noted that mere judicial reference or acknowledgment of that fact that legal systems instantiate the rule of law should not be taken at face value or as a matter of course. Such statements more often than not seem rhetorical in nature.

[150] Raz, however, notes that this should not stand as an obstruction to rule of law compliance. See Raz, *The Authority of Law*, at 212.

[151] Tremblay, *The Rule of Law, Justice, and Interpretation*, at 25.

[152] Endicott, 'The Impossibility of the Rule of Law', at 3. However, Matthew Kramer has argued that where a legal system can be seen to instantiate the rule of law, irrespective of whether the system is a "good" one, the ideal is present in that legal system and will stay instantiated for prudential reasons - as such there is no connection with morality. See, Matthew H. Kramer, *In Defence of Legal Positivism*, (Oxford University Press, 1999) at 37 - 78.

legal rules, placing limits on judicial discretion so that decisions do not enter the realm of the arbitrary.

In conclusion, this chapter has presented a brief history of the rule of law and aspects of the contemporary academic debate on the ideal to support my claim that conceiving the rule of law as a matter of form emphasises the values that the ideal is capable of exhibiting in a legal system. I have shown that it is not necessary for a conception of the rule of law to pass judgment on the content of the law, or that the law of a legal system orientates towards the good for us to know what values the ideal represents. Rather, the inherent value and use of the rule of law lies in its ability to confirm the degree to which a legal system is bound by rules. Thus, the focus on the structure or form of legal rules allows officials to know them when they are encountered. This lies in stark contrast to substantive claims, which hold that the rule of law must concern the fairness of the legal system. Yet, as outlined in the introduction, where the law is oriented toward the justice of the case, there are necessary costs for the levels of predictability and clarity in that system. That is, if the goal of the court is to discover the justice of the case rather than to apply the relevant statute, there are inevitable costs for the levels of predictability and clarity in the system. Substantive conceptions thus undermine the core value of the rule of law in the attempt to legitimise non-rule bound forms of interpretation. Whether such forms of decision making are necessarily immiscible with the rule of law will be the focus of later chapters in this thesis.

Chapter 2 The Prevailing Theory of Statutory Interpretation – An Assumed Constitutional Justification for the Rule of Law

In this chapter I will analyse how the rule of law is rationalised as a matter of constitutional principle in Ireland, focusing on the consequences of legislative supremacy in relation to the interpretative remit of the courts, and how this is a central presupposition of the prevailing approach to statutory interpretation. This theory stipulates a "rule-book" or non-substantive conception of the rule of law, given the emphasis placed on literal or plain statutory meaning. According to *Cross on Statutory Interpretation*, the correlation between literal statutory meaning and parliamentary intention reflects a conception of the judicial role which is a fundamental tenet of "the constitutional principle of the rule of law."[153] This relationship will provide one of the key points of the analysis in following chapters. Quoting Lord Simon of Glaisdale in *Stock v Frank Jones (Tipton) Ltd*[154], in *Cross*, Bell and Engle advert to such a connection between literal statutory interpretation and a non-substantive account of the rule of law ideal:

> ...in a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would otherwise have said if a newly considered situation had been considered.[155]

Both practice and canonical academic commentary in Ireland adopt this position, presupposing that a non-substantive conception of the rule of law manifests itself in the processes of statutory interpretation.[156] ***However, this thesis will show that the prevailing theory in Ireland is not an adequate account of what actually happens during the processes of statutory interpretation, despite the fact that the theory is routinely affirmed by the courts.*** The following sections will outline the underlying

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[153] John Bell and George Engle, *Cross on Statutory Interpretation*, (3rd ed., 1995) at 28

[154] [1978] ICR 347,at 354. Cited in John Bell and George Engle, *Cross on Statutory Interpretation*, (3rd ed., 1995) at 28.

[155] Ibid.

[156] For a general discussion of the basic principles of rule of law in the Irish context see Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland*, (4th Ed, Roundhall, 2010) at 9-12. To see how these principles are reflected in the prevailing theory of statutory interpretation, see Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, (5th Ed, Bloomsbury Professional, Dublin) at 558. See also David Dodd, *Statutory Interpretation in Ireland*, (Tottel Publishing, Dublin, 2008) chapters 5 and 11. The following chapters, particularly chapter 4, will show how this theory is adopted in the decisions of the Irish superior courts.

assumptions of the prevailing theory of statutory interpretation as explained in decisions of the courts and by academic commentators, but does not purport to endorse the presentation of interpretative practice under that theory. Central to these claims will be a discussion of features of the Irish constitutional framework which are said to denote a default literalist interpretative approach in the statutory context. Also, these underlying precepts will be analysed to illustrate how the courts purport to safeguard legal clarity and predictability while in fact engaging non-literal interpretative methods.

In setting out these arguments I will first consider the Irish constitutional framework and how, through the separation of powers and the principle of legislative supremacy, the constitution is said to order the legislative and judicial competences in relation to statutory law. This will establish the core presuppositions that are said to underlie the prevailing Irish approach, including an explanation of the preference afforded to literal interpretation.

Secondly, I will consider literal interpretation and how it is regarded as the default means of effectuating the intentions of the legislature. This will entail a discussion of the concept of legislative intent and why the intent assumed under the prevailing account of statutory interpretation necessitates a reflexive resort to the literal implications of the statutory text. This will also require a consideration of the kind of meaning implied by judges in the resort to "literal" interpretation.

Thirdly, I will sketch the conditions under which judges are allowed to depart from a literal reading of statutory texts and engage in purposive interpretation. This will include an analysis of the interpretative method judges employ when discerning the intentions of the legislature in (light of) the purposive approach.

Fourthly, I will analyse the role of the interpretative rules, canons and presumptions that the courts are assumed to take into account before articulating statutory meaning, and how these criteria interact with the other interpretative rules already outlined.

Finally, I will briefly reflect on these underlying aspects of the Irish approach to statutory interpretation and discuss some salient points of criticism prior to outlining the substantive criticisms of the prevailing theory of statutory interpretation in the chapters that follow.

2.1 The Prevailing Theory of Statutory Interpretation

As outlined, the prevailing theory is an account of statutory interpretation that is routinely affirmed in decisions of the Irish courts and mirrored in academic commentary on the area. This theory bears all the hallmarks of a constitutional theory of the rule of law which is based on the principle of democratic legitimacy and respect for legislative supremacy.[157] The interpretative duty of the courts under the prevailing theory can be summarised along the following lines:

> (1) Courts are obliged to give effect to the intention of the legislature as revealed by the literal meaning of the legislative text.
>
> (2) Where the literal meaning of the text is clear or "plain", the task of interpretation is done and the court should not worry about legislative purpose or look to other aids to interpretation...
>
> (3) Where the literal meaning of the text is clear or plain, this meaning governs regardless of consequences...[158]

The interpretative method required under the prevailing theory clearly envisages a non-activist judicial role, following the common law rule that the courts are not to injure the statutory text.[159] Notionally, this is said to affirm Fuller's principle of congruence between the law as written in statute and as applied by the courts. Thus,

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[157] See David Dyzenhaus, 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review', in Christopher Forsyth ed, *Judicial Review and the Constitution*, (Hart Publishing, Oregon, 2000) at 142.

[158] Ruth Sullivan ed, *Dreidger on the Construction of Statutes*, (3rd Edition, Butterworths, Canada, 1994) at 1. This foundational presupposition is not a specifically Irish phenomenon; it can also be found in discussion of the British and Canadian approaches to statutory interpretation. While the arguments hereafter point to the default preference for literalism in the Irish context; at a conceptual level in the UK and Canada, literalism also acts as an operative presupposition from which statutory interpretations begin, despite the obvious constitutional differences across these legal systems. Thus, while the default position of the literal approach in Ireland, and the considerable authority for such a presupposition is discussed here, it is beyond the scope of this thesis to delve into the distinct constitutional features which necessarily affect this starting point - for example, the difference between legislative supremacy denoted by the separation of powers in Ireland, and the principle of parliamentary sovereignty in the UK, and how these affect the interpretative approaches of respective courts.

[159] See for example the decision of the court in *State (Rollinson) v Kelly* [1984] IR 248, noted by Dodd, *Statutory Interpretation in Ireland*, at 123.

it is clear that the austere interpretative approach required under the prevailing theory is orientated towards rule of law compliance. (Instances in which the courts have to engage in strained interpretation, beyond the literal meaning of statutory language, will be dealt with in later sections.)

As outlined in chapter 1, the commitment to the separation of powers and the avoidance of arbitrary abuses of power are seminal features of rule of law theory. When considering the default process of statutory interpretation as presented above, those principles that have been identified as the distinct non-substantive rule of law features become apparent.[160] This is well established in the Irish context, as the prevailing account of statutory interpretation hinges on the assumption that the courts must exclusively *interpret* and not *make* law. Thus, the prevailing theory presupposes that the form of the law as represented by statute is not interfered with, but remains certain and determinate. Statutory law represents a nexus of public, clear, promulgated, prospective, stable rules; it is in this context that the formal aspects of legislation reflect the basic ordering principle of non-substantive conceptions of the rule of law, and in this respect we will consider whether the processes of statutory interpretation validates such. The success of this theory hinges on the interplay between the purported meaning of the statutory text and the conveyance of the legislative intention, processes which are assumed to be intertwined.[161]

2.1.1 The Constitutional Framework and Statutory Interpretation

In Ireland, under Article 15.2.1° Bunreacht na hÉireann, the Oireachtas (the combined institutions of the Dáil (Parliament), Seanad (Senate), and President) is established as the "sole and exclusive" lawmaking authority of the State. This legislative authority has been described as "absolute and all embracing"[162], subject to obvious qualifications such as Article 15.4.1° - prohibiting the enactment of

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[160] Thus, the prevailing approach to statutory interpretation in Ireland presents the notion that, through the default preference for literalist interpretation, the rule of law will be reflected in the interpretations and decisions of the judiciary. In this way a non-substantive account of the rule of law is applied *to* the practices of the courts, rather than conceiving of the rule of law as something that judges themselves routinely apply. Thus, the prevailing theory of statutory interpretation aims to instantiate rule *of* law, as opposed to rule *by* law.

[161] As outlined by the Court in *Crilly v T & J Farrington Ltd [2001] 3 IR 251*, and noted by Dodd, *Statutory Interpretation in Ireland*, at 115. See also, Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, at 562-563.

[162] Finlay P in *The State (Walshe) v Murphy* [1981] IR 275.

unconstitutional laws[163] - and the unconstitutionality of delegated legislative power to other agents under the *ultra vires* doctrine.[164] Coupled with the interpretative jurisdiction of the courts as administered under Article 34.1 of the Constitution[165] and the establishment of a tri-partite separation of powers under Article 6, this is a significant circumscription of the lawmaking faculties of the courts and is said to safeguard against unelected officials determining legal policy. This institutional arrangement is envisaged as a "functional" separation of powers[166], which is said to require that the courts refrain from legislating under the guise of interpretation.[167] The prevailing theory asserts this limited judicial role through the default interpretative position allocated to the literal rule.[168] The "contemporary relevance" of Article 15.2.1°, then, is to prevent other constitutionally mandated governmental institutions from usurping the legislative power.[169]

The relationship between Article 15.2.1°, the separation of powers and the assumed limited interpretative licence of the courts is proposed as a constitutional validation of the prevailing approach to statutory interpretation.[170] Thus, the prevailing theory of statutory interpretation holds that only the legislature can make law, and the courts must merely apply the intention of the legislature in their interpretative endeavours.[171] Considering this institutional balance in *O'Reilly v Limerick Corporation*[172] Costello J confirmed that the courts must not legislate:

> It is not appropriate for courts to make decisions in the legislative sphere. *Firstly*, it infringes the separation of powers envisaged by the Constitution. *Secondly*, the courts have no democratic mandate from, or accountability to,

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[163] Hogan and Whyte, *JM Kelly: The Irish Constitution*, at 237
[164] Oran Doyle, *Constitutional Law: Texts, Cases and Materials*, (Clarus Press, Dublin, 2009), at 307.
[165] Which stipulates that justice shall merely be "administered" by them.
[166] Denham J, *Laurentiu v Minister for Justice* [1999] 4 IR 26, at 60, noted in Dodd, *Statutory Interpretation in Ireland*, at 281.
[167] Ibid, at 287.
[168] Hogan and Whyte note the default status of the literal rule in the context of statutory interpretation, see Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution*, , (4th Ed, Butterworths, LexisNexis, 2004) at 5.
[169] Doyle, *Constitutional Law: Texts, Cases and Materials*, at 309.
[170] See Dodd, *Statutory Interpretation in Ireland*, at 117, 281, 282, 288, 289, 292. See also David Gwynn Morgan, 'Judicial-O-Centric Separation of Powers on the Wane?' (2004) 39 The Irish Jurist, 142, noting the "curious... vigour" attached to the principle in the Irish context.
[171] Dodd, *Statutory Interpretation in Ireland*, at 287.
[172] *O'Reilly v Limerick Corporation*, [1989] ILRM 181, See also *Norris v Attorney General*, [1984] IR 36.

> the People in respect of the making of legislation. *Thirdly*, individual judges, or judges sitting together, do not generally have the special qualifications and expertise to make legislative choices...[173]

The import of Costello J's statement is quite clear. Legislation is essential to the operation and regulation of the affairs of State, and while it is not deemed appropriate for the Courts to make legislative decisions, it is the role of the courts to interpret statutes. This is regarded as an imperative constitutional issue and no other institution of State has the authority to assume this interpretative function.[174] While this position supposes that the courts must interpret conservatively in order to avoid arbitrariness or potential law making, it does not make clear what constitutes rule interpretation - it merely states that the legislature makes law and that the courts interpret.[175] This will be a major point of criticism of the prevailing theory in the following chapter.

The prevailing theory of statutory interpretation thus posits a constitutional relationship of principal and agent between legislature and courts[176], insofar as it is the courts' duty to channel the intention of the legislature as reflected in statutory language through the use of the literal rule.[177] Indeed, it has been said that limiting the legislative arm of state power to one constitutionally prescribed source under Article 15.2.1° enhances rule of law compliance.[178] This is due to the fact that general rules of law, which are necessary to the instantiation of the ideal, can be instituted only by a deliberative and democratically elected legislature. [179] Thus, the prevailing approach to statutory interpretation presents the primacy of the literal approach

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[173] Dodd, *Statutory Interpretation in Ireland*, at 283, (emphasis in original).
[174] Barr J in *Shannon Regional Fisheries Board v An Bord Pleanala*, [1994] 3 IR 449.
[175] See, for example, the discussion of the interpretative duty of the court in the statutory context outlined in Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, (5th Ed, Bloomsbury Professional, Dublin) at 557-559, and how the assumption is made that literal interpretation is essential so as to ensure that the legislative prerogative of the Oireachtas is not usurped by the courts.
[176] Michael Freeman, 'Positivism and Statutory Construction: An Essay in the Retrieval of Democracy', in Stephen Guest ed. *Positivism Today*, (Dartmouth Press, 1996) at 11. See also, Posner, *The Problems of Jurisprudence*, at 265.
[177] Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, (5th Ed, Bloomsbury Professional, Dublin) at 558-559.
[178] Doyle, *Constitutional Law: Texts, Cases and Materials*, at 311.
[179] Ibid.

and the methodology of the courts in general as deriving from legislative supremacy and the separation of powers.[180]

An operative assumption of the prevailing theory is said to be the presumption that the legislature is familiar with the manner in which the courts employ their interpretative techniques,[181] and that clear statutory language engenders interpretative consistency on their part.[182] That is, the language of a statute as delivered by the legislature is taken to represent the law in a particular area and it is the duty of the courts to apply the literal implications of that text. This is regarded as one of the hallmarks of democratic legitimacy, denoting a particular conception of the judicial function[183] as supporting the rule of law. Thus, one of the core assumptions of the prevailing theory is that the judiciary is assumed to respect the pre-eminence of the legislature, and is constrained by the statutory text in articulating legislative intent.

This presupposition is said to reinforce the formal nature of statutory interpretation, as it is assumed that both the legislature and courts are familiar with the various interpretative tools.[184] Denham J in *Lawlor v Flood*, identified this aspect of statutory interpretation as "an essential part of the separation of powers ... [and] an illustration of the appropriate respect of one organ of government to another."[185] However, this aspect of the prevailing theory cannot require that the courts are totally passive in their interpretations. Rather, the courts must construct the meaning of statutory terms with the intention of the legislature in mind in certain instances[186], particularly where the statute in question has not defined particular

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[180] Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, at 562. See also, Dodd, *Statutory Interpretation in Ireland*, outlining the particular constitutional basis of statutory interpretation under Article 15.2.1° of the Constitution, at 117. Also, in the British context of statutory interpretation see FAR Bennion, *On Statutory Interpretation*, (5th Ed, LexisNexis, 2008).

[181] Dodd, *Statutory Interpretation in Ireland*, at 31, 34. See also Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998', (2006) 26 Oxford Journal of Legal Studies, 179, at 183-184.

[182] John Manning, 'The Absurdity Doctrine', (2002-2003), 116 Harv. L. Rev. 2387, at 2465, note 285.

[183] Bell and Engle, *Cross on Statutory Interpretation*, at 28.

[184] Dodd, *Statutory Interpretation in Ireland*, at 33.

[185] *Lawlor v Flood* [1999] 3 IR 107.

[186] *DPP v Best* [2000] 2 IR 17.

terms.[187] In this light, one of the major concerns in the following chapters will be finding whether judicial inferences of statutory meaning or legislative intent evolve from mere interpretative responses to acts of legislation.

2.1.2 An Irish Approach to the Rule of Law

The jurisprudence of the Irish courts on "the rule of law" has been relatively threadbare. Indeed, very few Irish cases have explicitly detailed what the ideal requires. [188] However, one such rare example arose in the judgment of Denham J in the case of *Maguire v Ardagh*[189] where she outlined the necessary features of the rule of law in an Irish context:

> A cornerstone of the Irish legal system is the rule of law. This legal principle has three components, being: (a) everyone is subject to the law, (b) the law must be public and precise, and, (c) the law must be enforced by some independent body, principally the court system... A reason for this component of the rule of law is that the law should be ascertainable and predictable.[190]

In underlining the value of the clarity and predictability of law and the role of the separation of powers in ensuring such, Denham J's articulation of the rule of law is almost identical in scope to the non-substantive conception of the ideal outlined in chapter 1. Yet, despite the underdeveloped Irish jurisprudence on the nature of the ideal, cases such as *Ardagh* - which did not concern an issue of statutory interpretation[191] - illustrate that the Irish courts conceive the rule of law as an ideal which is oriented to the non-substantive account outlined in chapter 1. Indeed, it is likely that the conception of the ideal outlined by Denham J in *Ardagh* approximates

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[187] In *Mason v Levy* [1952] IR 40, at 47, Murnaghan J held: "Where a statute ... defines its own terms and makes what has been called its own dictionary, a court should not depart from the definitions given by the statute and the meanings assigned to the words in the statute.

[188] Indeed, apart from cases like *Maguire v Ardagh* [2002] 1 I.R. 385, *Mallak v Minister for Justice, Equality and Law Reform* [2013 1 I.L.R.M. 73, and *A v Governor of Arbour Hill Prison* [2006] IESC 45, it appears that more often than not the phrase is invoked out of its rhetorical value, as opposed to relating to substantive points of law. See for example, the judgement of Mr Justice Hogan in *Michael McGrath v Athlone Institute of Technology*, Unreported, High Court, 14th June 2011, [2011] IEHC 254.

[189] [2002] 1 I.R. 385.

[190] *Maguire v Ardagh* [2002] 1 I.R. 385 at 567; see also, Hogan and Morgan, *Administrative Law in Ireland*, at 9, note 5.

[191] Ardagh concerned the constitutionality of the powers assumed by parliamentary committees to conduct investigatory proceedings where findings of fact therein would have adverse effects on the reputation of named individuals.

to the conception of the rule of law envisaged in discussion of the ideal in the statutory context above, given the focus on clarity and predictability.

With these underlying assumptions as to the constitutional basis for the Irish approach to statutory interpretation in mind, I will now proceed to show how the prevailing theory rationalises the relationship between the legislature and courts under the constitutional framework, and how this is said to affect the interpretative licence of the judiciary. This will begin by outlining the relationship posited between the literal rule and the consequent discernment of the intention of the legislature. I will then outline the nature of the principle of legislative intent and discuss briefly the form of the literal rule.

2.2 The Relationship between Literalism and Intent under the Prevailing Approach

The core of statutory interpretation in the Irish context is assumed to lie in the relationship between literal statutory meaning and the discernment of legislative intent. The default literalist position requires that in the absence of unclear or ambiguous meaning or where no absurdities appear as a result of a literal interpretation, the literal rule stands [192] even where that might lead to an unjust result.[193] The centrality of the exclusive legislative competence of the Oireachtas under the prevailing theory requires that courts discern and decide in accord with the legislative will as represented in the text of the statute;[194] and must not deliver value judgments as to what the meaning of a particular legislative enactment *should* be. As outlined, this requires that the courts assume a restrained role in ascertaining legislative intent, respecting the constitutional pre-eminence of the legislature as a deliberative, accountable lawmaking authority. Coté, writing in the Canadian context but in terms that fit with the Irish approach, succinctly outlines the duty of the courts in channelling legislative intent in light of this institutional relationship:

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[192] This test, as legislated for under section 5 of the Interpretation Act 2005 will be examined in later sections.

[193] See the judgment of Blayney J in *Howard v Commissioners of Public Works*, [1994] 1 IR 101, at 151.

[194] Kelly J, in *Ni Eili v Environmental Protection Agency and Roche (Ireland) Ltd*, [1997] 2 ILRM 458, stated that "all statutory construction has as its object the discernment of the intention of the legislature." See David Dodd, *Statutory Interpretation in Ireland*, (Tottel Publishing, 2008) at 19. See also Randal N. Graham, 'A Unified Theory of Statutory Interpretation', (2002) 23 Statute Law Review 91, at 98.

> This doctrine finds its principle foundation in other doctrines, namely Parliamentary supremacy and the separation of powers. The judge, who is the ultimate interpreter of laws, is not cloaked in the legitimacy of democratic election. Consequently, he must confine himself to being, in the words of Montesquieu, 'the mouthpiece for the words of the law'. It is Parliament, or whomever has been delegated legislative power by Parliament, which bears the responsibility for the political choices of legislative activity... These principles postulate the predetermination of meaning by Parliament, the passivity of the interpreter on the political level, and the latter's submission to the sovereign will expressed in the enactment.[195]

The first point of departure for the courts, then, in observing the principles of democratic legitimacy and legislative supremacy is presumed to lie in effectuating the legislative intent, according to what "the normal speaker of English" takes the words of the statute to mean.[196] In effectuating legislative intent it is assumed that the courts have regard to the objective intention(s) of the legislature.[197] This intention is that which is represented in the clear language of the statute, underlining the connection between clear textual meaning and the correlative assumed intent. Indeed, the Supreme Court affirmed as much in *Crilly v T & J Farrington Ltd*[198], holding that to effectuate the manifold subjective intentions of a deliberative multi-member institution would frustrate the intention of the legislature as represented in the wording of the statute. Accordingly, the position in Ireland is that the opinions of individual legislators, relevant Ministers and other officials in parliamentary debate, (often referred to as "legislative history"[199]), are

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[195] Pierre André Coté, *The Interpretation of Legislation in Canada*, (2nd ed, Cowansville Quebec, Les Editions Yvon Blais, Inc 1992) at 6, cited in Graham, 'A Unified Theory of Statutory Interpretation', at 98.

[196] Bell and Engle, *Cross on Statutory Interpretation*, at 28. An analogous criterion to that of conventional meaning as understood by the ordinary speaker of English, 'the man in the street', was adopted by the Supreme Court in *Re Irish Employers Mutual Insurance Association Ltd* [1955] IR 176.

[197] Dodd, *Statutory Interpretation in Ireland*, at 23. Dodd maintains that the notion of objective intention of the legislature is "rooted in constitutional theory and the nature of law itself."

[198] [2002] 1 I.L.R.M. 161.

[199] See W. David Slawson, 'Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law' (1991) 44 Stan. L. Rev. 383. However, in *Crilly* Murray J noted an important distinction between the terms "parliamentary history" and "legislative history" in the Irish context. [2002] 1 I.L.R.M. 161, at 189.

taken to be irrelevant - even where there is uncertainty as to what the legislature intended.

Thus, the prevailing theory not only requires that statutory meaning is determined by legislative intent; but also requires the pre-eminent position of legislative intent is grounded in interpretative theory.[200] Bell and Engle succinctly outline this relationship between textual meaning and the intention behind the words used:

> We often say that we are looking for the intention of the Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what the Parliament meant, but the true meaning of what they said.[201]

With this in mind, it has been suggested that the role of legislative intention in supplementing literal statutory meaning places the judge in a "deferential frame of mind vis-à-vis the legislature"[202], positing a co-dependent or "coextensive"[203] relationship between the two concepts. While the nature of this link does not appear complex, other principal features of the prevailing theory of statutory interpretation must be discussed to gain a more general understanding of the rules that the courts routinely follow in their default resort to literal meaning, which is taken to express the legislature's intent.

2.2.1 The Nature of "Legislative Intent"

Bennion identifies the determination of the intention of the legislature as the "paramount object" of statutory interpretation in any legal system.[204] However, the idea itself has been described as "one of the most fundamental, and at the same time elusive,"[205] interpretative concepts in the domain of statutory interpretation.

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[200] However, Kent Greenwalt is critical of the notion that constitutional frameworks or original constitutional meaning establish interpretative practices in the statutory domain. See Kent Greenwalt, *Statutory and Common Law Interpretation*, (Oxford University Press, New York, 2013) at 13, 32.
[201] Bell and Engle, *Cross on Statutory Interpretation*, at 26.
[202] Reed Dickerson, *The Interpretation and Application of Statutes*, (Little, Brown and Company, Toronto, 1975) at 86.
[203] Ibid, at 76.
[204] Bennion, *On Statutory Interpretation*, (Butterworths, 5th Edition, 2008), at 512.
[205] Dickerson, *The Interpretation and Application of Statutes*, at 67. See also, Richard Ekins, 'What is Legislative Intent? Its Content and Structure', available at

Theoretically at least, "legislative intent" denotes an adjudicative theory which fits within the constitutional framework; that is, the application of the literal rule purportedly effectuates the anticipated uses of the statute as set out in the text. Thus, under the prevailing account of statutory interpretation, literalism and legislative intent are inextricably bound, even derivative of one another. In the Irish context, this is reflected in the position taken by the courts in decisions like *DPP v Flanagan*:

> ...the province of the courts in interpreting a statute is not to divine what intention parliament had when passing the particular statute but, by the application of the relevant canons of interpretation, to ascertain what intention is evinced by the actual statutory words used.[206]

This implies that the conception of intent applied in the Irish context is a text-bound concept and does not second guess the intentions of "the legislature" as an abstract body as such.[207] Yet intent has been rationalised as an interpretative "analogy" – something the courts use to construct the likely aims of a statute.[208] This may be fitting, as intent is difficult to conceptualise in abstraction from the adjudicative process within which it is derived. However, the exact meaning or nature of legislative intent is a contentious issue.[209] It has been suggested as implying both the "actual intent" of individuals or groups, and the idea of the "intent objectively manifested by the language used" in the statute[210] and that other meanings of the word must be considered in order to find what type of intent the concept indicates. The latter idea most likely refers to the intent to enact the statute before the court, or to the intent to enact the words under scrutiny.[211] In light of the discussion of the

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http://www.statutelawsociety.org/__data/assets/pdf_file/0009/94572/RichardEkins.pdf, at 1 (accessed 07/07/13)

[206] *DPP v Flanagan* [1979] IR 265 at 282, quoted in David Dodd, *Statutory Interpretation in Ireland*, at 25.

[207] Dworkin has noted that the concept of legislative intent becomes troublesome once attempts are made to denote intentions to governmental institutions. See Ronald Dworkin, *Law's Empire*, (Fontana Press, 1986) at 335.

[208] Bell and Engle, *Cross on Statutory Interpretation*, at 23-24.

[209] Dodd, *Statutory Interpretation in Ireland*, at 20. Legislative intent was classically described as a "common but very slippery phrase" in the landmark case of *Salomon v Salomon*, [1897] AC 22, at 38

[210] Dickerson, *The Interpretation and Application of Statutes*, at 69. However, he has noted that this assumption is unclear to which intent of a host of possible intents is enacted: "the intent to enact this statute, the intent to enact the particular words in question, the intent to enact these words, the intent to enact their meaning, and the intent to enact the legislator's understanding of their meaning. Ibid, at 70.

[211] Ibid.

constitutional theory above these are the most likely conceptions of intent envisaged under the prevailing theory, it being said that the notion of legislative intent in the Irish context denotes the words "chosen by the legislature itself to express its intention."[212]

Nevertheless, the relationship between literal statutory meaning and intent remains somewhat inexplicable on this reasoning. Indeed, it is inherently tautological - if literal meaning and intent are synonymous and one implies the other, the only rational explanation for having two criteria represent one object is to incorporate deviations from literal meaning within the concept of legislative intent, so as to ensure that enactments which courts cannot effectuate through literal meaning are still reducible to legislative intent. Thus, the argument in favour of deciding in accord with the literal meaning of the statute - which cannot but be the literal meaning as the court understands - is that the discovery of the literal meaning is the only acceptable way of determining the intention of the legislature.

In an attempt to unpack the fusion of literal interpretation and the effectuation of legislative intent *Salmond on Jurisprudence* contrasts *literal* from *functional* interpretation[213] It is claimed that literal interpretation must be conceived as not looking beyond the *litera legis* - that which has been written by the legislature. Functional or "free" interpretation, on the other hand, is divorced from "the letter of the law", and seeks out the likely intentions of the legislature - the *sententia legis* - by speaking to the spirit of the law.[214] *Salmond* thus locates the "essence" of the law, legal meaning, in the spirit of the statute - thus, abandoning the primacy afforded to literal statutory meaning evinced in the discussion of the prevailing theory up to this point. This is because *Salmond* regards literal meaning merely as an "external manifestation" of the underlying intention.[215] Yet despite prescribing such a secondary role for literal meaning in the construction of statutory meaning, *Salmond* suggests that in all "ordinary" instances of interpretation the courts must be "content" to accept the *litera legis* as indicative of the *sententia legis*, despite the

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[212] Dodd, *Statutory Interpretation in Ireland*, at 25.
[213] PJ Fitzgerald ed, *Salmond on Jurisprudence*, (London, Sweet & Maxwell, 1966) at 132, (emphasis in original).
[214] Ibid, (emphasis in original).
[215] Ibid.

obvious tension between the two. Thus, the courts must be satisfied that the legislature "has said what it meant, and meant what it has said"[216], intimating that a close link between the two must be maintained nevertheless. Dickerson illustrates the point even more pragmatically: "Whatever their origins, words mean what they are normally used to refer to."[217]

While this is relatively straightforward in theory, as intimated, articulating intention from the basis of literal meaning proves difficult as a tensional balance must be struck between the two. Discerning legislative intention through an application of literal meaning to the statutory text is assumed to be an uncomplicated process; however, hard cases inherently require a deviation from the actual statutory words used. Farber suggests that even though it is common sense to assume that the courts are subordinated to the legislature, and incapable of asserting their own notions of public policy when interpreting statutes, the extent of such subordination or constraint is not particularly apparent.[218] The disconnection between effectuating determinate intentions in light of textual meaning and wider assumptions as to non-textual context can be observed in the decision of Finlay CJ in *McGrath v McDermott*[219], where the importance of articulating the "true meaning" of the statute, even in cases of ambiguity, was underlined:

> The function of the Courts in interpreting a statute ... is ... strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even other statutes expressed to be construed with it. The Courts have not got a function to add or to leave from the express statutory provisions so as to achieve the objectives which to the Court seem desirable. In rare or limited circumstances words or phrases may be implied into statutory

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[216] Ibid.
[217] Dickerson, *The Interpretation and Application of Statutes*, at 74.
[218] Daniel A. Farber, 'Statutory Interpretation and Legislative Supremacy', (1989-1990), 78 Georgia L. Rev. 281,at 282.
[219] [1988] IR 258.

provisions solely for the purpose of making them effective to achieve their expressly avowed objective.[220]

While it is clear from the tone of this decision that the Irish courts perceive themselves as bound by statutory language and duty bound to effectuate the intention of the legislature, it acknowledges that the literal rule cannot solve all interpretative disputes[221] and that the adjudicative character of statutory interpretation entails some interpretative flexibility. Indeed, in instances where literal meaning breaks down, the courts must still have regard to the intention of the legislature in discerning statutory meaning. Thus, legislative intent and the concomitant resort to statutory purpose are assumed to cover the whole spectrum of statutory meaning, from the use of the literal rule to informing statutory meaning in the event of a lack of clarity, ambiguity or absurdity. As a guiding interpretative principle, then, legislative intention denotes that the courts are obligated to identify the statute the legislature enacted, had it perceived the interpretative problem.[222] This will provide one of central points of the next chapter. Bearing these issues in mind, it will prove useful at this point to consider briefly what is understood by the "literal" rule.

2.2.2 "Plain Meaning" and the Literal Rule

Dodd suggests that the rules of ordinary language are an "essential feature" of statutory interpretation.[223]The assumption that the legislature drafts statutes clearly informs the primacy of the literal rule, fixing the judicial duty to adhere to policy set by another governmental branch in light of this.[224] Yet the default status of the literal rule is complicated. Writing in the context of Canadian statutory interpretation - the underlying presuppositions of which are very similar to the

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[220] *McGrath v McDermott* [1988] IR 258, at 275.

[221] Dodd, *Statutory Interpretation in Ireland*, at 116. See, for example, Clive Symmons' and William Binchy's argument in 'Licensing of Deer Hunting by Staghounds in the Light of Irish Statutory Law: An Instance of Mistaken Statutory Interpretation', (2007) 25 I.L.T. 297, that the interpretation of the word "deer" was an incorrect use of the literal rule in the context of the licensing of deer hunts, given that the words "wild" or "deer" were not defined in the Wildlife Act 1976. The ambiguity in the term "wild animal" under the legislation was problematic, as the deer in this case were merely non-domesticated captive animals, and not wild as such.

[222] See Michael Freeman, 'Positivism and Statutory Construction', in Guest, Stephen, (ed.), *Positivism Today*, (Datmouth Publishing Company, 1996) at 21.

[223] Dodd, *Statutory Interpretation in Ireland*, at 115.

[224] Dickerson, *The Interpretation and Application of Statutes*, at 77.

prevailing Irish approach - Ruth Sullivan has noted that one of the inherent difficulties in using the literal rule is that the "rule" itself does not specify what type of meaning is required:

> One of the most frustrating aspects of the plain meaning rule is trying to understand what sort of meaning interpreters have in mind when they label a meaning plain. There is a rich and shifting set of terms associated with plain meaning - ordinary meaning, literal meaning, common sense meaning, ordinary and grammatical sense, natural sense, and the like. These terms have no fixed or precise reference. Sometimes they are used as synonyms for "plain meaning" but it is also clear that different judges mean different things by them.[225]

This might seem an insignificant semantic issue; however, it establishes an important caveat when considering the complex relationship between literalism, intent and the role of purpose, as it is a tacit acknowledgement that the literal "rule" intimates various distinct interpretative approaches within one general term.[226] Indeed, Byrne and McCutcheon point to a distinction between the traditional common law literal "rule" and what they regard as its contemporary manifestation, the literal "approach".[227] They claim that the "rule" derives from the principle that courts cannot add to or subtract words from the statutory text, and that statutes should be interpreted strictly in the "ordinary, commonplace, or grammatical sense in which the words are normally used."[228] The "approach" on the other hand requires the courts to take into account the context in which words appear in statutory texts.

Yet Dodd treats the subject differently, stating that there are two "principal rules". The first rule concerns the use of ordinary language[229], which holds that

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[225] Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada, available at http://aix1.uottawa.ca/~resulliv/legdr/siinscc.html,, (accessed 1/6/13). Cited in, Dodd, *Statutory Interpretation in Ireland*, at 116.

[226] Dodd, *Statutory Interpretation in Ireland*, at 116.

[227] Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, at 562, 567.

[228] Ibid, at 562.

[229] Summers and Marshall propose quite a discrete interpretative argument from the platform of "ordinary meaning", highlighting the minute differences between ordinary and plain meaning in *The*

words must be given their "ordinary and natural meaning"[230], not dissimilar to the treatment of the literal "approach" by Byrne and McCutcheon. Whether this entails reference to context on all occasions is not stipulated. The second principal rule relates to the concept of "plain meaning" - where the language of a statute allows for an "entirely plain and unambiguous" meaning there is no need to engage the interpretative criteria or interpret any further, as the interpreter's task is complete.[231] However, there is an implicit point at which both these tests intersect. That is, the literal "rule" encapsulates aspects of both the "ordinary meaning" rule, in that words should be given their commonplace or "natural" meaning, implying a contextual reading, but also requires that words are construed strictly in discerning the intention of the legislature.[232] Thus, there is some uncertainty as to what interpretative method the "literal rule" requires, despite the default position it occupies in the Irish jurisprudence. Indeed, the Irish authorities above share Sullivan's distrust of the wide-ranging nature of the rule. For this reason I will not use the various labels associated with the literal rule interchangeably; instead, I will elect to use the label "the literal rule" throughout this thesis.

In outlining the connection between the literal rule, the interpretative criteria and legislative intent, Dodd underlines the assumption that the literal rule derives from the nature of language itself and necessarily occupies the default interpretative position:

> ...[the literal rule] does not deal with how the intended meaning of the words used in a statute is to be ascertained. The linguistic canons ... are interpretative criteria derived from the nature, form and structure of language. Many of the rules of language are logical and logic is an essential hallmark of statutory interpretation. The literal and logical canons of

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Argument from Ordinary Meaning in Statutory Interpretation, (1992) 43 Northern Ireland Legal Quarterly 213.

[230] Dodd, *Statutory Interpretation in Ireland*, at 118-120.

[231] Ibid.

[232] Hogan and White state that the general approach of the courts to statutory interpretation, in a constitutional context, is to consider the "ordinary practical effect" of the words under scrutiny. Hogan and Whyte, *JM Kelly: The Irish Constitution*, at 870-871.

interpretation provide neutral, efficient and objective aids to interpretation that require little or no evaluation of legislative intent.[233]

Given the emphasis placed on the interpretative criteria in this description of the rule - and the intimation that they bear some influence on the expression of the meaning of the legislative text - it will be necessary to give an account of how their implementation harmonises with literalism in discerning legislative intent. Whether these claims imply that literalism is an interpretative attitude[234] or requires the formal application of determinate language will be considered in the examination of the relationship between literalism, intention and purpose in the next chapter. First, however, we must consider the role played by purposive interpretation, and its correlation to the literal rule.

2.3 Purposive Interpretation

Purposive interpretation is regarded as occupying the opposite end of the interpretative spectrum to literal interpretation.[235] The prevailing theory presents the purposive approach as an alternative to literal meaning where the use of the literal rule is thought to, or assumed, to frustrate the intention of the legislature. However, it is assumed that the purposive method cannot extend too far beyond the literal implications of the statutory text. In the event that a literal interpretation gives rise to a patent absurdity, or where there is ambiguity in the statutory text itself, the courts must seek to find the "purpose" behind the statute in order to effectuate the legislative intent.[236] This interpretative scenario is legislated for under section 5 of the Interpretation Act 2005, which requires the courts to have regard to the statutory text as a whole in finding the purpose of the statute. However, it is important to note that under section 5 no mention is made of "purpose" or purposive interpretation. Dodd illustrates how, in instances of unclear statutory language, the resort to purpose is said to supplant literal interpretation yet facilitates the discernment of legislative intent:

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[233] Dodd, *Statutory Interpretation in Ireland*, at 115.

[234] Bell and Engle, *Cross on Statutory Interpretation*, (Butterworths, 3rd Ed, 1995,) at 42.

[235] Law Reform Commission, *Report on Statutory Drafting and Legislation: Plain Language and the Law* [61-2000] at 5.

[236] Hogan and Whyte have noted that in the constitutional context, the purposive or "broad" approach operates in a similar fashion, stating that its use negates the resort to interpretative maxims like those which will be discussed in the next section. See, Hogan and Whyte, *JM Kelly: The Irish Constitution*, at 5.

> Considering purpose allows the court to go beyond pure textualism and consider the intended objective of the legislature. Identifying and relying on the legislature's purpose allows the courts to connect back to the enacting legislature's intent ... and can be identified by the text and Act as a whole...[237]

Thus, purposive interpretation is conceptualised as a supplementary interpretative device to the literal rule, insofar as it bridges any gaps that arise between plain statutory meaning and effectuating legislative intent. Indeed, given the status of the legislature as supreme law-making institution, the purposive approach is envisaged as the court's alternative to re-writing unclear statutory provisions, insofar as legislative purpose can be ascertained from the text as it stands.[238]

Discussing purposive interpretation in *DPP (Ivers) v Murphy*[239], Denham J outlined the purposive approach as the modern account of the mischief rule as expressed in *Heydon's Case*,[240] finding that central to the "mischief rule" is the need for the court to have an understanding of the reason or purpose behind an enactment. The rule in *Heydon's Case* requires:

> ..that for the sure and true interpretation of all statutes in general ... four things are to be discerned and considered:
>
> (1) What was the common law before the making of the Act
>
> (2) What was the mischief and effect for which the common law did not provide
>
> (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth?
>
> (4) The true reason of the remedy?[241]

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[237] Dodd, *Statutory Interpretation in Ireland*, at 161. See also, Aileen Kavanagh, 'The Role of Parliamentary Intention under Adjudication under the Human Rights Act 1998', at 184.
[238] This will be analysed further in the next chapter. See, for example, the commentary on the decision of the court in *Mulcahy v Minister for the Marine* in Sean Patrick Donlan and Ronan Kennedy, 'A Flood of Light?: Comments on the Interpretation Act 2005', (2006) 6 Judicial Studies Institute Journal, at 116-118.
[239] [1999] 1 IR 98.
[240] [1584] 3 Co Rep 7.
[241] See Bell and Engle, *Cross on Statutory Interpretation*, at 11.

Purposive interpretation, then, is said to follow on foot of the maxim *ut res magis valeat quam pereat,* - "it is better for something to have effect than to be void."[242] Thus, the starting point of the approach is the assumption that every provision in a statute is to have some use, as the need for purposive interpretation "arises [from] a preference for interpretations that render an enactment with meaning and effect over interpretations that render provisions devoid of meaning or effect."[243] Presuming that the legislature intends enactments to have some effect, the need for purposive interpretation arises where a provision is capable of two or more possible meanings or effects.[244]

Coupled with the above maxim, it is clear to see how the "correct" purposive interpretation, when faced with interpretative plurality, is said to be the interpretation which best reflects the intentions of the legislature. There is an implied or intuitive connection, then, between the notion that a statute is presumed to have effect, and the idea that where there are a multitude of interpretations, the one which best gives effect to that statutory aim is the correct purposive interpretation. With this preliminary description of the purposive approach in mind, central to the analysis of purposive interpretation in the following chapter will be the manner in which it is invoked on the breakdown of the literal rule.

2.4 The Interpretative Criteria

The "canons of construction", "rules of interpretation" and "interpretative presumptions and maxims", collectively, are known as the interpretative criteria.[245] The interpretative criteria are said to facilitate the discernment of the intention of the legislature,[246] *Cross* noting that they take the form of an interpretative approach, acting as "traditions of good practice", not as binding rules *per se*.[247] The criteria arise from common law foundations and include, for example, presumptions such

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[242] Dodd, *Statutory Interpretation in Ireland*, at 164.
[243] Ibid, at 166.
[244] Bell and Engle use the example of the word "chair" as one such instance; that is, it may denote something to sit on, or the president of a meeting, pointing to the use of words in context and the purpose of the speaker as the means to solve such interpretative difficulties. See Bell and Engle, *Cross on Statutory Interpretation*, at 32.
[245] Although Dodd notes that the term "interpretative criteria is rarely used in Irish case law, see Dodd, *Statutory Interpretation in Ireland*, at 30.
[246] Ibid, at 33-34.
[247] Bell and Engle, *Cross on Statutory Interpretation*, at 39-42.

as the presumption against retrospective criminal punishments,[248] canons - which denote the use of logic - such as *reddendo singular singulis*[249] and legal maxims - self evident truths - such as *expressio unius est exclusio alterius*[250], although little has been said in the Irish courts as to their development.[251] Dodd notes that the term "interpretative criteria" is inclusive of all interpretative devices, including the literal and purposive approaches to interpretation, as well as the common law canons, maxims and presumptions such as those listed above.[252] However, this is stated as not affecting the default position of the literal rule as primary interpretative criterion.[253]

The Irish courts have stated that the interpretative criteria are amenable to change and evolution, but while it was held in *Crilly v T & J Farrington Ltd.*[254] that "there is no rule of law which prohibits a review of a rule of construction"[255], it is recognised that any changes in the criteria must be enacted by the legislature.[256] This may seem peculiar in light of their historical context as common law developed criteria. Statutory interpretation is recognised as the sole purview of the courts and is not a legislative issue,[257] yet this rule presumably arises from the presupposition, outlined above, that the legislature understands the methods of the courts in interpreting statutory enactments[258]; and the general common law principle that that certain common law rules become too entrenched to be changed by the courts.

In *Crilly v T & J Farrington,* Murray J gave an extensive account of the Irish approach to the interpretative criteria, underlining the preference afforded to both intention and statutory text presupposed under the prevailing theory. This decision represents the most exhaustive account of the Irish courts' understanding of the

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248 For an analysis of "specialised" interpretative criteria see Hogan and Morgan, *Administrative Law in Ireland*, at 461.
249 Translates as; "giving each to each."
250 Translates as; "the express meaning of one thing excludes all others."See Dodd, *Statutory Interpretation in Ireland*, at 32-33.
251 Ibid, at 31.
252 Ibid, at 30.
253 Ibid, at 35.
254 [2001] 3 IR 251.
255 Dodd, *Statutory Interpretation in Ireland*, at 31.
256 Ibid. Yet this implicitly contradicts the common law assumption that rules change as they are applied, in light of the common law evolution of the interpretative criteria.
257 Bennion, *On Statutory Interpretation*, at 512.
258 Dodd, *Statutory Interpretation in Ireland*, at 31, 34.

uses and invocation of the interpretative criteria under the prevailing approach to statutory interpretation:

> They are, as I have mentioned, intended as efficient and neutral aids to the interpretation of statutes and are not some sort of standard formulae automatically shaping the result of an interpretative issue. The use of canons or principles of construction, or any one or combination of them in a given case depends on a variety of factors and their interplay - the complexity or clarity of the text in issue, whether applicable precedents exist, whether there are fundamental principles in issue or constitutional considerations - one could go on. The point of departure for the court is always the actual text of the statute to be interpreted and it is a matter of judicial appreciation, in the light of submissions from counsel, which canons or method of interpretation are appropriate to the nature of the problem which presents itself in a particular case.[259]

Thus, the interpretative criteria are assumed to augment the constitutionally mandated interpretative approach of the courts, depending on the complexity of the interpretative difficulty before them. It is worth noting Murray J's statement that the application of relevant criteria in any case is "a matter of judicial appreciation." Indeed Bennion's depiction of the common law characteristics of the interpretative criteria goes some way towards explaining the opinion of Murray J. First, Bennion argues that the application of any criterion as an interpretative guide to a statute cannot prove authoritative or binding in relation to another unrelated statute.[260] Secondly, it is often assumed that the courts are laying down authoritative rules in providing guidelines as to the use of particular interpretative criteria. Bennion attributes this to the prescriptive kinds of language routinely used by the judiciary, as opposed to representing prescriptive statements in relation to the employment of various criteria. Rather, the courts merely engage in "sketching [the] ... outline" of the rule or interpretative criterion.[261] Thus, the interpretative criteria, *en bloc*, are not

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[259] [2002] 1 I.L.R.M. 161, at 185.
[260] Bennion, *On Statutory Interpretation*, at 513.
[261] Ibid, at 514.

taken to be interpretative rules that determine the case, but it is assumed that the courts must take them into account in discerning legislative intent.

However, it has been suggested proposing a straightforward method of discerning meaning or intention in the absence of clear meaning is impractical, as statutes and acts of parliament are "prepared unscientifically and in haste".[262] Indeed, it is often argued that the nature of language itself would frustrate such an attempt in any event.[263] The following passage from Bennion was quoted in its entirety by Murray J in *Crilly* in light of the difficulties that courts experience in having to weigh interpretative factors and choose the correct interpretative criteria:

> The natural and reasonable desire that statutes should be easily understood is doomed to disappointment. Thwarted, it shifts to an equally natural and reasonable desire for efficient tools of interpretation. If statutes must be obscure, let us have at least simple devices to elucidate them. A golden rule would be best, to unlock all mysteries. Alas ... there is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative *criteria*. Fortunately, not all of these present themselves in any one case; but those that do yield factors that the interpreter must figuratively weigh and balance. That is the nearest we can get to a golden rule, and it is not very near.[264]

This summation of the role of the interpretative criteria implies that the processes of statutory interpretation may not be as straightforwardly located between the lines of literal meaning and legislative intent, and the concomitant resort to purpose on the failure of that. Indeed, this suggests that statutory texts may be understood differently in different cases. Indeed, Kavanagh has suggested that the interpretative criteria manifest as "presumed legislative intentions"[265], which compel the decision of the judge one way or the other. Yet, as outlined, any unease as to the potential for arbitrary forms of judicial decision making in instances where an interpretative criterion must be chosen to elicit legislative intention is subdued

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[262] Ibid, at 9.
[263] Dodd, *Statutory Interpretation in Ireland*, at 116.
[264] FAR Bennion, *On Statutory Interpretation*, at 9, cited in [2002] 1 I.L.R.M. 161, at 184.
[265] Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998', at 185.

on foot of the assumption that the legislature is "fully aware" of the correct invocation of the interpretative criteria. Indeed, the legitimacy of the court's capacity to apply the criteria is based on this supposition.[266]

2.5 Critiquing this Account of Statutory Interpretation

Thus, the prevailing theory of statutory interpretation in Ireland holds that the courts assume a default literalist interpretative approach in light of the principle of legislative supremacy and the separation of powers. The literalist drive of the prevailing theory is said to effectuate the intention of the legislature as a matter of course, proposing an innate nexus between the literal import of the statutory text and the objective intention of the legislature. This theory purports to instantiate a non-substantive conception of the rule of law given that the form of the law (or statute) is enshrined in clear and predictable statutory language, which produces the ancillary value of ensuring non-arbitrariness on the part of legal officials by dint of this default preference for the literal text.

As outlined in the introduction, the aim of this thesis will be to engage critically with the foundational precepts of the prevailing theory described above and find whether the theory, in fact, instantiates a non-substantive conception of the rule of law. The primary focus will be on the internal processes of judicial interpretation as rationalised under the prevailing theory, the creativity of which, I argue, is concealed by the default resort to literal interpretation under the prevailing account. Thus, the uncertainty surrounding whether a judge, in fact, routinely has to interpret in a non-literal fashion during applications of statutory meaning will show whether the prevailing theory of statutory interpretation is capable, in fact, of instantiating a non-substantive conception of the rule of law. If the prevailing theory does not represent an accurate account of interpretation, we must consider whether it presents a plausible account of statutory interpretation at all. If in fact it does not, then the underlying assumptions of the prevailing theory must be adapted or re-appraised. The following chapters will ask whether the prevailing description of the literal rule – illustrated in the following quote from Dodd - is reflective of

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[266] Ibid.

interpretative reality and whether it is possible to account for the rule of law if we alter our conception of interpretation in the statutory context:

> The literal approach is ... viewed as enhancing the rule of law, basic fairness and certainty. For citizens to receive fair notice of the law and to arrange their affairs with reasonable certainty, they must be able to rely on the apparent meaning of the legislative text. Citizens are entitled to rely on the law as enacted and to expect the courts to give effect to the text of the law. There is unfairness if the courts rewrite laws laid down by the legislature, the ordinary text of which has been relied upon... Emphasising the literal approach indicates to those dealing with legislation that they can rely on the ordinary meaning.[267]

While this is indicative of a general rule of law position, the intricacies of the interpretative process have profound consequences for the claim that routine statutory interpretations instantiate a non-substantive conception of the rule of law.

The problem of judicial law making is a divisive issue, particularly where the courts are furnished with a creative interpretative approach such as under purposive interpretation.[268] Yet despite the fact that the Supreme Court has cited Dodd as correctly stating the position of the Irish courts in instances of "strained" statutory interpretation,[269] this thesis contends that there are aspects of the prevailing theory of statutory interpretation which are inimical to the rule of law, but which are consistently overlooked.

In light of the relationship between literalism, intention and purpose, and the somewhat complicated role the interpretative criteria play in this, it is worth considering how these complications affect rule of law compliance. The prevailing theory communicates a pristine transition from meaning to intent, without adverting to whether obstacles or complications arise therein. Consider the implications of a high degree of conformity with a non-substantive conception the rule of law for the processes of statutory interpretation - linguistic certainty and

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[267] Dodd, *Statutory Interpretation in Ireland*, at 118.
[268] For example, See Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998', (2004) 24 Oxford Journal of Legal Studies, 259-285.
[269] Finlay Geoghegan J, in *Re Eylewood Estates Ltd*, [2010] IEHC 57, at 51-53.

non-arbitrariness in interpretation are presupposed in light of the connection between articulating legislative intent through the application of the literal rule. However, external interpretative factors imply that the transition from legislative meaning to intent is more intricate than is assumed under the prevailing theory. TRS Allan has noted how nuanced judicial considerations may affect this transition:

> When we perceive the interdependent nature of legislative and judicial authority, we can see that common law principles give way to statute so far as, but not further than, the reason of the case demands. The legislative context in which statutory power is exercised may radically affect the relevant requirements of common law; but fundamental constitutional requirements, embodied in the common law, will always *inform* that context, to some degree, thereby ... taming legislative power.[270]

In light of Allan's contribution, I will argue that there are implicit departures from the literal approach to the interpretation of rules in every case, and that the prevailing theory of statutory interpretation overstates the levels of determinacy offered by literal interpretation. If we are to accept this account as an authentic representation of the processes of statutory interpretation, then either we must accept that there are costs to the rule of law that cannot be disregarded, or relinquish the claim that the prevailing theory of statutory interpretation implicitly enforces the ideal. Indeed, there are many examples of cases in which the courts have refused to countenance interpretations which effectuate or create new rights, or substantially alter legislation, out of concerns for democratic legitimacy and the rule of law.[271] However, scant consideration is paid to whether there are incidental breaches of the rule of law or examples of judicial legislating in cases where judges make seemingly uncontroversial interpretative choices under the established theory of statutory interpretation.

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[270] TRS Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig', (2004) 24 Oxford Journal of Legal Studies, at 564.

[271] See Dodd, *Statutory Interpretation in Ireland*, at 289.

Chapter 3 A Critique of the Prevailing Account of Statutory Interpretation

Chapter 2 illustrated how working assumptions in the prevailing theory of statutory interpretation establishes a purported constitutional basis for literalism as the primary interpretative mechanism of the Irish courts. This theory is held both by the courts and the canonical academic commentators. These interpretative principles were discussed in my attempt to show how the prevailing approach to statutory interpretation is claimed to instantiate a non-substantive conception of the rule of law. Building on the criticism developed in the final section of chapter 2, this chapter will analyse the presuppositions of the prevailing theory. Central will be an analysis of two principal features of that approach; namely, (1) the default interpretative position occupied by the literal rule, including the manner in which departures from it are rationalised, and (2) the role of legislative intent. Having presented a case against literalism as an adequate account of what courts in fact do, I will suggest that, as an alternative to the literalist paradigm, statutory interpretation should be thought of as an adjudicative forum which takes political and institutional concerns into account, as well as considering the meaning of statutory terms.[272]

Regardless of the general nature of statutory terms, in everyday life we manage to avoid litigation as the primary mode of deciphering the meaning of legislation. Thus, at a basic level there must be more to statutory interpretation than considering the semantic content of legislation in finding the meaning and effect of such. It is arguable that statutory interpretation ends up in the courts only by default, and that people have a general, spontaneous or common sense understanding of the purpose and effect of the laws under the rule of which they live their daily lives. This implies that statutes are routinely understood through looking to the purpose of the enactment and that there is an underlying technique that characterises statutory interpretation, best described by the arguments that will be forwarded in this thesis.

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[272] Richard A Posner, *The Problems of Jurisprudence*, at 271. Posner argues that such decisions can only be regarded as compelling factors in statutory interpretation, and that interpretations are not semantically engendered.

The *modus operandi* of statutory interpretation, then, lies beyond semantically internal[273] considerations of the particulars of the text - that is, in looking to words or sentences exclusively, in order to find the meaning of those words or sentences. Thus, the aim of this chapter is to challenge the prevailing literalist narrative of statutory interpretation and to find whether or not the prevailing theory accounts for what occurs in practice.

3.1 Revisiting the Core of the Prevailing Approach

Prior to engaging in a critical analysis as outlined above, it will be instructive to briefly recall the fundamental pillars of the prevailing approach to statutory interpretation. The duty of courts in interpreting statutes is taken to be the effectuation of the intentions of the legislature. This intent is said to be captured in the language of the statutory text and is not found in the opinions or values of individual legislators. It is for this reason, along with Article 15.2.1° of the Constitution, that the literal rule is conceived as the foundational starting point in the Irish context. When judges engage in statutory interpretation, their first point of departure is stated to be to discern the legislative intent through a literal reading of the statutory text. This is believed to uphold a non-substantive conception of the rule of law, as, purportedly, the courts merely give effect to the words drafted by the legislature and are prohibited from inferring any personal or political biases. The following excerpt from the decision of Blayney J in *Howard v Commissioner of Public Works* illustrates the non-interventionist role of the courts envisaged under the prevailing theory:

> Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases

[273] For a consideration of the role of semantic internalism and semantic externalism in the articulation of legal meaning see Brian Flanagan, 'Revisiting the Contribution of Literal Meaning to Legal Meaning', (2010) 30 Oxford Journal of Legal Studies, 255.

> merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands...[274]

Thus, it is not for the courts to effectuate what they regard as just results where clear statutory meaning provides otherwise. Where the courts are satisfied that the meaning they arrive at is the literal meaning of the statute under scrutiny, this meaning is said to automatically signify the intention of the legislature for that statute. Yet this implies that the prevailing theory does not distinguish between the legislative intention and the meaning expressed in the statutory language - thus, the judge's consideration of the one does not necessarily precede or inform the formulation of the other, as they are conceptualised as co-dependent or simultaneously occurring interpretative principles under the prevailing approach.

Exponents of the prevailing doctrine such as F.A.R. Bennion[275] and David Dodd[276] assume this position, stating that the legislative intention and the literal meaning of the statute are the end towards which statutory interpretation is aimed. Thus, in essence, the prevailing theory, in its default preference for literalism and intentionalism, purports to insulate statutory interpretation from the creative aspects of adjudication. While at face value these theoretical presuppositions appear uncontroversial, they must be analysed if the court's use of literal interpretation is to be accepted, at face value, as a prerequisite to statutory interpretation. If the processes of statutory interpretation are to uphold a non-substantive account of the rule of law as is assumed, the application of literal statutory meaning must be mechanical in nature. That is, literal meaning must be shown to apply formally, without judicial inference. Thus, the prevailing account posits, and is wholly dependent upon, a non discretionary, interpretatively formal account of adjudication. The courts, therefore, are merely envisaged as a conduit which links self evident statutory meaning and legislative intent. The circular nature of this

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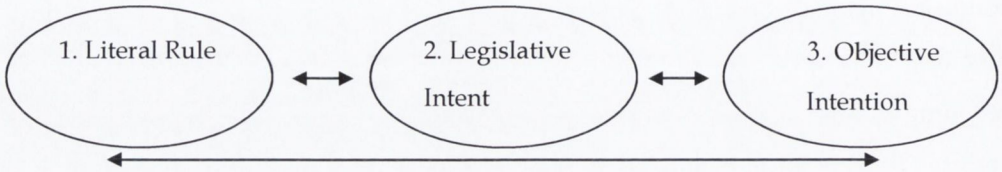
[274] [1994] IR 101 at 151. This case is regarded by Justice Hugh Geoghegan as one of the most significant in the Irish context of statutory interpretation. See *Statutory Interpretation in the Context of the Irish Constitution,* available at http://www.statutelawsociety.org/__data/assets/pdf_file/0003/84702/Statutory_Interpretation_in_the_context_of_the_Irish_Constitution._Mr_Justice_Hugh_Geoghegan.pdf, at 5, (accessed 29/4/2013)

[275] Bennion, *On Statutory Interpretation,* at 469.

[276] Dodd, *Statutory Interpretation in Ireland,* at 24.

interpretative scheme can be illustrated by the following diagram and the explication below:



As outlined in chapter 2, the prevailing theory holds that the default interpretative approach of the courts is the literal rule. This is said to allow the courts to discern the intentions of the legislature effortlessly, given the co-dependent connection between literalism and intent. Yet in Ireland the courts must focus on the objective intention of the legislature - the implication of objective intention necessitates the resort back to the literal meaning of the statutory text, as literal statutory meaning is said to be the only legitimate indicator of that objective intent. As outlined, literal meaning, in turn, is reflective of the intention of the legislature. Thus, the prevailing theory portrays the routine interpretative practice of the courts as insulated from external, non-textual interpretative factors, evincing a pristine transition from literal meaning to objective intention.

However, this rationalisaton is somewhat peculiar, unsatisfactory even, as it communicates an unsophisticated interpretative theory. It presents a process comparable to rule formalism, intimating the "immanent intelligibility" of the law,[277] and deflects attention from how judges consider competing interpretations. In contrast, it is the creative aspects of adjudication, in reality, which underlie the separation of literal meaning and intention when the courts determine the purpose of a statute. Intuitively, there must be some tension in the interpretative duty of the courts - between considering the meaning of the statutory text on the one hand, and discerning the intention behind those words on the other.[278] Indeed, if the prevailing

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[277] For a discussion of the theory of law's immanence, see Denis Patterson, *Law & Truth*, (New York, Oxford University Press, 1996) at 25.

[278] Freeman has noted that the tension between effectuating statutory meaning and intent stems from a dichotomous conceptualisation of the judicial function in the statutory context, as between a British, text based approach on the one hand, and a Continental intent based approach on the other. See Michael Freeman, 'The Modern English Approach to Statutory Interpretation', in Michael Freeman ed, *Legislation and the Courts*, (Dartmouth Publishing Company, 1997) at 2.

theory was not characterised so strongly on a literal basis, it would be clear that institutions such as courts sometimes have to do things other than interpretation to carry out their duty. This tension will be a subject of analysis in later sections of this chapter. Kent Greenwalt has portrayed the difficulty concisely:

> Given the evident significance of statutory text, the basic controversy is whether... text should totally (or nearly totally) displace actual legislative intent and be *the* focus of interpretation. Arguments that it should are grounded on theories that in our political process, the text is what counts, regardless of anyone's ability to figure out what legislators had in mind, and on theories that the search for intent is futile.[279]

Yet, despite this tension, the prevailing theory purports to present a systematic interpretative scheme. In Ireland, where the meaning of the text is unclear, ambiguous or gives rise to an absurdity, the courts are allowed to depart from the literal meaning and seek out the purpose of the statute. In accordance with s.5 of the Interpretation Act 2005, the courts must limit their purposive inquiry to the text of the statute "as a whole", and are prohibited from engaging wider concerns.[280] Yet there is something unsatisfactory in this account of the interpretative practice. It is with these provisional difficulties in mind that I will proceed to a consideration of what I call the "precepts" of the prevailing approach, attempting to unpack systematically some of the internal incoherencies therein.

3.1.1 Analysing the Precepts of the Theory

There are a number of "precepts" which are assumed as central to our understanding of statutory interpretation in an Irish context. These are; 1) the role of the "constitutional framework" in guaranteeing the interpretative ascendency of the literal rule; 2) the default position of the literal rule itself in expressing legislative intent; 3) the assumption of a purposive approach to interpretation on the breakdown of literal meaning; and 4) the duty placed on the courts to take

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[279] Kent Greenwalt, *Statutory and Common Law Interpretation*, (Oxford University Press, New York, 2013) at 47.

[280] Donlan and Kennedy have noted that the 2005 Act did not adopt the "moderately purposive approach" favoured by the Law Reform Commission in their report on statutory drafting and interpretation LRC [61-2000]. See Sean Patrick Donlan and Ronan Kennedy, 'A Flood of Light?: Comments on the Interpretation Act 2005', (2006) 6:1 Judicial Studies Institute Journal, 92, at 116.

obligatory common law interpretative criteria into account. These precepts will be analysed and commented on in turn, in order to illustrate the key instances where the prevailing approach, in practice, does not match what is being presented in theory. An alternate reading of interpretative practice will be proposed on foot of these main points of criticism.

3.2 The Significance of the Literal Rule under the Constitutional Framework

A brief re-phrasing of the relevance of the underlying "constitutional framework" to the prevailing theory of statutory interpretation will prove instructive. The interpretative licence afforded to the courts under the prevailing theory is reflected in the institutional structure denoted by separation of powers and the principle of legislative supremacy. By dint of the legislative prerogative of the Oireachtas, the courts are assumed to operate in a formal capacity, merely applying the literal import of statutory terms. Thus, the constitutional framework is said to determine the form interpretation takes in the statutory context, hedging interpretative unpredictability, respecting institutional competences and delivering uncontroversial answers which reflect the plain meaning and aims of legislation.[281]

The constitutional framework was affirmed as an organising principle in the Irish statutory context in *Crilly v T & J Farrington Ltd.*[282], one of the rare examples where the court delivered an in-depth analysis of the main rules of statutory interpretation. In that case Murray J found the framework to be a decisive factor in the relationship between the objective intention of the legislature and the literal approach. In considering whether to dispense with the rule excluding recourse to parliamentary debates as a rule of interpretation, the court affirmed that its remit was to have regard to the objective intention of the legislature as evinced in the statutory text. This was held as a necessary feature of democratic legitimacy, which would be diluted were the rule excluding the use of subjective parliamentary intentions dispensed with. The primacy of the literal approach, then, is assumed to derive from the limitations placed on the interpretative licence of the court under

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[281] For an analysis of the theory that courts are "faithful agents" in statutory interpretation, versus claims that they play the role of "independent actors" see Kent Greenwalt, *Statutory and Common Law Interpretation*, (Oxford University Press, New York, 2013,) at 19.

[282] [2002] 1 ILRM 161, at 186-187.

Oireachtas under Article 15.2.1° of the Constitution. Indeed, Murray situated the role of the courts in the interpretation of statutes in light of this relationship.[283]

Thus, a strict premium is placed on literal statutory meaning in order for decisions to reflect the principles of democratic legitimacy and the rule of law. Indeed, the framework is envisaged as determining the manner in which the courts interpret statutes, proffering a principal/agent relationship between legislature and court, as outlined in the previous chapter. Yet this aspect of the prevailing theory is inherently contestable, particularly in its ascription of a particular interpretative approach to the institutional arrangement in Ireland. Thus, it is essential to consider whether the principle of legislative supremacy requires a particular interpretative theory.

3.2.1 Can the Principle of Legislative Supremacy Produce Literal Interpretations?

The presumed effect of the constitutional framework on interpretative theory is that it determines which interpretations are legitimate or illegitimate. This interpretative legitimacy is said to derive from the default position of the literal rule, which is assumed in light of the principle of legislative supremacy. Thus, the interpretative licence of the courts under the prevailing theory is said to be predicated on separate notions of rule making and rule interpretation. However, this presupposes literalism rather than requires a need for literalism in particular instances. That is, the constitutional framework does not outline what interpretation is or how interpretation proceeds - it merely sets out boundaries between legislation and interpretation, electing appropriate institutions for each practice. This is not a theory of interpretation, so it cannot require that interpretations in the statutory context are literal in the main.

The constitutional structure merely presupposes notions about what it is to make law and what it is to interpret law, as the Oireacthas is endowed as the supreme lawmaking authority under article 15 of the Constitution, purportedly fixing the courts as a restricted interpretative institution. It does not follow from this relationship that interpretation should be literal, nor does it prescribe any other

[283] Ibid. This case will be analysed at length in the next chapter.

form of interpretative approach. However, if we consider an alternative or hypothetical constitutional scheme whereunder the Oireachtas is presented as the dominant legal institution as opposed to a legal institution with an exclusive power to make law, it might follow that the courts should adopt the literal approach. This is because the Oireacthas as dominant legal institution would be able to require a particular interpretative approach on the part of emasculated courts. However, the prevailing theory does not present this claim. It merely states that the Oireachtas is the supreme law making authority, and that the role of the courts is to interpret. This has no effect on the manner in which the courts interpret - it merely states that it is the court's institutional prerogative to interpret. Thus, it does not follow from the constitutional structure that the courts must give effect to literal interpretations.

3.3 Deconstructing the Prevailing Conception of the Literal Rule

The claim up to this point has been a rather simple one: it is far from settled that statutory interpretation operates literally, on foot of distinct institutional boundaries which are informed by Article 15.2.1° of the Constitution and the separation of powers. However, the interpretative process is more complicated than assumed under the prevailing theory, which regards literal interpretation as self evident.

To base our understanding of the processes of statutory interpretation on such a rudimentary foundation necessarily conceals other key elements of interpretation. Scant attention is paid to the non-textual factors that compel courts to articulate the - purportedly determinate - statutory meaning they are looking for. Indeed, there is no suggestion under the prevailing theory that anything other than isolated, text specific interpretation is going on when the courts interpret statutes, or that purposive interpretation fills the gaps in situations where literal interpretation does not apply. Indeed, it is possible that, in the genuflection to legislative supremacy, the inter-related precepts of literalism and a restricted court hold nothing other than rhetorical value; particularly if they are presupposed out of concern for the rule of law and democratic legitimacy.

Thus, literalism is taken to be determinative of what our conception of interpretation in statutory cases should be - insofar as that particular form of interpretation is taken to correspond to the relationship between legislature and

courts. Yet this is by no means necessarily the case, and does not answer the quandary of what legitimate interpretation is. The following points of analysis will illustrate how the prevailing theoretical account of statutory interpretation fails to account for the actual interpretative practice of the Irish courts. First, I will briefly recap how the literal rule is said to operate under the prevailing theory, along lines similar to those drawn in chapter 2.

3.3.1 The Literal Rule as Prescribed under the Prevailing Theory

The analysis thus far confirms that the prevailing theory rationalises statutory interpretation primarily on the basis of literal meaning. Thus, when the meaning of the statutory text is "plain", the courts are not permitted to engage in further interpretation, as the intention of the legislature is said to be rooted in clear statutory language. This conception of literal statutory meaning and legislative intent has considerable historical pedigree. Oliver Wendell Holmes Jr. is said to have formulated "the plain meaning rule" when describing the relationship between legislative intent and literal meaning in the following terms: "We ask not what [the legislature] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[284] It is unclear whether he speaks of contextual interpretation or of mere formal textualism,[285] but this is very similar to the approach of the Irish courts, as evinced by the decision in *DPP v Flanagan*.[286]

Yet the literal rule as rationalised under the prevailing theory implies that literal interpretation necessitates the formal application of determinate language where it is encountered, and that the resort to context plays little or no role in formulating literal meaning. This claims that judges are capable of interpreting in a vacuum in discerning literal meaning, which is incorrect. Thus, the prevailing theory presupposes an account of literal interpretation which requires justification on its own terms. A major point of contention in the criticisms that follow is

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[284] Oliver Wendell Holmes, "The Theory of Legal Interpretation, (1899) 12 Harvard Law Review, at 417-418.

[285] Posner argues that Holmes did not consider textual interpretation problematic, and considers this a crude "formalistic" rationalisation. Posner, *The Problems of Jurisprudence*, at 262

[286] [1979] IR 265. The statement of the court in *Flanagan* was cited in section 2.2.1. of the last chapter, where the court held that statutory interpretation is concerned with the intention implied by the words of the statute and not second guessing the intention of the legislature itself. See note 206.

whether the necessary resort to the context of the case dilutes the claim under the prevailing theory that literal meaning applies as a matter of course and requires little or no judicial inference.

If it is accepted that context plays a role in "literal" interpretation, there is a divergence in descriptions of the operation of the literal rule - as between a rule denoting the formal application of rules of language, and an attitudinal or contextual approach to statutory terms, which has at its end point the articulation of the legislative intention. This implies that the literal rule is not absolute, and confirms the tension outlined in chapter 2 between literal meaning and intent. Bennion notes that in the context of the rule, the words "literal" or "plain" should be construed so as to denote a meaning that is "natural".[287] This prescribes a common sense approach to statutory meaning, implying that meaning should be what it appears to say, insofar as there is no competing applicable interpretative criterion in the circumstances which may detract from that meaning. It is suggested that only where there are inferences which *"modify, alter or qualify"*[288] the meaning in question is one allowed divert from the default interpretative approach. Literal meaning, then, is said to exist in the "immediate context" of the language of the statute. That is, the meaning one associates with the words at the moment of reading, or within the text as a whole when considering the meaning applied in that immediate context.[289]

None of this, at first glance, is particularly controversial, as the prevailing theory holds that the literal rule is assumed to apply formally, or to operate by an application of deductive logic to a determinate text. However, the manner in which the courts are said depart from the literal rule is significant, as it is here that the cracks begin to appear in the prevailing theory of statutory interpretation.

3.4 Departures from Literalism: Does the Theory Capture Interpretation in Practice?

While resort to literal meaning is said to occupy the default position in discerning legislative intent, the courts have on occasion acknowledged the limitations of the

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[287] Bennion, *On Statutory Interpretation*, at 549.
[288] Ibid,(emphasis in original).
[289] Ibid.

literal or plain meaning rule.[290] The prevailing theory holds that the courts may depart from the literal rule where the meaning of the text in question is unclear, ambiguous or produces an absurd result. Thus, prevailing doctrine requires that where there is ambiguity in the language of the statute, or where there is no clear, literal meaning to apply therein, the judge must go beyond the literal rule and resort to these text relative interpretative techniques. In the Irish context this interpretative procedure is codified under s.5 (1) of the Interpretation Act 2005 which provides:

> In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -
>
> (i) in the case of an Act to which paragraph (a) of the definition of 'Act' in s 2(1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.[291]

Thus, the prevailing theory allows the interpreter to dispense with the literal rule, but he cannot deviate from the provisions of the text itself in considering statutory purpose. This posits a restrictive, dichotomised approach to statutory interpretation, as, first, it presupposes that literal interpretation is the default interpretative device in all situations - again, assuming an a-contextual interpretative approach - and secondly, assumes that purposive interpretation is only relevant where literal interpretation fails to express the intentions of the legislature.

However, this reading of the interpretative practice of the courts downplays the significance of non-textual considerations in determining the correct statutory

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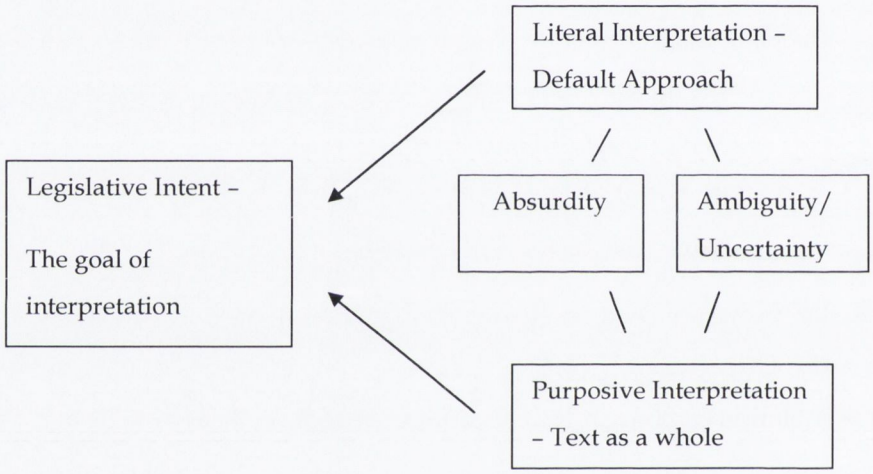
[290] See *Carlisle Trust Ltd v Dublin Corporation*, [1965] IR 456, cited in Dodd, *Statutory Interpretation in Ireland*, at 167, or the decision of the court in *State (Rollinson) v Kelly* [1984] IR 248, where the court refused to apply the literal rule and also refused to apply a purposive approach to an erroneously drafted statute.

[291] Available at http://www.irishstatutebook.ie/2005/en/act/pub/0023/sec0005.html

meaning. This interpretative scheme proposes that there is a deductive answer to statutory meaning in all cases, even in instances of interpretative plurality, and assumes that purposive interpretation is relevant only where the courts encounter such plurality or vague meaning. The text remains an obvious starting point for the interpreter - this much is not contested by this thesis. However, the interpretative scheme proposed under the prevailing theory is rationalised purely on a literalist foundation, leaving little or no room for the role of context and purpose in the description of the interpretative practice of the courts.

Consider the following diagram as an illustration of this interpretative scheme:



Thus, the prevailing theory stipulates that where the literal rule is inapplicable, in discerning the intention of the legislature judges must have regard to a purposive reading of the text, providing a remedy to any ambiguities or absurdities therein. Thus, it is clear that the prevailing account conceptualises statutory interpretation as a purely textual enterprise, as non-textual interpretative considerations do not fit in the above interpretative scheme. That is, in the above rationalisation of the purposive approach and under section 5 of the Interpretation Act 2005, statutory purpose is regarded purely as a text reflective or text oriented interpretative device. This leaves no room for a consideration of the context or conditions of the case in question, in finding the purpose of the statute. The prevailing theory thus assumes that a consideration of the purpose of the statutory language in the context of the text of the statute as a whole is capable of addressing any interpretative difficulty.

This compels us to question whether statutory meaning is purely reflective of the text, or whether resort to statutory purpose or legislative intent implies more than mere textual implications – that is, a resort to extrinsic contextual considerations in identifying statutory purpose. Thus, were courts to consider non text reflexive issues in interpretation - such as the facts of the case before them, and how a particular interpretation will affect the parties - interpretative practice would appear discretionary when rationalised in light of the prevailing account of interpretative practice. Indeed, this thesis will show that instances in which literal meaning breaks down illustrate how the prevailing theory of statutory interpretation cannot be an accurate description of the practice.

Thus, the following section will concentrate on interpretative choices that are made on the collapse of literal interpretation and how they undermine the apparent formal nature of prevailing account of statutory interpretation. Indeed, presupposing literal or text-based interpretations, where other interpretative methodologies are in play, may only be a judicial sleight of hand, allowing the courts to give effect to the legislative intention which would, more likely than not, be closest to what the legislature objectively intended. Whether the courts must give effect to literal meaning, take a purposive approach, or merely pragmatically express the particular legislative intent, then, becomes unclear. At this juncture I will sketch some fact scenarios, by way of example, to show how in dealing with the lack of clarity, ambiguity and absurdity, the prevailing theory does not accurately depict how such circumstances are resolved.

3.4.1 Interpretation in the face of Uncertainty

Where a word or sentence under consideration is unclear - in its definitions, for example - substantial uncertainty may arise as to what is actually provided for under the statute and frustrate attempts at discerning legislative intent, given the lack of clarity as to whether the words enacted apply to the factual situation before the court in question. Thus, as rationalised under the prevailing theory, the literal rule does not apply, but the court must consider a purposive reading of the text as a whole in discerning intent. It is not difficult to imagine how unclear statutory meaning produces interpretative difficulties in its interpretation or application. As an example, consider the following situation:

Imagine a lost stranger in Dublin City looking for directions to Heuston station. On brushing off an approaching pedestrian the stranger apologises and asks "do you know the way to the station?" There may seem an obvious, immediate answer to this question - the pedestrian may make an inference that the stranger is looking for Heuston station. However, he might not - the question is necessarily unclear and cannot be answered on its own terms. It might be that the stranger is merely asking the passerby does he know the way to a station for either for buses or trains - assuming he does, the answer is "yes" and it is a simple matter which does not require any more of him. However, it would be absurd for him to interpret the question in this manner, so it may be that the stranger is asking for the directions to a particular station.

If he assumes that the stranger is, in fact, looking for directions to a train station, the vague nature of the question is still problematic - there are a number of train stations, and kinds of train, that could be in question. The passerby must look for or offer some context from which he can attempt to answer the question - is the stranger getting a bus or train, for example. Thus, it is necessary to resort to information beyond the initial utterance where that utterance is unclear in order to know what the initial utterance means. If there is no means of figuring out what the stranger is communicating on the bare terms of the utterance, then the passerby must, necessarily, seek out more clues in informing his answer. By the same token, in order to figure out the meaning and application of unclear statutory provisions, some level of non-textual information must be taken into account in inferring statutory purpose. Thus, the prevailing theory is incorrect in asserting that a consideration of statutory purpose proceeds on a purely text bound basis in all situations, because the interpreter will have to look beyond the text at some level in considering how it is to be applied.

While the consequences of unclear utterances are quite straightforward, insofar as the interpreter must look for some context in allowing for a viable interpretation of the words communicated, the case is not so straightforward with the interpretation of ambiguous and absurd utterances or texts. For example, in instances where there is no statutory definition for words which are central to

deciding a case[292], or where a seemingly clear interpretation produces what the court regards as a patently absurd result, the courts often make common sense inferences of meaning which impute the intention which the legislature most likely intended. This is rather straightforward - there is a lack of clarity that is remedied by reference to the context of the case – that is, how the statute will be applied in the case in question. This is markedly different from a consideration of the unclear provision in the context of the text as a whole. This distinction is a significant one. Indeed, the following chapter will show that the Irish courts do not admit to considering the contextual application of the statute, further entrenching the rationalisation of the processes of interpretation under the prevailing theory.

Thus, in situations where statutory meaning is merely unclear, the prevailing theory may be correct insofar as judges might consider the unclear provision or word in relation to the text as a whole in finding the meaning of the statute and, by extension, what it tries to achieve. However, this resort to textual context does not characterise purposive interpretation definitively. The following examples will show that the courts also consider the statute in a non-textual fashion, looking to the application of the statute as a means of discovering the legislative intent. Where statutory meaning is clear but produces absurd results, the interpretations of the court appear to be far less straightforward in approach, tending towards intentional interpretations.

3.4.2 Interpretation in the Event of Ambiguity

Textual ambiguity implies that the text or utterance in question is capable of holding more than one meaning. Uncertainty or vagueness in the meaning of a text is not a necessary ingredient of ambiguity - an ambiguous statement can be quite clear but have manifold meanings, occasionally making the application of meaning a difficult task. Thus, these labels give rise to distinct interpretative conditions. As outlined, statutory ambiguity requires the interpreter to refer to the statutory text as a whole, in order to discern the legislative intent. This naturally assumes that the key to deciphering legislative intent lies somewhere in the text itself, even where

[292] As occurred in *Rahill v Brady* which will be discussed in the next chapter, where the court had to discern what the term "special event" meant in the context of the case before them, where there was no statutory definition for the term.

that text is ambiguous. In so doing, it is clear that the prevailing theory purports to ensure that, in coming to his decision, the judge is insulated from resorting to external, possibly arbitrary, indicators of meaning. In essence, then, if the judge is faced with an ambiguous text or utterance, in order to correct that ambiguity the only legitimate context he can refer to is that of the text as a whole.[293] However, the prevailing theory is silent as to whether referring to the text as a whole necessarily requires the judge to consider the application of that text in the context of the case.

Considering ambiguity in a less abstract manner may allow us to find a way around this difficulty and identify a more practical explanation as to how the courts deal with ambiguous statements. To continue with the leitmotif of travelling by train, an example of the potential for interpretative plurality in the case of an ambiguous phrase arises in every time one steps on or off a train. The warning "Mind the Gap" on both train exits and platforms is a familiar and obvious notice to travellers to avoid the danger of falling between the train and the platform. "Mind the Gap" is a useful example of a straightforward textual communication; however, in situations where deciphering the context of the communication is left to the interpreter, words which normally appear self evident may not mean what they appear to mean.

Looking to the above example; in isolation the respective meaning of the words "mind", "the" and "gap" are self evident. However, it is also clear from the example that texts or utterances which are ambiguous by their nature do not have to be complex or convoluted. It might be regarded as a nonsensical interpretation of the phrase "mind the gap" to conclude that the notice directs train station employees, if not passengers themselves, to supervise the gap area while passengers embark and disembark - hence, minding the gap. The notice is clear insofar as the words "mind" "the" and "gap" are readily understandable o their own terms, but a resort to the context in which the notice is applied - putting passengers on notice of a potential danger - is necessary if the intended application of the communication is to be understood. Thus, solving the problem of ambiguity does not lie exclusively in

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[293] Kavanagh intimates that if the judge bases his interpretation on something other than the text in such circumstances the legitimacy of that interpretation is questionable. See Aileen Kavanagh, The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998, (2004) 24 Oxford Journal of Legal Studies, at 262.

a consideration of the context of the text "as a whole", as is suggested under the prevailing theory.

The solution to the interpretative difficulty facing potential passengers in above example lies in considering the context in which the communication is made. As stated, "Mind the Gap" notices are usually visible at exit points and train platforms, so it is reasonable to suggest that all people should "avoid" or "beware" the danger posed by the gap, not supervise it. On being confronted by textual ambiguity the interpreter may well resort to a consideration of the text as a whole to find a correct meaning; however, to suggest that considering ambiguity must be in relation to the text only, as is assumed under the prevailing theory, is misleading. Rather, the most significant context to consider in the case of an ambiguous provision is be the social or legal imperative which the statute is to address; that is, the intended application of the statute.

Yet a correlative difficulty here lies in the very choice of the context in which the sentence is to be interpreted, where a multitude of contexts arise. That is, an ambiguous statement may have various meanings, but all of those meanings have corresponding contexts; thus, multitudinal contexts unavoidably produce ambiguities in themselves. However, putting the interpreter on notice of this difficulty does not resolve interpretative disputes where ambiguities arise, given that the words alone do not allow the interpreter to grasp how wide a context he is allowed to consider. It is not readily apparent when faced with a text, and in choosing a context in which to interpret it, how we are to choose. This difficulty becomes more complicated when we consider that it is the words of the text that allow us make inferences as to context in the first place. Thus, there is a necessary circularity to the idea that linguistic determinacy and text oriented interpretation can lead to straightforward meaning. It is in the resort to the correct context that ambiguities are eradicated, necessarily entailing a resort to external, non textual issues. Interpretation in the event of ambiguity, then, must go beyond a consideration of the textual implications alone in order to address the interpretative quandary.

The bottom line is that literalism cannot solve interpretative disputes on its own terms, and ultimately, these kinds of concern do not furnish any greater understanding of how statutory interpretation works. While the prevailing theory accepts that the literal rule alone cannot solve all interpretative disputes,[294] the notion that resort to the text as a whole alone provides enough context where the courts are faced with ambiguous or absurd results is unsatisfactory. It is a given that statutory purpose is often not legislated for in statutory texts, barring the inclusion of legislative recitals, which, until recently, have been quite rare. Yet how is a court to make inferences as to the purpose of legislation if it can refer only to the provisions as a whole? The interpretative action of the court is thus necessarily oriented towards the appropriate statutory purpose or legislative intention, that is, it must consider the application of the statute - which must be conceptualised in abstraction from the legislative text.

The above analysis entails that sometimes - though not always - the text in itself will provide answers to interpretative difficulties. However, the fact is that looking to the context of the case; that is, a consideration of the statute in operation, is necessary to the discovery of both statutory meaning and intent.

3.4.3 Interpretation in the Event of Absurdity

The treatment of departures from literalism in cases of absurdity is another principal feature of the prevailing theory, yet the same considerations as above apply if we consider how the courts approach statutory absurdities. Where the court finds that to effectuate a literal interpretation of a statutory provision would be patently absurd, in a similar fashion to that as required in cases of ambiguity, it must consider the statutory provision in relation to the Act as a whole.

In *Positivism and Fidelity to Law: A Reply to Professor Hart,* Lon Fuller outlined an example of an absurd literal interpretation of a statutory provision, and the necessary consideration of statutory purpose in finding the appropriate application of the statute. I will adapt Fuller's example for the purposes of this section. Consider a legislative enactment which punishes sleeping in a railway station by removing those found asleep from the premises. In outlining the purpose behind the statute

[294] Dodd, *Statutory Interpretation in Ireland,* at 116.

Fuller communicates an unsympathetic state of affairs - that being to disaccommodate "disheveled tramp[s]" who might fall asleep on railway benches otherwise occupied by "weary passengers".[295] I will dispense with Fuller's reference to the "alcoholic derelict"[296] for the purposes of this example; however, much can be gained if we adopt the fundamentals of Fuller's scheme. If we posit two similarly situated individuals in broad contravention of the statute, and add an extra individual whose case stands as a clear application of statutory language, the example illustrates both the purpose behind the statute, and how literal interpretations can be inappropriate in particular circumstances.

Imagine three people waiting at a train station on a Friday evening in order to travel from point A to point B. The train has been delayed by several hours. Traveller 1 is a businessman who works long hours in a stressful, exhausting environment. Traveller 2 is a foreign student on his way to point B for a weekend of relaxation and merriment, and is accompanied by traveler 3, his female travelling companion. Time passes slowly. Owing to exhaustion traveller 1 nods off while sitting on a bench in the station. Traveller 2, on the other hand, is quite awake but nevertheless, being unaware of the rule, decides to unfurl his sleeping bag and set up camp for the night. Traveller 3, however, is already asleep on the platform in her sleeping bag. Per Fuller's example, traveller 1 is arrested while sleeping lightly, sitting in an upright position. Traveller 2 is arrested as he is lying down, but is not asleep, and traveller 3 is arrested on being awoken from a deep sleep. The inquiry, then, is to address which of these situations captures the "standard instance" of the term "sleep" for the purposes of the legislation. The purpose behind such legislation, it reasonably could be suggested, is to discourage people from seeking overnight shelter in train stations. Thus, a consideration of the presumed legislative intention behind such an Act is necessary to find the correct target audience of the statute.

It would seem that a consideration of the purpose behind the statute must deem the punishment of traveller 1 absurd, as he is not actively seeking to overnight

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[295] Lon L Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harvard Law Review, 630, at 664.

[296] Lon L Fuller, *Anatomy of the Law*, (Frederick A Praeger, Publishers, 1968) at 17.

in the train station. However, given that traveller 2 is not asleep, to convict him may also be absurd in the literal sense. To convict either would certainly result in an injustice. But if the statute is to prove effectual, the only way for the courts to circumvent effectuating injustices and absurdities is to consider the context of the case and intention behind the statute. Only the situation of traveller 3 appears to capture a straightforward application of the plain meaning of the text and the legislative intent behind such. Yet it is unclear, by the interpretative procedures adopted under the prevailing theory, whether an interpretation of the text as a whole will lead to a correction of the ambiguity or to a satisfactory result in the context of travellers 1 and 2.

Fuller's response to such quandaries is that the courts must have regard to the purpose of the law in a contextual sense; that is, the courts must seek an interpretation which leads to the fairest result, thus best achieving the legislative intention behind the statute in question. In the above situation a contextual or purposive interpretation of the intention behind the statute might lead the court to find that it would be incorrect to punish traveller 1, and possibly traveller 2, with traveller 3's situation being the most appropriate application of the statute. Thus, traveller 3's case shows that in clear cases plain statutory meaning can and does apply; however, as noted, this meaning does not apply in and of itself - the context of the case denotes that the scenario represents a clear application of the literal meaning of the text. Yet where the courts are faced with borderline cases, like travellers 1 and 2, in which they cannot apply the statutory terms in a literal sense, a resort to the statutory purpose is necessary and offers the most reasonable approach to effectuating the legislative intent.

Yet the decoupling of literal meaning and statutory purpose as rationalised under the prevailing theory conceals an underlying uses of the purposive approach which, at surface level, appears to concern meaning. That is, if we accept that traveller 1's situation is an absurd literal interpretation, this characterises our conclusion as a straightforward literal interpretation as envisaged under the prevailing theory. That is, the prevailing theory would hold that, on reflecting on the statutory terms, a literal approach is appropriate to traveller 3's case, but not to traveller 1. Yet both individuals are asleep. Therefore, there must be some

underlying, non textual interpretation at play here in order to find which case represents the standard instance of the word sleep for the purposes of the statute. Moreover, on a literal appraisal, traveller 2's case is less clear cut, yet his situation comes within the scenarios likely to have been envisaged by the legislature in drafting such an Act.

Thus, a consideration of the purpose behind the statute in the context of traveller 2's case is required in order to identify the legislative intent, even though his case falls outside of the core of the rule. This example furnishes two conclusions: first, taking the text as context approach as assumed under the prevailing theory cannot solve this legislative gap, and second, that the intertwined relationship posited between literalism and intent under the prevailing theory is inaccurate. Traveller 3's case shows that literal interpretation can work in particular instances, but there must be an absence of intuitively absurd results in order for the prevailing account of literal meaning to apply. That is, the case of traveller 3 illustrates that statutes can bear a literal application, but these instances are rare for the most part because it is uncommon for statutory language to cater adequately for real life scenarios. Indeed, the analysis of statutory purpose and the resort to the context of the case in the application of the statute illustrates the claim made in the introduction to this thesis - that statutory interpretation in the main operates on a purposive foundation.

The prevailing theory holds that when we reach an absurd literal meaning we must change tack and consider purpose. The judge is said no longer to take a literalist approach, even though it is assumed that he may have to consider ambiguous or absurd results before formulating a literal interpretation of statutory language or considering statutory purpose. The crucial issue is that there is never a threshold point at which we make that change from a literal to a purposive outlook. With this in mind I will now consider the underlying role attributed to statutory absurdity, and illustrate how this leads to a purposive interpretative approach.

3.4.4 The 'Absurdity Doctrine'

The threshold issue outlined above is pivotal in finding whether the courts actually move from literal interpretation to discerning legislative purpose. That is, the shift

from the literal to the purposive approach as provided for under the prevailing theory supposes a fixed point where the judge can determinately say that he can no longer interpret literally. Manning claims that the "absurdity doctrine" lies at the core of this transition from the literal approach to the purposive approach. The ability of the doctrine to account for this interpretative gap is rooted in the consistency of the interpretations of the court when it attempts to discern legislative intention. That is, Manning holds, that to arrive at the "correct" interpretation of the legislative intent, purposive interpretation presupposes the idea of an absurd literal meaning, an absurd meaning which, regardless of its clear literal ramifications, is presumed not to mean what it is straightforwardly interpreted to mean:

> The standard justification for the absurdity doctrine is straightforward. In a system marked by legislative supremacy (within constitutional boundaries) ...courts act as faithful agents of [the legislature]. For that reason, legislative intent is widely assumed to be the touchstone of statutory interpretation. While the enacted text is generally considered the best evidence of such intent, [the legislature] does not always accurately reduce its intentions to words because legislators necessarily draft statutes within the constraints of bounded foresight, limited resources and imperfect language. The absurdity doctrine builds on this idea: If a given statutory application sharply contradicts commonly held social values, then the Supreme Court presumes that this absurd result reflects imprecise drafting that [the legislature] could and would have corrected had the issue come up during the enactment process. Accordingly, standard interpretative doctrine (perhaps tautologically) defines an 'absurd result' as an outcome so contrary to perceived social values that [the legislature] could not have 'intended it'. So understood, the absurdity doctrine is merely a version of strong intentionalism, which permits a court to adjust a clear statute in the rare case in which the court finds that the statutory text diverges from the legislature's true intent, as derived from sources such as ... the purpose of the statute as a whole.[297]

[297] John Manning, 'The Absurdity Doctrine', (2002-2003), 116 Harv. L. Rev. 2387, at 2389-2390.

Thus, referring to the example in section 3.4.3 above, finding traveller 1 guilty of the offence of sleeping in a train station satisfies what we perceive to be an absurd result. Thus, tacit assumptions as to legislative intent are made under the guise of a consideration of the results of a literal interpretation, even though the literal ramifications of the rule against falling asleep in the train station appear self evident.

This captures an important underlying relationship between the invocation of purposive interpretation and the role that the 'absurdity doctrine' plays in capturing the correct legislative intent and, indeed, the "literal" meaning in question. The principal operative factor in a statutory meaning being held as absurd lies in the contextual ramifications of a "literal" interpretation of such. This confirms the theory that in order to interpret in a literal capacity, we must first ask ourselves 'is this meaning absurd?' This, in turn, points to the fact that, if the absurdity doctrine is always in play, then we are always interpreting purposively in relation to non textual issues, such as the 'commonly held social values' that Manning mentions. Therefore, in light of my examples, a literal interpretation of the meaning of the word "sleep", or construing the correct meaning of the words "do you know the way to the station" in the context of the text or communication as a whole, is beside the point, and the prevailing rationalisation of the movement from literal to purposive interpretation where ambiguities and absurdities are involved is inaccurate, as purpose is always in play.

3.5 The Resort to Statutory Purpose: Context over Literal Meaning

As outlined, the prevailing theory requires a consideration of purpose where literal meaning is not evident. In considering how interpreters employ a purposive methodology, it is clear that the resort to statutory purpose underscores the role played by the context of the case in interpretation situations. This argument is detrimental to the presupposition that literalism occupies the default interpretative approach. This pre-literalist orientation of purposive interpretation has been noted in *Cross on Statutory Interpretation*:

> ... assumptions [as to literalism] relate, in part, to the purpose of the speaker or the writer ...We still refer to this as an interpretation by reference to

> 'ordinary meaning' because the reader is able to rely on an immediate understanding of the purpose behind the use of the words without engaging in any further research. If this interpretation of the writer's words proves wrong, the reader can rightly complain that a warning should have been given that it was necessary to read the words in a different, less immediate context.[298]

If we take this claim to its logical conclusion, there is always some contextual reading which assumes the purpose of the statute, anterior to assumptions about literalism and its role in articulating legislative intent. This argument rejects the contention that courts adopt a pre-determined literal meaning which exists independently of the purpose of the statute and the appropriate context. In essence, then, the notion of context independent literal statutory meaning is presupposed but difficult to reconcile with interpretative practice. In reality, judges articulate meaning "appropriate in relation to the immediately obvious and unresearched context and purpose ... unless notice is given to the contrary."[299] This line of analysis suggests that statutory interpretation takes place not on foot of a consideration of the language of the statute in isolation, but in terms of an abstract application of the purpose behind the statute to the context of the case.

It would be ill-advised, however, to overextend purposive interpretation as a panacea to all the difficulties of statutory interpretation, given that - as we shall see in the Irish context at least - the courts are not all too clear on what exactly is meant by the "purposive approach". This is due to the threshold issue outlined in the discussion of the absurdity doctrine. That is, where there is a divergence between literal and purposive interpretation there is an unquantified interpretative gap between the decision to abandon literal interpretation and adopt a purposive approach. Thus, there remains a residual uncertainty as to the exact conditions under which the court dispenses with literal interpretation, aside from the relatively uncompartmentalised doctrines of uncertainty, ambiguity and absurdity under s.5 of the Interpretation Act 2005, which will be visited again in the next chapter.

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[298] Bell and Engle, *Cross on Statutory Interpretation*, at 32.
[299] Ibid.

In light of this indeterminacy the obvious question arises: how ineffective - that is, uncertain, ambiguous or absurd - must a statutory provision be in order to invoke a purposive approach? The prevailing theory offers no compelling explanation as to how or when a judge will dispense with the literal approach and adopt another interpretative method. The most concise statement of how the courts perceive the various interpretative methods was outlined by McGuinness J in *DB v Minister for Health;*[300] however, her decision does not address when literal interpretation ends and purposive interpretation begins:

> It may, I think, be safe to sum up the judicial dicta in this way. In the interpretation of statutes the starting point should be the literal approach - the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self contradiction, or even absurdity.[301]

Given that the statement of McGuinness J does not advert to the complexity of the interaction of literal and purposive interpretation, it might be that the courts do not openly acknowledge the underlying role played by statutory purpose in the formulation of clear statutory meaning. Dodd argues that 'if a provision is found to be entirely plain and incapable of bearing more than one meaning, effect must normally be given to that plain meaning, and purpose will play little or no role.'[302] However, this seems incorrect in that it assumes that the method by which a provision's plain meaning is ascertained is superseded by the result arrived at; that is, the result proves more important than the procedure. This presupposes the idea of literal meaning; thus, the hypothesis becomes the premise. As stated before, if we are to arrive at literal statutory meaning we must ask ourselves the question: "is this statutory provision ambiguous, or does the language of the section include any absurdity?" This is inversely purposive; it is, in effect, a purposive question - essentially we are asking "does the language of this section permit straightforward application", or "will it be formally realised?", but in order to do so, we must conceive of the intended contextual application of the provision.

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[300] [2003] 3 IR 12
[301] *D.B. v. Minister for Health* [2003] 3 I.R. 12, at 49-50
[302] Dodd, *Statutory Interpretation in Ireland*, at 168

This assumes that there is always a need to ask questions as to potential for absurdity. That is, if we are to be capable of interpreting literally, then, we must preface our literal interpretations with a purposive methodology. On this understanding of statutory interpretation we cannot interpret literally at all, and the foundational rationale of the prevailing theory collapses on itself. Thus, a contextual reading of the statute precedes any formulation of literal statutory meaning. Indeed, Donlan and Kennedy have pointed to this incongruity in the prevailing distinction between literal and purposive interpretation, and how they diverge - in a way underlining the key position of purposive interpretation within the statutory context:

> ...the dividing lines between literal and purposive interpretations may not always be clear. As a practical matter, it will be difficult to read the whole text literally without also reading it purposively...[303]

This alludes to one of the chief criticisms of the prevailing approach outlined in this theory - the proposal of an abstract tipping point between literalism and purposivism - whereas in fact, the purposive approach occupies the default interpretative position. The observation then that one cannot interpret literally without also engaging purposively with the text gives the lie to the claim that the interpretations of the courts espouse a preference for the literal approach.

Indeed, the notion that legislative intent is not determined solely by the words of a text is central to a consideration of the foundational role played by context in statutory meaning.[304] Twining and Miers outline a useful taxonomy of the concept of intent and how in its different manifestations it orientates towards various notions of "meaning" or "purpose", applications of intent which overlap and are used interchangeably, making it difficult to determine how intent is applied in practice in statutory interpretation. In an attempt to unpack this lack of clarity, a cross section of the table presented by Twining and Miers will be adapted and

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[303] Donlan and Kennedy, 'A Flood of Light?: Comments on the Interpretation Act 2005', (2006) 6 Judicial Studies Institute Journal, at 118

[304] Flanagan, 'Revisiting the Contribution of Literal Meaning to Legal Meaning', at 256

employed here to illustrate both the similarity and nuances between these concepts. This will also aid in the arguments forwarded in the next section:[305]

Object of intent	Some possible deviations	Term
1. L intended that the words should be understood according to some settled convention or some technical usage.	The words to be interpreted had no settled meaning or L ... had no clear intent as to meaning.	intended meaning of words.
2. (a) L intended that the rule should cover situations of type O but not situations of type P.	L had no clear intention as to scope.	intended scope.
2. (b) L intended that this rule should/should not repeal, make an exception to or otherwise change other rule(s).	L had no intention as to the possible effects on other rules; the rule had affected other rules in ways not contemplated by the rule maker.	(un)intended effects.
3. L intended that the rule should have a particular (direct or indirect) impact on behaviour or attitudes or have other consequences.	L had no clear intent as to the consequences of the rule or the rule did not have the consequences intended or it had other unintended consequences.	purpose,(un)intended consequences

Thus, Twining and Miers's treatment of the nuances between intent, meaning and purpose shows how legislatures, and by extension courts, often interchange these labels.[306] This may offer one explanation why there is a lack of clarity as to the distinction between meaning and intent in the prevailing theory, and indeed, intent and purpose in the practice. Thus, it is suggested for the purposes of this thesis the term "meaning" implies how the words of the statute will be understood; "intent" refers to the narrow notion that the words used will serve some aim; whereas "purpose" implies the wider notion that there will be consequences on a general application of the rule which courts must consider in finding whether that intention

[305] See William Twining and David Miers, *How to Do Things with Rules*, (5th ed, Cambridge University Press, 2010) at 151-152.
[306] Ibid, at 150.

will be served. In order to separate these distinct interpretative approaches, consider the following taxonomy, which will outline the prevailing approach to the terms, and the alternative approach proposed in this thesis. All non-literal forms of interpretation will be considered under the catch-all label "teleological interpretation":

1) Literal Interpretation - Prevailing Theory: clear statutory language applies in itself, automatically represents the intention of the legislature.

2) Teleological Interpretation:

    a) Subjective Intention - Prevailing Theory: rejects role of extrinsic aids such as parliamentary debates. Courts not allowed consider subjective intentions, such as those outlined by Ministers or particular T.D.'s.

    b) Objective Statutory Intention – Prevailing Theory: consideration of the intention of the legislature as represented in the literal meaning of the words of the statute. Intimates co-dependent connection with literal rule.

    c) Text as Context Interpretation – Prevailing Theory: consideration of the intention of the legislature in light of the words of the statute taken as a whole on the failure of literal approach.

    d) Purposive/Hybrid Approach – interpretative critique of prevailing approaches proposed in this thesis. Court decisions demonstrate an underlying purposive approach in considering the application of the statute to the context of the case, yet demonstrate an orientation towards the words of the text in considering the intended application of those words in light of statutory purpose. Literal interpretation, per se, is formally rejected.

3.6 The Fusion of Statutory Purpose and Legislative Intent

The relationship between statutory meaning and the resultant intent is central to the prevailing theory of statutory interpretation, as it is suggested that there is no gap between discerning the meaning of the text and the intention ascribed to it. However, as outlined above, the underlying role of purpose and context in the

articulation of statutory meaning indicates that the prevailing theory is incorrect in assuming a predisposition towards literal interpretation on the part of the courts. This necessarily disrupts the assumed nexus between literal meaning and intent, thus affirming the claim at the outset of this chapter that the statutory language on its own terms cannot automatically adequately express the legislative intention. This aspect of the prevailing theory necessarily obscures the roles played by purposive interpretation and the consideration of legislative intent in articulating statutory meaning.

In its default preference for literalism the prevailing theory depicts the purposive approach as a secondary, non-literal interpretative device which represents a means of articulating the intention of the legislature. However, legislative intent is often regarded as an interpretative principle in itself. Thus, we are faced with a quandary: when the courts depart from literalism in seeking to effectuate the intention of the legislature, the prevailing account is silent as to whether this transition is guided by purpose alone, by a reflection of the intention of the legislature on its own terms, or by combining a consideration of both those, and other principles.

Barak has suggested that the resort to purposive interpretation necessitates first, conceptualising the fusion of the general purpose of a statute; that is, looking to the goals, interests and values implicit in the statutory text - the *ratio legis* - and second, conceptualising the objective and subjective intentions of parliament in light of this.[307] Yet this rationale implies a very strong similarity between statutory purpose and the role that legislative intent plays in the discernment of statutory meaning, to the point that they are indistinguishable. Indeed, it has been suggested that in their "widest senses" the concepts of legislative intent and statutory purpose "overlap".[308] This fusion is not helpful in deciphering how intent and purpose are separated in practice.

In their report on statutory interpretation in the Irish context, the Law Reform Commission argued that there is "very little difference" between the

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[307] Aahron Barak, *Purposive Interpretation in Law*, (Princeton University Press, 2005), at 339-340.
[308] Dickerson, *The Interpretation and Application of Statutes*, at 87. The "widest" sense of purpose here is regarded as the "very general" notion that statutes are aimed at advancing the common good.

phrases purpose and intent, yet signalled that purpose implies a "broad concept", whereas "intention" refers to extrinsic aids used in relation to textual intention.[309] This represents the assumed meaning of both terms in the prevailing theory when the notion of non-literal interpretation is considered. In adverting to the overlap between intention and purpose, the Commission underlined the danger of departing too radically from literal meaning in effectuating statutory purpose, affirming the claim above that intention may be a more text-orientated interpretative device than statutory purpose:

> There is a strong argument in favour of a common sense approach to statutory interpretation, whereby a judge, in deciding a case, is expected to avoid giving a provision a meaning which plainly thwarts the legislative intention behind the statute. On the other hand, there is a fine line between embracing this principle and empowering a judge to impose his or her own view of the most appropriate meaning, at the expense of the explicit wording of the provision. The former situation may be regarded as desirable, common-sense judicial interpretation; the latter opens the door to the risk of judicial legislation.[310]

Thus, the Law Reform Commission point to an inherent tension between the pillars of the prevailing theory - the primary use of the literal rule, the effectuation of legislative intent, and the use of purpose where a link cannot be ascertained between meaning and intent on the application of the literal rule. However, little or nothing is said of the relationship between legislative intent and statutory purpose, beyond the general claim that the latter is a wider interpretative device. The prevailing theory does not offer any distinction between the court's resort to purpose and legislative intent where literalism is dispensed with. For his part Dodd merely states that when courts dispense with the literal rule, they will "resort to the concept of legislative intention", and in so doing "typically does so on the basis that it is giving effect to the legislative intent"[311], with no allusion as to when the purposive method ensues.

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[309] L.R.C., [61-2000], at 11.
[310] LRC [61-2000], at 10.
[311] Dodd, *Statutory Interpretation in Ireland*, at 24.

It may be that reference to legislative intent is a necessary juridical artefact, an interpretative reference point which purports to hedge non textual judicial discretion. Yet, by the same token, judicial reference to the purposive approach has become synonymous with statements as to legislative intent given its non-textual connotations. Thus, the two concepts have become somewhat fused, both abstractly and in the Irish practice. Twining and Miers have noted that this conflation has become a feature of both theory and practice, suggesting that more should be done to flesh out the difference between the two.[312] In order to distinguish between intentions and purposes they recommend that the concept of intention should relate to a general cluster of notions about intent; for example, the notion that rule makers intend to make particular rules, that they have intentions as to the scope of rules, that the rule makers intended to express the rule in the words chosen and had intentions as to the meanings attached thereto.[313] They recommend that purpose, on the other hand, should be confined solely to a consideration of the possible consequences of the rule.[314]

Thus, in order to limit confusion, "purpose" should speak to intended consequences, direct and indirect purposes - that is, the stated outcome of the rule and ancillary effects. Adapting an example outlined by Twining and Miers, the direct purpose of police check points is to check tax, insurance, licences, roadworthiness of vehicles etc, but they have the indirect or "ulterior" purpose of catching drink drivers and making roads and road users aware of the rules and enhancing road safety.[315] Thus, Twining and Miers recommend that we should conceptualise intention as relating to the rule itself, or to the text of the rule in the statutory context, whereas purpose refers to the results of the rule. This differentiation is useful and will be revisited in the discussion of interpretative theory in chapter 5.

Despite this useful differentiation, the claim in this thesis that purposive interpretation plays an underlying role in the articulation of statutory meaning

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[312] See Twining and Miers, *How to Do Things With Rules*, at 150-154.
[313] Ibid, at 153.
[314] Ibid.
[315] Ibid.

situates purpose as a "touchstone" of statutory interpretation[316], complicating how we conceive legislative intent as an interpretative device. What is clear is the incorrectness of the prevailing assumption that speaking of the purpose of an Act resolves the tension between literalism and the effectuation of intent, because it has been shown that there is always a peremptory resort to statutory purpose. Therefore, if anything, purpose and intent, and not literalism and intent, manifest a foundational orientation towards each other. Twining and Miers's arguments intimate that the chief difference between intention and purpose lies in the approach of the court in considering the application of the statute. That is, resort to legislative intent seeks to effectuate the wishes of the enacting legislature in the context of the legislative text, had they been presented with the interpretative issue at hand; whereas purposivism requires courts to be faithful to the "broader purposes" of the statute, and solve the interpretative issue in relation to those purposes in considering the application and consequences of the statute.[317]

The prevailing theory thus assumes that there is a co-dependent relationship between the literal rule and legislative intention. That is, literal meaning is said to automatically signify the intention of the legislature, fulfilling the interpretative duty of the courts. The role of purpose under prevailing theory has been described as a text-oriented approach which considers the purpose of the enactment in the context of the text of the statute as a whole in order to effectuate the legislative intention. However, the argument above that there is an underlying resort to purpose necessarily undermines these claims. If the prevailing theory is incorrect in the assumption that the literal rule is the default interpretative device, this negates the claim that there is a co-dependent relationship between literal meaning and intent.

Instead of the prevailing account of the relationship between literal meaning, intent and purpose, this thesis claims that purpose is the underlying interpretative device in finding plain statutory meaning. Thus, the literal rule as rationalised under the prevailing theory does not work on its own terms, as there must always

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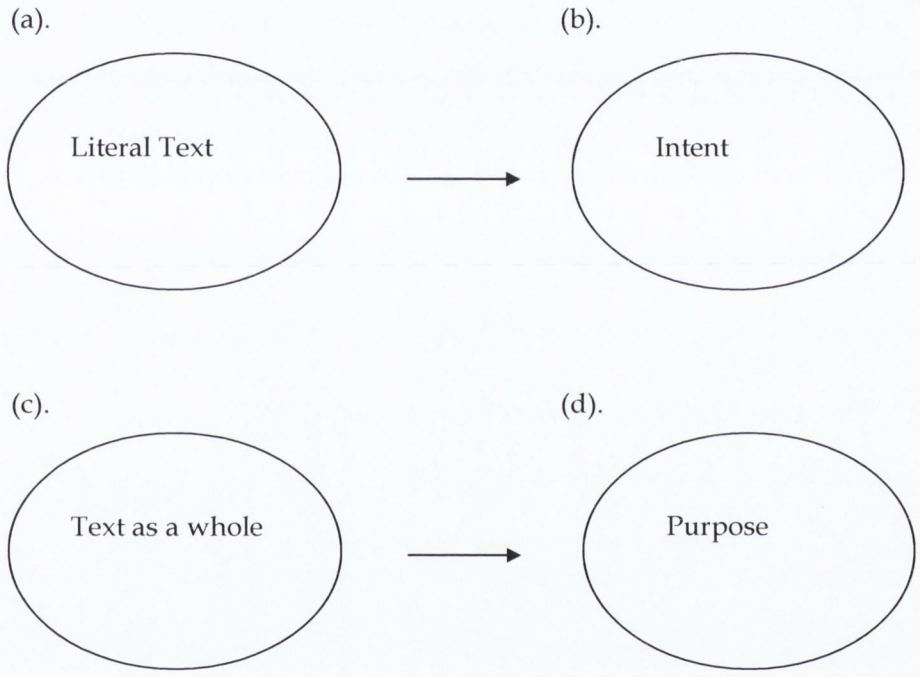
316 See Dickerson, *The Interpretation and Application of Statutes*, at 87.

317 Martin H. Redish and Theodore T. Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', (1993-1994) 68 Tul. L. Rev. 803, at 815.

be an underlying reference to the context of the particular case in determining the "literal" meaning of the statute. The resort to legislative intent, then, can be read as an attempt by courts to channel abstract causal factors that led to or motivated the legislature to enact the statute in question.[318] This is a necessarily text oriented enterprise. Statutory purpose on the other hand involves a broader, hypothetical view of what the statute seeks to achieve. The following diagrams are an attempt to illustrate the distinct roles of purpose and intent in light of these arguments and to differentiate between the two concepts. The prevailing approach to legislative intent and statutory purpose is reflected in the following diagrams:



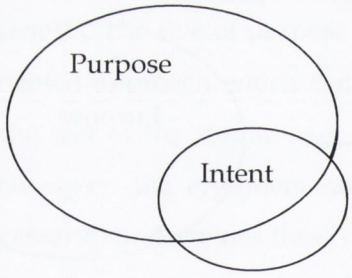
The prevailing account of the interpretative practice supposes that, when faced with different interpretative conditions the courts must engage different interpretative methodologies. Thus, when the courts are satisfied that they can apply a literal textual meaning, it is assumed that this meaning automatically represents and speaks exclusively to legislative intent, whereas in situations where there is an absence of literal meaning, they must consider the statutory purpose in relation to the text as a whole - the only context they are allowed to consider. Thus, diagrams (a), (b), (c), and (d) represent the prevailing account of the separation of meaning

[318] See Dworkin, *Law's Empire*, at 50.

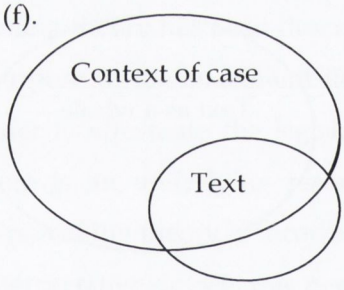
and intent and how the concepts differ in practice to the correlative notions of statutory purpose and contextual interpretation.

However, this is far too rudimentary an account of interpretation. The second set of diagrams below is a more accurate description of the similarities between statutory purpose and intent, and how they are arranged on a similar interpretative spectrum, but apply to distinct concerns. This claim implies that the courts consider a combination of statutory purpose and legislative intent in reaching the ultimate end of statutory interpretation. This suggests that the default pairing of meaning and intent, and the correlative secondary relevance of purposive interpretation under the prevailing theory is inaccurate. The interpretative methods of the courts cannot be so crudely categorised as represented in the prevailing theory and, if anything, are merged until such a point that we can attribute statutory purpose in considering the application of the statute, or the intention behind the words of a statutory text and what they are supposed to achieve. My argument has been to point out that we do not approach texts from a default literalist position, and that it is incorrect to demarcate interpretative methods in such an unqualified fashion.

(e).



(f).



Thus, imagine diagrams (e) and (f) above represent statutory interpretation in practice - an alternative conception of the practice as assumed under the prevailing theory. My argument is that a consideration of both purpose and intent, and text and context, are malleable and cannot be extricated from each other as simply as proposed under the prevailing theory. That is, I find it inaccurate to argue that judges intuitively know that they are dealing with literal meaning and must channel intent exclusively, or conversely, know that they must look to the text as a whole in ascertaining its purpose. Diagram (e) represents the notion that statutory purpose necessarily concerns a wider interpretative lens than the concept of legislative

intent. This is intimated in the prevailing theory; that is, where the courts cannot decipher a clear legislative intent they have regard to the statutory purpose, and, as such, is not a problematic issue.

If we consider diagram (f), this reflects the claim that there is always a reference to context in some form. Thus, a consideration of statutory purpose concerns the meaning of the statute in relation to the context of the particular case, and in light of the consequences of an application of a particular interpretation. Intention concerns textual matters, or the intended meaning of the statute. The problem with the rationalisation of interpretative practice under the prevailing theory is that in routine instances of statutory interpretation it is assumed that there is no resort to context or statutory purpose, as the courts need only refer to the text or to the text as a whole in the absence of plain meaning, or in the event of ambiguity or absurdity. So the prevailing account of interpretative practice necessitates four separate interpretative lenses, a singular interpretative approach and a correlative object of interpretation for literal and non-literal interpretative situations. This is an inaccurate prescription of how interpreters engage with texts.

3.7 Uncertainty as to the Form and Function of the Interpretative Criteria

The last precept to be analysed here is the notion that the courts are duty bound to have regard to the interpretative criteria in every case where the interpretation of a statute is at issue. As outlined in chapter 2, the interpretative criteria are said to take the form of long established rules, maxims, and presumptions, which compel interpretative decisions as to legislative intention.[319] It is asserted that the interpretative criteria promote interpretative predictability and "avoid excesses that might arise if there was no logical system for adjudicating interpretative disputes"[320], yet the courts have acknowledged that while there is relative agreement as to which interpretative criteria are employed, applying them is not so straightforward.[321]

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[319] Dodd, *Statutory Interpretation in Ireland*, at 30.
[320] Ibid, at 34.
[321] Noted by the court in *DPP v Alan Simpson (No 2)* [1959] IR 335, cited in Dodd, *Statutory Interpretation in Ireland*, at 35, note 78.

Thus, the interpretative criteria are assumed to be pro-literal under the prevailing theory, insofar as they provide the courts with a range of assumptions that assist in discerning literal interpretation. However, this very assumption pulls against the isolationist rationalisation of the literal rule under the prevailing theory, suggesting that if the interpretative criteria are employed in the construction of literal meaning, literal meaning does not apply in and of itself. Indeed, Twining and Miers have noted this tension, stating that that while the courts have developed a wide range of "prescriptions" that aid them in the interpretation of statutes, they operate as justifications for interpretations in particular cases, as opposed to criteria that actually compel interpretative decisions.[322]

Thus, in assuming that the courts must have regard to a wide range of interpretative criteria in every case, the prevailing theory presents a dichotomous conception of role attributed to the interpretative criteria. This necessarily dilutes the default role of literal interpretation and cuts against the secondary role attributed to statutory purpose. That is, the prevailing theory cannot have it both ways - the interpretative criteria cannot be assumed as pro-literal in that they aid the courts in discerning literal statutory meaning, nor can they be regarded as supplementing the purposive approach, because they are non-textual interpretative aids and the prevailing theory regards statutory purpose as a text oriented interpretative approach. Indeed, very little is said of the place of the interpretative criteria under the prevailing approach - whether they augment literal interpretation, or whether it is assumed that they are separate and distinct interpretative measures from the literal approach. Rather the basic claim is that the literal rule is the primary interpretative criterion, and various other secondary criteria interpretative (canons, maxims etc) are employed, but not as regularly as the literal rule.[323]

Instead, the interpretative criteria should be conceived as anti-literal. That is, tools used by the courts which compel decisions one way or the other,[324] each canon representing an arrow in the interpretative quiver at the court's disposal. Yet the prevailing rationalisation of the role played by the interpretative criteria does not

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[322] See Twining and Miers, *How to Do Things with Rules*, at 239.
[323] Dodd, *Statutory Interpretation in Ireland*, at 30.
[324] Ibid.

extend beyond the rudimentary claim outlined above - that they aid the courts in discerning legislative intent. Indeed, the criteria were described by Murray J in *Crilly v T & J Farrington Ltd.*[325] as the "methodology used by the courts for the purpose of ascertaining the will of the Oireachtas as expressed in Acts adopted". How the courts employ specific criteria and whether they interact with a consideration of purpose and legislative intent, for example, is left unresolved.

Dodd states that the use of the interpretative criteria is not coupled with the court's evaluation of legislative intent[326] - rather it is said that they provide an interpretative limitation on the courts, preventing them from encroaching on the legislative power of the Oireachtas.[327] Thus, the prevailing theory assumes that the interpretative must be taken into account by the courts in considering the literal meaning of statutory texts. However, it is also implied that they manifest as discretionary interpretative devices, but this is offset by the assumption that the legislature can predict their use as it is presumed to know how the courts go about statutory interpretation.[328] Yet Dodd locates the "source of legitimacy" through which the court applies the interpretative criteria in "the basic rule of interpretation", that is, the presupposition held by the legislature that statutes will be interpreted by reference to the interpretative criteria.[329] Thus, the prevailing theory holds that the Oireachtas believes the interpretative criteria will be used, and so are understood as legislating in cognisance of the criteria and their likely effect.

At first glance, however, this seems to be self-affirming, or circular at the very least. Assuming that the legitimating force behind the interpretative criteria is a conviction on the part of the legislature that they will be applied is self evident. Essentially, this amounts to the claim: "the interpretative criteria are legitimate because we the legislature believe them to be legitimate". Thus, the criteria get as much interpretative legitimacy from the Oireachtas's belief that they will be used as the literal approach gets from the assumption that the constitutional framework requires interpretation to be literal, because the prevailing theory does not elicit an

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[325] [2001] 3 IR 251.
[326] Dodd, *Statutory Interpretation in Ireland*, at 115.
[327] Ibid, at 288.
[328] Ibid, at 34.
[329] Ibid at 31.

interpretative theory as to how the criteria will be used. Instead it merely assumes that they will be used. There should be substantive external reasons to make such a claim, but the significance of the criteria under the prevailing theory hinges on this assumption.

If the assumption relates merely to one criterion, such as the presumption that statutory words are presumed to have some effect, then there is no significant problem, as the courts will only be concerned with the basic purpose of effectuating legislative intent. However, the fact is that in every case there are several conflicting interpretative criteria at issue. Thus, a circular assumption such as "the legislature can account for the manner in which the courts apply the interpretative criteria", cannot answer all interpretative problems. The legislature is about as capable of predicting which criterion will be utilised in particular circumstances as it is at predicting the threshold point at which literalism gives way to purpose. Yet both of these notions are considered legitimating principles under the prevailing theory of statutory interpretation.

Bennion has noted the vague role played by the criteria in the processes of statutory interpretation and how it is unrealistic to assume that they augment literal interpretation.

> The natural and reasonable desire that statutes should be easily understood is doomed to disappointment. Thwarted, it shifts to an equally natural and reasonable desire for efficient tools of interpretation. If statutes must be obscure, let us have at least simple devices to elucidate them. A golden rule would be best, to unlock all mysteries. Alas ... there is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative *criteria*. Fortunately, not all of these present themselves in any one case; but those that do yield factors that the interpreter must figuratively weigh and balance. That is the nearest we can get to a golden rule, and it is not very near.[330]

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[330] Bennion, *On Statutory Interpretation*, at 9 (emphasis in original).

The above statement was quoted in full in *Crilly* Murray J[331] illustrating that there is a great deal of uncertainty as to the role of the criteria, particularly given the systematic approach to interpretation presupposed under the prevailing approach and how the criteria have been shown to resist conformity to that interpretative system. Indeed, it is curious that the interpretative criteria are even considered relevant under the prevailing theory, given that the literal rule and purposive interpretation are purported to cover a wide ranging interpretative spectrum. In fact, despite the prevailing assumption that the interpretative criteria are well established rules and maxims, the suitability of any criterion is ultimately an issue for the judge to settle on. Thus, underlying the application of each interpretative criterion there is an element of discretion, which is not dictated according to rule or maxim: [332]

> In any given case, the importance of any one particular criterion may depend on its intrinsic usefulness in addressing the interpretative doubt that arises and identifying the intention of the legislature. There is considerable judicial discretion as to the application of an individual criterion in any given case. In applying the criteria, a court is generally permitted to place greater weight on one criterion over another.[333]

While this acknowledges an underlying uncertainty in respect of the factors which compel the choice of any single criterion, Dodd's rationale here necessitates asking whether we must always make an assumption as to the usefulness of an interpretative criterion in the context in which it is applied. If an interpretative criterion proves useful by virtue of the fact that it allows us to arrive at the meaning of the statute in the case in question, then the standard by which we are assuming the usefulness of the interpretative criterion in that situation proves self affirming. There is an unstated presupposition here as to the utility of any interpretative criterion. That is, the usefulness of different criteria is assumed in particular circumstances, but an interpretative method cannot be justified by its results unless

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[331] Dodd, *Statutory Interpretation in Ireland*, at 34.
[332] Karl Llewellyn illustrates this discretionary application clearly in 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed', (1949-1950) 3 Vand. L. Rev. 395.
[333] Dodd, *Statutory Interpretation in Ireland*, at 30.

the court takes a radically pragmatic turn in decision making. This is an entirely regressive theoretical presupposition. The court cannot state that an interpretative criterion is good or useful simply because it allows for the correct interpretative approach and answer. In interpretative situations courts, like individuals, have an intuitive sense that a particular decision is right. It is true the selection of an interpretative criterion might facilitate a particular decision, but that does not imply that there is an obligation to take the criteria into account in all instances of statutory interpretation.

Rather, such an intuitive consideration is separate from the interpretative issue in question. This discretionary movement in choosing the relevant interpretative criterion does not reflect an aspect of statutory interpretation that is concrete in its determinacy. Any charges of arbitrariness then are understandably difficult to fend off - a case which was resoundingly made by James Landis among others.[334] The uncertainty surrounding the question of how the courts adopt particular interpretative criteria is apt to claims that the courts' discretionary capacity in this area frustrates rule of law compliance. Thus, lurking behind the prevailing notion that the courts must have regard to the interpretative criteria is the suspicion that the courts implicitly know a right answer when they encounter one. This necessarily assumes that the selection of the correct interpretative criterion is a purely discretionary choice, cutting against one of the underlying principles of the prevailing theory - the placing of limits on judicial discretion.

In the US it has been suggested that the interpretative criteria are not that significant in the interpretative scheme - for example, Posner claims that not only do they amount to a mere list of relevant considerations of "modest utility", he does not regard them as interpretative considerations. He likens them to the "maxims of everyday life", considerations which merely help the court establish presumptions that allow them to decide statutory cases, like the considerations one would take into account on making a difficult decision in life.[335] This assumes that the interpretative criteria offer the court nothing in the way of guiding interpretation,

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[334] See James M. Landis, 'A Note on "Statutory Interpretation', (1929-1930) 43 Harv. L. Rev, 886, at 891, discussing the difficulties posed when statutory interpretation gives rise to indeterminacy and courts engage in speculation as to legislative intent.

[335] Posner, *The Problems of Jurisprudence*, at 280.

insofar as they do not compel, in any sense, notions of what the legislature meant in particular situations.[336] Thus, it is possible that the interpretative criteria merely provide the court with a foundation from which to make a substantive policy based decision.[337] Coupled with Llewellyn's criticism that any number of canons can compel the decision of the court in any case, and that these criteria necessarily pull against each other,[338] this drastically undermines the central position of the interpretative criteria in the Irish context. Indeed, on such an understanding they have little or nothing to do with interpretation *per se*, and certainly could not be regarded as guiding literal interpretation.

3.8 Conclusion

In this chapter many of the underlying problems of the prevailing theory of statutory interpretation have been discussed. On foot of the presentation of the core precepts of the prevailing theory in chapter 2, it has been shown that the interpretative scheme assumed under the theory is untenable. Indeed, the underlying precepts of the prevailing theory fail to reflect interpretative practice adequately - something that will be analysed further in the next chapter. These arguments have established that, far from ensuring a systematic, determinative approach to interpretation, the prevailing theory cannot work owing to a series of inaccuracies which are endemic in the operative precepts of the theory.

The prevailing theory of statutory interpretation in Ireland is dependent on a number of invalid assumptions. For example, the claim that the constitutional framework requires literal interpretation has been shown to be unworkable and does not, in practice, require the courts to interpret literally as it does not propose a theory of interpretation of itself. This underlying assumption is one of a number of unsustainable claims which are central to the approach, but which do not reflect reality. Indeed, the assumed isolationist approach to literal interpretation fails in light of the resort to context, which underlies any instance of interpretation, as does the assumption that literalism requires no interpretative endeavour on the part of the judge, particularly in light of the failure of the prevailing approach to draw

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[336] Ibid.
[337] Ibid.
[338] Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed', at 401.

determinate lines between literal and purposive interpretation. This isolationist interpretative approach does not work on its own terms, suggesting that, despite the inherent conceptual difficulties the default resort to literalism - which receives widespread support in the decisions of the courts - may be carrying out political work while hiding a site of power.

The notion that the courts must resort to the purposive approach in instances of textual uncertainty, ambiguity or absurdity belies the relationship envisaged between literalism and purpose under the prevailing account, and forces a recalibration of the concept of statutory purpose. The argument that there is an underlying resort to statutory purpose in any instance of statutory interpretation is fundamentally contrary to the default interpretative position occupied by the literal rule under the prevailing theory. Throughout this analysis it has been shown that the resort to statutory purpose and the context of the case play a pivotal role in the formulation of statutory meaning. This underlying claim is not observable in the prevailing account given the focus on the connection between literalism and intent. The critique of the prevailing theory on this point dissolves the distinction assumed between the literal and purposive approaches and undermines the validity of the prevailing account as an adequate representation of interpretative practice. Indeed, this fundamental shift requires a re-conceptualisation of central interpretative assumptions, such as the role of legislative intent and statutory purpose.

Indeed, the notion that the courts are obligated to consider the purportedly pro-literal interpretative criteria in any instance of statutory interpretation has also been rejected. This cannot be correct because the interpretative criteria do not compel interpretative decisions. Indeed, the criteria manifestly pull against each other – certain specifics of a case will imply one criterion, whereas another criterion may be equally applicable to another aspect of the same case. Interpretative devices so fluid in their application and relevance cannot be assumed as essential aspects of a predominantly literalist interpretative approach. The next chapter will discuss a cross-section of decisions of the courts that are assumed to substantiate the prevailing account. However, in analysing the reasoning processes of the judiciary in these cases I will attempt to substantiate the claims above by offering an

alternative perspective on how the courts apply their interpretative techniques. The arguments will proceed along similar lines as outlined in the criticisms above.

Chapter 4 The Prevailing Theory and Interpretative Practice in the Irish Courts

In this chapter I will discuss the interpretative practices of the Irish courts and consider the criticisms of the prevailing theory outlined in chapter 3 in light of those practices. This case analysis will, along the lines of the previous chapter, focus primarily on the courts' use of the literal and purposive approaches to statutory interpretation, with two principal goals in mind; first, to find whether the prevailing theory is reflected in the practices of the courts; and secondly, to consider whether the prevailing theory represents an adequate theoretical exposition of those interpretative practices. This necessarily entails finding whether the prevailing account correctly compartmentalises those interpretative approaches which are routinely affirmed in the decisions of the courts. Thus, to understand the practices of the Irish courts it is essential to look in detail at what we might term "borderline" cases, as it is borderline cases that most clearly mark out the boundaries of the different interpretative approaches.

As outlined in chapter 2 and 3, the prevailing account dictates that courts consider statutory purpose only if the literal meaning of a statute is absurd or ambiguous. However, it has been shown that there must always be an underlying consideration of statutory purpose, even when applying the literal approach, because the courts presume that the legislature would not have intended to give rise to an absurd result, where a literal approach is taken. This clearly undermines a core claim of the prevailing account. In the following cases it will be shown that the courts routinely operate in this manner, but pay scant attention to this paradox.

To critically examine the interpretative practices of the Irish courts the appropriate first point of departure is to begin with an analysis of judgments which are recognised, both by the courts and academic commentators, as underlining the default status of the literal rule in statutory interpretation. Generally however, there is a divergence in descriptions of the operation of the literal rule in Irish jurisprudence - as between a rule denoting the formal application of rules of language, and an attitudinal or contextual approach to statutory terms, which has at its end point the articulation of the legislative intention. If we are to arrive at a clear

understanding of statutory interpretation in Ireland, it is essential to identify which interpretative approach is the default approach to interpretation.

Secondly, I will consider how the courts depart from applications of the literal rule. My aim in this discussion will be to substantiate the claim in chapter 3 that resort to purpose interpretation is not a secondary interpretative device, nor is it confined to a consideration of the text as a whole as legislated for under section 5 of the Interpretation Act 2005. My arguments will show that, contrary to claims of the proponents of prevailing theory, a consideration of vague statutory language necessitates that courts consider the application of the statute in the context of the case, interpreting beyond the text of the statute "as a whole". This will entail a discussion of cases that deal with instances of statutory uncertainty, ambiguity and absurdity to show how the prevailing rationale is an inaccurate description of interpretative reality.

Thirdly, in light of these claims I will show that the resort to purpose plays a foundational role in the construction of statutory meaning, and that the role of legislative intention as an interpretative device is linked to statutory purpose. This rejects the notion presupposed under the prevailing account that there is a necessary link between literal meaning and legislative intent. As intimated above, contextual application is important, but the text still retains a foundational importance in the interpretative process. Thus, while focusing on the statutory purpose departs from a consideration of the statutory language, it represents a more realistic foundation point for describing the interpretative practices of the courts, because they invariably refer to the statutory text in articulating the legislative intent.

Finally, I will show that a consideration of the interpretative criteria is not essential to the construction of statutory meaning, and that the role they play in the interpretative process is incidental to interpretation, rather than being a necessary feature of it. Due to space limitations these case discussions will either consider a cross section of the various judgments of a case, or focus solely on individual judgments that are of particular significance to the arguments proposed in this thesis.

4.1 The Literal Rule Applied in Practice

The first claim in chapter 3 addressed the notion that the constitutional framework does not require literal interpretation. As outlined, this is a theoretical claim and the thrust of this chapter is to illustrate how the interpretative practices of the courts do not correspond to what is presented under the prevailing theory. Yet the courts do, on occasion, implicitly acknowledge that the constitutional structure cannot necessitate literal interpretation on its own terms, and this point will be discussed briefly. In the case of *DPP (Ivers) v Murphy*[339] Denham J emphasised the fact that she could not "encroach on the Constitutional role of the Oireachtas as the legislative organ of the State"[340] and cited the role of the judiciary *vis-à-vis* the legislature as one of the operative reasons why the courts may engage in purposive modes of interpretation, but could never depart unreservedly from the statutory text:

> The rules are applied to interpret the Acts passed by the legislature and in so doing afford the respect appropriate from the judicial organ of government to the legislature... The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take.[341]

This is a significant case in the context of statutory interpretation and will be analysed at length in the discussion of purposive interpretation in later sections. However, the statement of Denham J here offers valuable insight, as the courts appreciate that the constitutional framework does not characterise how statutory interpretation proceeds, but are nonetheless aware that to depart drastically from the statutory text is tantamount to legislating. It is clear, then, that the default presupposition of literal interpretation under the prevailing theory is incorrect and that literalism cannot be assumed on its own terms. I will now consider how the literal rule is applied by the courts and find whether the claim that literal statutory meaning applies formally can be substantiated.

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[339] [1999] 1 ILRM 46.
[340] Ibid, at 59.
[341] Ibid, at 59-60.

The prevailing account of the literal rule is that when statutory meaning is clear, unambiguous or does not produce an absurd result, it applies without the court engaging in further interpretation. However, this is not illustrative of the routine interpretative practice of the courts. Decisions which are widely regarded as applications of the literal rule will be analysed to find whether the vacuumed interpretative state of affairs posited under the prevailing theory exists in practice. The analysis of the literal rule in chapter 3 has shown that the "rule" cannot work as is assumed under the prevailing approach, as a form of purposive enquiry is essential to finding whether the literal approach is appropriate in the circumstances. With this in mind, applications of the rule in practice will be considered to find whether the courts are cognisant of this problem, or whether the routine application of the rule mirrors my claim but overlooks the ramifications of such an application for the default status of literalism in the Irish context. This discussion will begin by analysing a case which is assumed as a straightforward application of the literal rule. The following analysis will show that, when the literalist approach of the court is compared to the description of the prevailing theory in chapters 2 and 3, the austere literalism envisaged therein does not carry through in practice.

The case of *Rahill v Brady*[342] is considered to be one of the clearest examples of an application of the literal rule in the Irish context of statutory interpretation.[343] The case concerned uncertainty as to whether a cattle mart that was held twice a week for the duration of the year qualified for an occasional "special event" licence under section 11(1) of the Intoxicating Liquor Act 1962. The respondent had acquired a licence to sell alcohol under s. 11(1) of the 1962 Act from the District Court, which had agreed that marts qualified as special events under the section. The applicants were the owners of the licensed public house nearest to the area where the marts took place and contested the status of the mart as a "special event" under the section. Section 11(1) of the Intoxicating Liquor Act 1962 provides:

> Subject to the provisions of this section, on application to a Justice of the District Court by the holder of an on-licence, the Court may, if it so thinks fit,

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[342] [1971] I.R. 69.

[343] See Byrne and McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, at 562, and (LRC 61-2000) at 11. Donlan and Kennedy, 'A Flood of Light? :Comments on the Interpretation Act 2005', at 114.

> and is satisfied that a special event is being held at any place to which no licence for the sale of intoxicating liquor is attached grant to the applicant a licence in this section referred to as an occasional licence authorising him to sell at that place during such times and on such days (not exceeding three), as may be specified in the licence such intoxicating liquor as he is authorised to sell by the on-licence aforesaid.

The applicants submitted that the sale of animals in the salesyard where the mart was held could not be conceived of as a "special event" within the meaning of the subsection. They also submitted that an "occasional licence" was not applicable to an event held every Tuesday and Thursday throughout the year because the "frequency and regularity" of the marts denied their status or character of something "occasional". They appealed to the High Court on those grounds and were successful.

In the High Court Butler J found for the applicants, yet it is his rationale in constructing the meaning of "special events" in the circumstances that is of most interest. Considering the applicants' submission as to the significance of the word "occasional" in section 11(1), Butler J rejected that the word in this instance indicated a temporality requirement. Rather, the word indicated that a licence would be granted on the taking place of "an occasion" or event. In so finding, he refused to infer any definition that extended the meaning of the word "special" in the context of the provision to the circumstances at hand, and felt that it was not his place to deviate from or embellish any existing statutory definitions:

> ...giving the words of s 11 of the Act of 1962 their ordinary and natural meaning, as I must in the absence of definition, I am satisfied that an event must be special either intrinsically because of its own character or from the nature of the place where it is held. In the latter case it must be different from the ordinary use of the premises although it may be intrinsically commonplace.[344]

It is clear that Butler J considered his decision a straightforward application of literal statutory meaning in line with the standard rationalisaton of the literal rule.

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[344] [1971] I.R. 69, at 73.

However, in light of my critique of the literal rule in chapter 3, the latter part of Butler J's statement hints at a purposive qualification of the meaning of the section in that particular context, as he patently considers the consequences of an application of the submitted meaning before finding the literal meaning of "special" under section 11(1). Thus, Butler J felt that in the vast majority of cases, in looking at the event and where it was to take place, the court could "say with some certainty" whether such an event was special or not.[345] This seems to be directed or guided by a contextual approach to the word "special" in section 11(1), inferring a noteworthy event out of the ordinary. Given the regularity of such cattle marts at the time, one assumes that this is the context in which the meaning of "special" was determined.

While this is regarded as an uncontroversial application of the literal rule I submit that to describe this interpretative approach literalist is incorrect. Irrespective of the interpretative duty of the courts required under the principle of legislative supremacy, it is inaccurate to suggest that there must be tunnel-vision literalism. Instead, context is taken into account at some level; that is, questions as to the purpose behind a section, or the meaning of a particular word within the context of the section as a whole, are asked but not acknowledged. Bell and Engle in *Cross on Statutory Interpretation* aptly describe this tension between literalism and contextual interpretation:

> ... an 'ordinary meaning' or 'grammatical meaning' does not imply that the judge attributes a meaning to the words of a statute independently of their context or of the purpose of a statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used.[346]

4.1.1 The Judgment of the Supreme Court - The "Classic Statement" of the Literal Rule

The Supreme Court upheld the decision of the High Court, finding that the case hinged on an interpretation of the words used in the statute, as there was no statutory definition for the phrase 'special event' in section 11(1) of the 1962 Act.

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[345] Ibid, at 74.
[346] Bell and Engle, *Cross on Statutory Interpretation*, at 32.

The Court found that the provision had to be construed in relation to the special nature of the event in question, rejecting the claim that the word "special" in the context of the case implied infrequent occasions:

> ... the interpretation of the phrase "special event" in s.11(1) of the Act of 1962 was to be found by an application of the ordinary meaning of the word "special", and without reference to the word "occasional", which was merely used in the designation of the licence mentioned in the section.[347]

The decision of Budd J is regarded as the definitive statement of the literal rule in the Irish jurisprudence[348], and had been described as a "somewhat conservative" reading of the rule.[349] Delivering the following "classic statement" of the "rule", Budd J accepted that the question of whether the occasion amounted to a "special event" was open to review, and rejected the argument that the meaning of the word 'special' in s.11(1) meant either "particular" or "identifiable":

> In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has *prima facie* preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of words should not be departed from *unless* adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature.[350]

It is obvious that this reading of the literal rule by Budd J significantly dilutes the formality of the literal rule under the prevailing approach as outlined by Dreidger and Dodd in chapter 2. This affirms that the courts are cognisant of that fact that they must, and in fact do, carry out a purposive reading of the text before they

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[347] [1971] I.R. 69, at 69.
[348] See (LRC 61-2000), at 11, note 24.
[349] Donlan and Kennedy, 'A Flood of Light? :Comments on the Interpretation Act 2005' at 114.
[350] [1971] I.R. 69, at 86 (emphasis added).

discern the literal meaning of that text. Thus, Budd J's statement that literal meaning may not be departed from "unless adequate grounds" can be shown that an interpretation would not effectuate the intentions of the legislature represents a mandatory direction that the courts must consider the purpose of the enactment during any interpretation of the statutory language. This explicitly acknowledges that purposive interpretation is the default interpretative approach, significantly undermining the claim under the prevailing theory that the courts must adopt a default literalist position.

In their report on *Statutory Drafting and Interpretation: Plain Language and the Law,* the Law Reform Commission state that the practical effect of this judgment was to adopt the position that "literal meaning may be departed from if, and only if, there is evidence within the Act as a whole that such a literal meaning goes against the purpose of the Act."[351] In light of my criticisms in chapter 3, and the implications of Budd J's direction, this is an incorrect reading of the operation of the practice, as the LRC merely repeat the assumption that literal interpretation occupies the default interpretative position. Yet if this judgment represents the clearest indication of the operation of the literal rule, this dramatically alters the nature of the rule as presupposed under the prevailing theory, as Budd J found that the case hinged primarily on a purposive and contextual reading of the section, given that there was no statutory definition for the phrase "special event" in s.11(1). To describe this as "literal" is inaccurate, insofar as it does not square with the prevailing conceptualisation of the literal rule.

Thus, it is clear from the decision in *Rahill* that the court must take context into account at some level; that is, one must ask questions when faced with linguistic indeterminacy as to the purpose behind a section or the meaning of a particular word when an interpretation is applied to the context of the case. [352] It is inaccurate, then, as suggested by Donlan and Kennedy,[353] to describe this judgment as a conservative version of the literal rule, as the resort to purpose effectively pre-determines the degree to which the courts articulate "literal" meaning in a given

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[351] L.R.C. [61 - 2000], at 11.
[352] Bell and Engle, *Cross on Statutory Interpretation*, at 32.
[353] Donlan and Kennedy, 'A Flood of Light? :Comments on the Interpretation Act 2005', at 114.

case. This is because the judgment of Budd J lays down a condition precedent on the invocation of the literal approach, requiring that the court first take into account contextual issues, apart from the mere language of the text, in construing the Act as a whole. This involves the interplay of literal interpretation and what could be described as a form of purposive interpretation, in order to arrive at the "ordinary" or literal meaning. How the literal approach retains a default interpretative status or a *prima facie* preference in light of this interplay is open to question, given that the contextual matters that must be taken into account seem contingent on the use of the literal approach, and vice versa.

4.2 Departing from Literalism in Practice

The prevailing theory assumes that literal and purposive interpretation are complementary but fundamentally different interpretative lenses, insofar as the purposive approach is engaged when the courts encounter statutory terms that do not evince a literal meaning. Yet my arguments in chapter 3 have illustrated why this interpretative arrangement does not work in theory. Moreover, the analysis of *Rahill* - which is considered a seminal application of the literal approach - has shown that the prevailing conceptualisation of the literal rule does not operate as assumed. Thus, it has been shown that there is a default resort to the context of the case and statutory purpose in articulating statutory meaning. Bearing this in mind I will now consider judgments that concern departures from the literal rule as envisaged under prevailing doctrine – that is, under the categories of uncertain, ambiguous and absurd statutory meaning. By using cases to mirror the hypothetical examples in chapter 3, my analysis will show that the prevailing account is incorrect in its description of interpretative practice, even in the non-literal context, and that judgments of the courts do not notice these inaccuracies.

4.2.1 Uncertainty and the Interpretation of Statutory Terms[354]

The courts are tasked with the interpretation and application of presumptively clear statutory terms to ordinary fact situations, looking to the literal meaning of the statutory text in the applied context to effectuate the intent behind the legislation.

[354] The analysis of the *Rahill* decision above is equally applicable to a section considering the interpretation of vague statutory terms, given the open-endedness of the term "special event"; however, given its status as the clearest indication of Irish approach to the literal rule, it was more appropriate to discuss the *Rahill* decision in the section dealing with the application of the rule.

Yet, in most cases involving interpretative difficulty, the situation evinces an ill fit between the statutory language and the facts of the case. The case of *Dunnes Stores v Director of Consumer Affairs*[355] indicates that courts do not merely consider statutory language in the context of the Act as a whole when they are confronted with unclear statutory terms. In *Dunnes* the applicant was found guilty of selling nappies below cost price in contravention of Section 8 of the Restrictive Practices Act 1972. The High Court refused the applicant's claim, and the case turned on whether nappies were considered to be "household necessaries" within the category of "grocery goods" under Article 2 of the Restrictive Practices (Groceries) Order 1987. Grocery goods were defined in the Order as being:

> ... goods for human consumption (excluding fresh fruit, fresh vegetables, fresh and frozen meat, fresh fish and frozen fish which has undergone no processing other than freezing with or without the addition of preservatives) and intoxicating liquors not for consumption on the premises and such household necessaries (other than foodstuffs) as are ordinarily sold in grocery shops, and includes grocery goods designated as "own label", "generic" or other similar description.

The applicant sought an order to the effect that nappies did not constitute such goods. The court found that under Article 2 of the 1987 Order, the words 'grocery goods' had to be construed strictly as they were housed in a statute which enacted penal sanctions. On foot of the decision of the court in *Inspector of Taxes v Kiernan*[356], Finlay Geoghegan J held that the phrase "household necessaries ... as are ordinarily sold in grocery shops" should be construed so as to square with its "relevant statutory context"[357], that is, in line with any relevant reports made by the Restrictive Practices Commission pursuant to Section 8 of the Restrictive Practices Act 1972.

Finlay Geoghegan J found that there were no recommendations in any report of the Commission to support the claim made by the respondents that the

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[355] [2006] 1 IR 355.

[356] [1981] IR 117, in which Henchy J found that: 'a word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole...' This decision will be discussed below.

[357] [2006] 1 IR 355, at 359.

definition of "household necessaries" should be extended to include items such as nappies in the instant case.[358] She rejected the submission that the phrase "household necessaries" should be construed so as to effectuate a "special meaning" beyond the immediate literal statutory terms. That is, a different meaning from the ordinary or natural meaning of the phrase by virtue of its being used in the specific context of the grocery trade, as outlined in *Inspector of Taxes v Kiernan.*[359] In light of this decision, Finlay Geoghegan J found that there was no evidence to suggest that people "conversant with that trade, business or transaction" knew and understood the phrase "household necessaries" to have a particular meaning in that trade, given that the phrase bore a consistent meaning throughout the statutory enactments in which it appeared:

> The issue which the court has to determine essentially turns on the meaning of "household necessaries". I have concluded in applying the above principles that the court should seek to determine the meaning of the phrase "household necessaries" in accordance with the ordinary meaning of that phrase as used in the particular statutory context of a grocery order made under s 8 of the Act of 1972...[360]

While Finlay Geoghegan J opted for a "literal" interpretation of the statute, in light of the statutory context in which the phrases 'grocery goods' and 'household necessaries' appeared, she nonetheless implied a preference for a purposive methodology in prescribing how the interpretations of the courts are guided or constructed. That is, she found it difficult to accept that the statute "clearly and unambiguously include[d] goods beyond such goods ordinarily sold in grocery shops as are necessary for the running and maintaining of a house ..."[361], yet found that nappies were not included as they were used only in the care of young persons in such households. Indeed, in determining what constituted such "grocery goods", Finlay Geoghegan J quoted a section from *Craies on Statute Law* concerning the

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[358]Ibid, at 361 - 363.

[359] [1981] IR 117, per Henchy J, 'If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.

[360] [2006] 1 IR 355, at 361.

[361]Ibid, at 365.

definition of statutory terms. She held that the meaning of statutory terms accords to the intention expressed in the language of the section, such that the words must be interpreted contextually, but not in such a manner as to amount to speculation:

> In a court of law ... what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. After expounding the enactment, it only remains to enforce it, notwithstanding that it may be a very generally received opinion that it does not produce the effect which the legislature intended, or might with advantage be modified. The meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find that natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute.[362]

What is remarkable in the above is that Finlay Geoghegan J cites with approval the idea that intention may be arrived at by giving effect to a contextual reading of the words and by using "reasonable and necessary implication"; yet she located this interpretative method within the context of applying "only" what the legislature has enacted. The latter half of this reasoning is, in effect, an articulation of the prevailing rationalisation of the literal rule, despite the implications as to the significance of contextual interpretation in the former. Thus, while Finlay Geoghegan J alluded to the importance of the context of the case in any instance of statutory interpretation, she situated this within the prevailing paradigm of literal statutory meaning. Considering the tight nexus that is presupposed between literal statutory meaning and objective legislative intent under the prevailing theory, her stated preference for a contextual, broadly purposive method of discerning intention is inconsistent with the prevailing account of literalism, suggesting that the conception of literalism in practice assumes an interpretative approach is necessarily contextual.

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[362]Ibid, at 359.

It is possible that in referring to "only" what was enacted by the legislature, Finlay Geoghegan J was misguided by the assumed connection between literal meaning and legislative intent, consequently attributing the need for textual constraint to the literal rule. However, it is more likely that the concern for textual constraint is effectuated through channeling the intention of the legislature, because, as has been shown, there is an underlying purposive interpretative method at play. While Finlay Geoghegan J outlined an initial preference for literal interpretation, the passage from *Craies* intimates a form of purposive interpretation, with context and "reasonable implication" at its foundations. In disallowing nappies to be categorised as grocery goods or household necessaries, there is a certain incongruity in Finlay Geoghegan J's endorsement of the interpretative approach adopted in *Inspector of Taxes v Kirwan*, which did not necessitate the reading of words into the statute.

In essence, Finlay Geoghegan J could not have been exactly sure of the nature of the goods envisaged under the section on a reading of the statutory text alone. Yet, in outlining her preference for speaking to the purpose of the section in question, she in turn refused to hold that nappies were envisaged as such household goods, which would necessitate reading words into the statute. Thus, it is clear that a straightforward consideration of the literal import of statutory language in this case betrays the necessary resort to statutory purpose and consequences in order to apply such plain meaning. There are two alternatives – either Finlay Geoghegan J's rationale does not correspond to what the courts do when they encounter unclear statutory meaning envisaged under the prevailing theory or this is an example of where literal interpretation does not work in the case in question, despite the assumption that it does.

The case of *Inspector of Taxes v Kiernan*[363] is another pertinent example of how the courts deal with uncertainty as to the import of statutory terms – that is, how the courts discern meaning where there is uncertainty as to whether the circumstances of a case warrant an intuitive application of the statutory language. On appeal to the Supreme Court it was considered whether pig farming was envisaged under the provisions of s.78 of the Income Tax Act 1967, which outlined the income tax

[363] [1981] 1 IR 117.

liability of occupiers of land that were "dealer[s] in cattle." The Act did not include a statutory definition of the word "cattle". The respondent in the case was a farmer who was engaged in "pig production" - the process of buying between 2000 and 2500 pigs annually and fattening them in order to sell - and was not a pig "farmer" in the sense that he did not breed pigs. It was on foot of this buying and selling that the inspector of taxes found that the respondent was a "dealer in cattle". The Circuit Court affirmed the findings of the inspector, finding that for the purposes of the legislation the term "cattle" included pigs. However, the High Court overturned this decision. This, in turn, was appealed to the Supreme Court.

In the Supreme Court the applicants' submission that the Act inferred an "extended connotation" to include pigs and other animals was rejected. The applicants argued that this extended connotation was envisaged by the legislature in the enactment of earlier Acts such as the Income Tax Act 1918, and that it was necessary to interpret the word "cattle" in a specialised way in light of this.[364] The decision of Henchy J is instructive insofar as it offers an example of how the courts approach language generally. Henchy J's preference was to have regard to the "immediate context" of statutory language, in accordance with the "scheme and purpose of the particular statutory pattern as a whole."[365] This indicates that the court must opt for the statutory meaning which effectuates the aims or purpose of the legislation rather than that which indicates the literal meaning of the statutory terms. Henchy J outlined three necessary "basic rules of statutory interpretation" that he had to consider before coming to a decision on the matter:

> First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning...
>
> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word

[364] Ibid, at 122-123.
[365] Ibid, at 121.

> should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language...
>
> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use.[366]

On foot of the first rule, Henchy J felt that the statutory language in s.78 was "plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense."[367] This effectively disallowed the contention of the applicant that the word "cattle" should be given an extended meaning not ordinarily associated with the meaning of the word. The second rule implied that if the court accepted the interpretation of "cattle" included pigs in this particular case, such a finding would leave the respondent open to greater tax liability. Henchy J held that such a tax liability was be unjust due to the fact that it was created on foot of the use of "oblique" language, necessitating the ordinary use of the word. In relation to the third rule, Henchy J held that his experience of the "modern usage" of the word "cattle", which corresponded with that as understood by the "ordinary man in the street", was intended to mean and indicate nothing other than bovine animals, given that cattle, sheep and pigs were readily understood as "distinct forms of livestock."[368]

From the first "rule" above it is clear that, while his reasoning concerns the meaning of the word "cattle" in a particular context, Henchy J considered the application of the statute in light of the meaning of that term. That is, Henchy J formulated the meaning of the word "cattle" in relation to the likely consequences of an application of the statute. Indeed, this applies equally to the second and third rules. These rules intimate a purposive reading of the statutory text in the context of their application to the case, irrespective of the postulates throughout his judgment intimating an application of literal or ordinary meaning. Henchy J clearly considered the use and effect of the contested word in the circumstances, implying

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366 [1981] IR 1 117, at 121-122.
367 Ibid, at 122.
368 Ibid.

that judges do not construe vague statutory terms in an interpretative vacuum or in the context of the statute as a whole as assumed under the prevailing theory. It is commonsensical to conclude that the word cattle should not be interpreted as applying to pigs; however, Henchy J's interpretation is underscored by a purposive reading of the word in the context of the application of the statute, and in light of the results effectuated by either interpretation. Thus, the prevailing theory is incorrect insofar as it suggests that judges interpret statutory terms in abstraction from the conditions to which they are applied. Therefore, there is always an underlying, yet unacknowledged resort to purpose and context.

Following from the discussion of plain meaning and purpose in section 3.4 of the previous chapter it is clear that, in practice, the resort to purpose plays a pivotal role in finding the literal import of statutory terms or utterances, even under the auspices of literal interpretation. In line with the example in section 3.4.1 of the last chapter, judges necessarily have to have regard to the context of the case in order to find whether the meaning they are constructing amounts to the correct interpretation of the term in the case at hand. Indeed, the reasoning process of Henchy J above validates my criticisms of section 5 of the Interpretation Act 2005 and the idea under the prevailing theory that the court is only allowed have regard to the text as context, as it is essential that the interpreter understands the conditions to which he applies that meaning. This alone is enough to convince that the interpretative practices of the courts do not mirror what is assumed in the prevailing theory, as it is patently clear that statutory meaning cannot be construed in a vacuum.[369] Just like the attempt to find the intentions of the stranger who is looking for the train station, the interpreter cannot arrive at meaning unless he looks for something outside of the text or utterance and resorts to some external context in arriving at that meaning.

These arguments flesh out the two criticisms of literal interpretation outlined in chapter 3, and consequently affirm the underlying role played by statutory purpose and the resort to the context of the case in discerning statutory meaning and intent. Thus, there must always be contextual interpretation where the courts apply the literal rule - that is, a reflection on the context of how the words of the

[369] See Twining and Miers, *How to Do Things with Rules*, at 249.

statute will be applied in the real world - not just in terms of the context of the words of the statute as a whole. Correlatively, this also shows that the absurdity doctrine is correct - that is, the literal/contextual reading of the text must be checked to be non-absurd before it can be continued with and applied as a "literal" interpretation of the statute.

4.2.2 Interpreting Ambiguous Statutory Language

The interpretation of ambiguous statutory terms offers a useful example of how the courts balance and choose between competing "literal" interpretations, despite the prevailing assumption that the literal rule eliminates interpretative plurality. As outlined in chapter 3, statutory ambiguity occurs where a statutory provision is capable of more than one literal application; however, this does not require that there is vagueness or uncertainty in that meaning, rather there may be manifold clear interpretations of the words or text in question which complicates the application or identification of the correct meaning. A recent decision which illustrates how courts consider the contested 'literal' meaning of ambiguous statutory terms is that of *Equality Authority v Portmarnock Golf Club*.[370] The case is something of a seminal decision in the context of Irish statutory interpretation given the constitutional backdrop to the case - the clash of two fundamental rights: the rights to equality and to freedom of association. While the vast majority of submissions made to the court and the opinions of the Supreme Court judges themselves were conceived primarily in terms of an application of literal meaning, the judgment of Hardiman J, which will be the focus of this analysis, does not appear to arise solely from consideration of the literal provisions of the statutory text.

In the case the Equality Authority instigated proceedings in order to establish whether Portmarnock Golf Club was a "discriminating club" for the purposes of section 8 of the Equal Status Act 2000, given that membership of the golf club was confined to men. Women were allowed access to club facilities and were allowed to play on the course, with or without an accompanying member. However, the main submissions concerned whether the principal purpose of the golf club was to cater for the needs of the male only members of the club, and

[370] [2010] 1 I.R. 671.

whether the club was thus a single gender non-discriminating club set out under s.9 of the Act. The case turned on the interpretation of the word "needs", and the phrase "principal purpose" within the provisions of section 9 of the 2000 Act, as both terms rendered the section somewhat ambiguous.

The following are the relevant subsections of sections 8 and 9 of the 2000 Act. Section 8(2) of the Equal Status Act 2000 provides:

> For the purposes of this section –
>
> **(a)** a club shall be considered to be a discriminating club if –
>
> > **(i)** it has any rule, policy or practice which discriminates against a member or an applicant for membership...

Section 9(1) of the 2000 Act provides:

> For the purposes of section 8, a club shall not be considered to be a discriminating club by reason only that –
>
> **(a)** if its principal purpose is to cater only for the needs of –
>
> > **(i)** persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin.

The Authority successfully argued its case in the District Court, where it was found that the golf club was a discriminating club as principal purpose of the club was to play golf. This was appealed to the High Court where it was found that the club qualified under the exceptions outlined in s.9(1)(a) of the 2000 Act and was, therefore, not a discriminating club under s.8. The Supreme Court upheld the decision of the High Court in finding for the golf club, rejecting the Authority's submissions that the words "as such" be read into section 9, and that a connection between the principal purpose of the club and the activities engaged therein be shown, in order to qualify for the exemptions in section 9(1)(a).

The Authority submitted that the golf club was established "only" to meet the needs of the male-only members and should not be entitled to the benefit of the exemption under s.9 of the 2000 Act, as golf, by this argument, was not a 'need' or a

necessary feature in the lives of men. They submitted that reading the words "as such" into section 9 was necessary to show that the playing of golf was not a particular need of men *qua* men and that, consequently, the golf club could not discriminate on gender grounds. The Authority also submitted that there must be some necessary or logical connection under the Act between the category of person catered for by the club and the principal purpose or objective of the club, stressing that the "principal purpose" of any golf club is for the playing of golf, not catering only for the needs of persons of a particular gender, or the members of the club.

However, Hardiman J held that both submissions would render the section meaningless, as to interpret the section thus necessarily implied that the purpose or activities engaged in by any club had to be an inherent need of the members of such clubs. In dismissing these submissions he found that, irrespective of the particular grounds for discrimination under consideration, the wording and basic structure of s.9(1)(a) of the 2000 Act must be given "the same" [literal] interpretation, which did not necessitate the reading of the words "as such" into the section. Indeed, he suggested that the inability of the Authority to provide even one example of a sport or activity that would meet the requirement of being a need of "men *qua* men" proved to the detriment of the submission:

> If a "need" is required to be logically connected to one of the 11 categories mentioned in the section, it follows that it must be a need of, for example, women "as such", women *qua* women. If something is a need of women "as such" or "qua" women then it seems to follow that it is a need of *all* women. But this is manifestly ludicrous. However many women are devoted to golf, there must be a larger number who are quite indifferent to it. The same could be said of men.[371]

The Authority also argued that in the event that there was no activity that could be classified as a need of men or women "as such", then the ramifications of s.9 were that although members of a club could associate in a discriminatory fashion, they could not engage in any activity while doing so. This was rejected outright by Hardiman J, stating that people are free to associate in relation to any agreed

[371] [2010] I.R. 671, at 727 (emphasis in original).

purpose, once that purpose was legal.[372] Thus, the interpretation of the word "needs" lay at the root of conceptualising the principal purpose of non-discriminating clubs. Hardiman J saw it that a club, in having a principal purpose, was not debarred from having other purposes, given that "to describe one purpose positively implies the existence of other purposes"[373]; rather, the principal purpose necessarily occupied "a position of primacy".

In this sense Hardiman J favoured the submission of the golf club, finding that the principal purpose of the club was not the playing of golf; instead it was the principal purpose of the club to provide facilities to make available the option of playing golf to men. Thus, the word "needs" was interpreted not as denoting an absolute necessity, given that the game of golf could not realistically be placed in that category. The purpose in question, then, was found not relate to the activities of the members of the club, but to the facilities provided in catering for the activities to take place.

This led Hardiman J to find the reading of s.9(1)(a) advanced by the Golf Club an intelligible reading of the section, which was easy to resolve with the purposes of the Act. Accordingly, he approved the decision of O'Higgins J in the High Court, stating that such a reading "did not undermine s.8 but qualified its provisions in an understandable way in relation to clubs coming within a particular category."[374] The Authority's reading of the word "needs" was thus rejected as it was held to be tantamount to '"reading words into the statute":

> The interpretation of s.9 as contended for by the golf club does not ... in any way undermine those aims, but rather recognises the fact that there is nothing inherently undesirable with persons seeking - in a social context - the society of persons of the same gender or the same nationality or the same religion. In a tolerant and free and increasingly diverse society it is not surprising that the type of exemptions listed in s.9 were enacted ... the significant omission from the s.9 based exceptions of exceptions based on

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[372] Ibid, at 730.
[373] Ibid, at 737.
[374] Ibid, at 719.

> race and colour serves to reinforce the plaintiff's argument for their interpretation of the section.[375]

Thus, for Hardiman J the reason the Authority submitted that the court take a purposive approach - reading the words "as such" into the statute - was to ensure that their submission would not effectuate a patent absurdity such as, for example, exempting a Bulgarian club, but not a Bulgarian bridge club, as bridge could not be shown as an inherent need of those members. While the Supreme Court outwardly rejected the notion that purposive interpretation or reading words into the statute should be countenanced[376], Hardiman J's decision is not strictly literal in the standard sense either. His decision on the correct meaning of the words "needs" and "principal purpose" in this context is underscored by a reference to the ramifications of the *use* of such, and in relation to what he regarded as the correct intention of the Act in that context. Thus, this stands as a clear example of how context informs the assumed literal meaning.

That is, in opting for the interpretation proffered by the golf club and noting the ban on clubs based on race and colour, Hardiman J clearly conceptualised the aims or application of the statute in deciphering the meaning of "needs" and "principal purpose", as opposed to merely applying the literal import of those terms. While he may have referenced other parts of the section or Act to inform his interpretation, he did not construct the statutory meaning of the terms "needs" and "principal purpose" solely in relation to the text itself, as he deliberately considered the consequences of the interpretation submitted by the Authority. Yet much of the argumentation and indeed Hardiman J's reasoning on foot of those arguments is framed specifically in terms of an application of the literal meaning of the statutory text.

Indeed, it would be mistaken to suggest that the above considerations were informed by an application of the literal rule, as Hardiman J's consideration of the literal application and interaction of the words "needs" and "principal purpose" is contingent on the statutory ambiguity in question. In line with the discussion of

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[375] [2010] I.R. 671, at 719.

[376] See the judgment of Denham J at [2010] I.R. 671, at 696, and Hardiman J at 718.

statutory ambiguity in chapter 3, Hardiman found it illogical to interpret the contested words as submitted by the Authority as they would result in a manifest absurdity; however, in treating the ambiguity of the statutory terms Hardiman J necessarily had to construe the sections in abstraction from the text as a whole – indeed his rationale clearly points to a purposive conceptualisation of the possible consequences of the absurd interpretation of the Authority. Not only does interpretation in the face of statutory ambiguity produce results which reject a "literal" interpretation on foot of the plain meaning of the Act, it may also provide the courts with answers they deem "literal" on a rejection of a submission which looks to a purposive reading of the statute. This does not make Hardiman J's decision literal *per se,* however; plain meaning here is still premised on a contextual reading of the statute and a purposive application of that statutory meaning. It is significant then that Hardiman J refers to this submission of the Authority as a 'literally absurd' interpretation:

> The foregoing conclusions ... exclude the necessity to adopt a broad, purposive construction of s.9, as the Authority contends for, in the alternative. It is literally ludicrous to suppose that the Oireachtas would adopt this futile devising of a legal nonsense – a set of legal entities which could never have any member – when it could easily and usefully have stated "it shall not be lawful to maintain a club which does not make membership available to persons of both genders", if that was what it intended to do. I conclude that that was not what intended to do.[377]

Thus, Hardiman J denied that purposive interpretation was appropriate in the circumstances, but in speaking to the intended aims of the statute he invoked a purposive method as outlined in chapter 3, albeit in its more constrained intent-oriented guise. The underlying intentionalist rationale behind Hardiman J's decision here, therefore, is masked by an appeal to common sense literal meaning. Again, in concluding whether the argument proffered by the Authority could reflect the plain meaning of the statutory provision, and thereby the intention of the

[377] [2010] I.R. 671, at 730.

Oireachtas in drafting it, the court necessarily must to seek out the purpose of the Act by way of applying the contended statutory meanings in the abstract.

While at face value it appears that the courts in such instances are debating the meaning of particular statutory words or phrases, in actuality the settled statutory meaning arises out of finding which of the contended interpretations best achieves the intention the Oireachtas would most likely have intended. While this case appears to be an open and closed example of an application of plain statutory meaning under the prevailing theory, the questions that courts must ask before arriving at that meaning dilute the straightforward appeal of such a rationalisation of the interpretative processes. Therefore, in trying to locate the legislative intent and correct meaning of the statutory terms through rejecting a purposive approach to the issue, Hardiman J conceived the statutory language in terms of the intended meaning of the statute, betraying a necessary underlying resort to statutory purpose.

With these concerns as to the underlying resort to the context of the case in mind, if we revisit the example outlined in section 3.4.2 of the last chapter, it becomes clear that while a consideration of the text is necessary as a starting point for resolving the textual difficulty, it is in the resort to context that interpretative difficulties are downplayed. Thus, much like the ambiguity surrounding the communication to train passengers that they should "mind the gap", while it is necessary to look to the utterance or text as a means of finding out what in fact was communicated, for the courts to find the meaning of a "special event" in *Rahill*, for example, it was necessary to consider the term outside of the text, and as applied to the particular context of the case. By the same token, in order for Hardiman J to be satisfied that the High Court was correct in its decision to reject the claim of the Authority, it was necessary to consider the consequences of their submission in the context of the members of such clubs, not in relation to the text as a whole.

Thus, following from my criticism of the prevailing approach to literalism in chapter 3, in order to find the "literal" meaning of the statutory text, courts must routinely apply those meanings in abstraction. Therefore, in correcting statutory ambiguity the method adopted by the courts cannot lie in addressing the text as a

whole. This process is markedly different from that prescribed by proponents of the prevailing account of the literal rule.

4.2.3 Interpretation in the Face of Statutory Absurdity

In order to understand more fully the underlying role played by the resort to context and purpose in the interpretation of statutes, at this point it is also necessary to consider cases in which the courts are faced with absurd results on the application of the literal rule. The prevailing theory holds that where the courts are faced with a patent absurdity arising from a literal interpretation of the statutory text, they must have regard to the purpose of the Act as a whole. Such instances illustrate the position of departing from the literal implications of the statute, again intimating a threshold between plain statutory meaning and engaging with non-textual interpretative methods. However, I will show that in considering statutory absurdity in practice, no such threshold exists. Rather, the potential for absurdity animates all stages of interpretation.

The case of *Nestor v Murphy*[378] concerned the interpretation of s. 3(1) of the Family Home Protection Act, 1976, and, in contrast to the approach taken in *Rahill v Brady*, has been cited as an example of the courts engaging a less restrictive approach to statutory interpretation.[379] In this case the defendants were a married couple who refused to give effect to a contract for the sale of their house, despite the fact that they had both signed the contract for sale. They contended that the contract was void because the female spouse had not given consent in writing to the sale prior to the execution of the contract, rendering the sale void under s.3(1). The High Court ordered specific performance of the contract of sale by the defendants and on appeal this was upheld by the Supreme Court. Section 3(1) of the Family Home Protection Act, 1976 provides:

> Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void.

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[378] [1979] IR 326.
[379] LRC [61-2000], at 12.

Henchy J held that a "surface or literal appraisal" of section 3(1) might have the effect of supporting the claim of the defendants, given that the wife in this case did not give consent to the conveyance in writing.[380] However, he stated that their argument was incorrect in assuming that section 3(1) came into effect when both husband and wife were parties to the conveyance of the family home, owing to the fact that it could not have been the intention of the legislature for the section to apply when both parties were involved in the conveyance. Thus, section 3(1) was envisaged as guaranteeing the protection of disenfranchised spouses. Ultimately, the spouses had signed a contract for sale, which signalled both of their involvement in the conveyance, irrespective of the fact that the wife did not deliver her consent in writing prior to the execution of the sale. It is worth quoting Henchy J at length in order to observe his purposive reading of section 3(1), and the implications of such an approach:

> The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home. The sub-section cannot have been intended by Parliament to apply when both spouses join in the "conveyance." In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. The provisions of s 3, sub-s 1, are directed against unilateral alienation by one spouse. When both spouses join in the "conveyance," the evil at which the sub-section is directed does not exist.[381]

Given the fact that the defendants had entered into a contract to sell the family home in the first place, Henchy J opined that to interpret the section in the manner submitted would lead to a "pointless absurdity".[382] To allow the defendants to

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[380] [1979] IR 326, at 328.
[381] Ibid.
[382] Ibid, at 329.

avoid an 'otherwise enforceable obligation' by virtue of either of their refusal to give consent in writing was held to be outside 'the purpose and scope' of the 1976 Act. Henchy J outlined the need to engage in a "schematic or teleological" approach in the interpretation of the section.[383] This involved departing from a literal interpretation in favour of a 'restricted meaning', that is, a meaning which did not "overstep the limits of the operative range" of section 3(1), in the context of the legislative scheme of the 1976 Act.[384] Henchy J thus found that section 3(1) could not be given a construction that would allow for anything other than the effectuation of the right of avoidance of a conveyance when a non-participating spouse has not given prior consent in writing.

Discussing the general use of the literal rule Henchy J intimated that a purposive reading of the statutory text best gives effect to the legislative intention. He cited the English case of *Luke v Inland Revenue Commissioners*[385], where it was stated that to interpret words literally was to 'defeat the obvious intention of the legislation and produce a wholly unreasonable result' and that in wishing to achieve the 'obvious intention', we must 'do some violence to the words.'[386] This implies that the Irish courts are willing to allow for much more freedom in the interpretative licence afforded to the judiciary than the more restrictive departure from the literal approach as intimated under the prevailing theory or as legislated for under section 5 of the Interpretation Act 2005. Yet, it is difficult to square this attitude with the prevailing notion that the literal implications of the statutory text must be given precedence:

> The general principle is well settled. It is only where the words are absolutely incapable of a construction *which will accord with the apparent intention of the provision* and will avoid a wholly unreasonable result that the words of the enactment must prevail.[387]

The latter section of the statement of Lord Reid in *Luke v Inland Revenue Commissioners* above sums up the approach supported by Henchy J, yet it goes

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[383] Ibid.
[384] Ibid.
[385] [1963] AC 557.
[386] [1979] IR 326, at 329.
[387] Ibid, (emphasis added).

further than allowing for purposive interpretations where the intention of the legislature is frustrated by strict literal statutory interpretation. Indeed, this implies that the courts do not just look to absurdity in discerning statutory meaning, but also have to keep an eye on the apparent intention of the statute. This envisages quite loose conditions under which the courts can depart from literal interpretation, and lends credence to the claim of the Law Reform Commission that there exists a bifurcation between the idea of strictly discerning legislative intention through a literal interpretation of the text, and how purposive interpretation is also assumed to signify the intention of the text.[388]

Nevertheless, Henchy J's interpretation of the applicants' submission speaks to the absurdity of consequences, as opposed to a form of linguistic absurdity - the idea of internal textual contradiction. Indeed, these two contrasting conceptions of statutory absurdity are significant in terms of how we conceptualise the interpretative method of the courts. It has been suggested that statutory absurdity in the Irish context refers to the notion that the consequences of an interpretation are absurd if they are not intended by the legislature, [389] and not the narrower idea. On the face of the judgment of Henchy J in *Nestor* the effect of purposive interpretation is to go further than literalism and effectuate a common sense approach to statutory meaning, while limiting the interpretative discretion afforded to the courts. This allows the court slightly more latitude in effectuating the intention of the legislature when confronted with a literal meaning that produces a patently absurd result. The difficulties surrounding the discretionary nature of the "absurdity doctrine" have been adverted to in the preceding chapter; however, therein lies the greatest difficulty facing the courts, as they are tasked with effectuating a very delicate balance. That is, the line separating the effectuation of legislative intent on a purposive reading of a statute and arbitrary decision making is incredibly fine - so much so that it is difficult to separate these movements at all. Indeed, the Law Reform Commission has adverted to such a danger:

> There is a strong argument in favour of a common sense approach to statutory interpretation, whereby a judge, in deciding a case, is expected to

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[388] LRC [61-2000], at 10.

[389] Ibid. See also, Dodd, *Statutory Interpretation in Ireland*, at 190-192.

> avoid giving a provision a meaning which plainly thwarts the legislative intention behind the statute. On the other hand, there is a fine line between embracing this principle and empowering a judge to impose his or her own view of the most appropriate meaning, at the expense of the explicit wording of the provision... Drawing a balance between these competing concerns is undoubtedly difficult, but it requires a choice as to which the senses of 'absurd' should be adopted.[390]

Identifying the judgment of Hency J in *Nestor* as the "classic articulation" of the "teleological and schematic approach"[391], Byrne and McCutcheon claim that the teleological approach is conceived as speaking to the purpose of the legislation; whereas the schematic approach focuses on statutory context, or the context of the statute taken as a whole, and is an alternative interpretative method to the purposive approach. Yet Byrne and McCutcheon are conflicted as to whether the schematic and teleological approaches are mutually inclusive or separate interpretative approaches.[392] They state that adopting the teleological approach requires the courts to read words into statutory provisions, in order to effectuate the statutory purpose, but in doing so are confined to a consideration of the Act itself and pre-existing law on the matter.[393]

In making this argument Byrne and McCutcheon suggest that the schematic and teleological approaches have been used by the courts as modern versions of the golden and mischief rules respectively.[394] It appears, then, that despite identifying internal incoherencies within the scheme, in conceptualising the nature of purposive interpretation Byrne and McCutcheon are entrapped within the conceptual boundaries set by the prevailing theory. That is, they are concerned primarily with the notion of interpretation in terms of the text as a whole. I contend that instead of trying to conceptualise interpretation categorically under the labels textual and non-textual, we should be trying to figure out what the courts actually do in routine instances of statutory interpretation. That is, it is one thing to contend that Henchy J

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[390] Ibid.
[391] Raymond Byrne and Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System*, at 571.
[392] Ibid, at 573.
[393] Ibid.
[394] Ibid.

adopts a teleological as opposed to a schematic approach, but in effect these labels only underscore the standard approach to non-literal interpretation. Indeed, when considered in light of my discussion of the uncertain application of statutory terms in *Inspector of Taxes v Kiernan*, and statutory ambiguity in the *Portmarnock* case, Byrne and McCutcheon's conceptualisation of the schematic approach - the text as context - offers very limited guidance as an interpretative aid in situations characterised by statutory uncertainty, ambiguity and absurdity.

Thus, the analysis of the interpretation of statutory absurdity has noted that the concept in the Irish context concerns the absurdity of consequences - the application of the statute which would result in situations not intended by the legislature. This necessarily dilutes the established position that non-literal interpretations are text oriented. However, the notion of absurdity of consequences preserves an element of text-oriented interpretation due to the focus on legislative intention. This analysis of the interpretation of absurd statutory meaning in *Nestor* conveniently brings us to a discussion of the absurdity doctrine as outlined in chapter 3, and an analysis of whether the doctrine is central to literal interpretation in the Irish context.

4.2.4 The Role of the Absurdity Doctrine in Formulating Literal Meaning

The case of *James Howard and Others v Commissioners of Public Works in Ireland*[395] is considered, along with *Rahill v Brady*, to be one of the clearest illustrations of the literal rule in practice.[396] However, I will show that the application of the literal rule in *Howard* is premised on an application of the absurdity doctrine as outlined in chapter 3. That is, under the absurdity doctrine courts deem that the literal application of a statutory provision cannot mean what it is naturally assumed to mean if it manifestly pulls against prevailing social values or common sense. This shows that there is a necessary and premeditated resort to statutory purpose and the context of the case in the construction of statutory meaning. Indeed, courts regularly construct an alternative "literal" meaning in such circumstances.

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[395] [1994] 1 IR 101.

[396] Dodd, *Statutory Interpretation in Ireland*, at 24.

In *Howard* the court had to consider whether works carried out by the Commissioners constituted "development" for the purposes of the Local Government (Planning and Development) Act 1963. The case concerned the development of the Burren National Visitors' Centre at Mullaghmore in County Clare. The applicants argued that the development in question was *ultra vires* the 1963 Act given the scope of the construction project, and that the development was illegal as there was no planning permission. On foot of these claims they submitted that the respondents should be restrained from proceeding with the development. In judging whether the Commission was exempt from having to apply for planning permission under the provisions of the 1963 Act, the Court held that there was no principle, deriving either from the common law or the Constitution that statutes do not apply to the State or to organs of the State. One of the main issues under consideration in *Howard* was whether, beyond mere ordinary, literal or plain meaning, words could be inferred into statutes in interpretation by the court. The following are the relevant sections of the 1963 Act that proved central to the decision in *Howard*.

Under section 3(1) of the Local Government (Planning and Development) Act 1963:

> 'Development' ... means, save where the context otherwise requires, the carrying out of any works on, in or under land, or the making of any material change in the use of any structures or other land.

Section 24 of the Act of 1963 provides as follows:

> **(1)** Subject to the provisions of this Act permission shall be required under this Part of this Act
>
> > **(a)** in respect of any development of land, being neither exempted development nor development commenced before the appointed day, and
>
> **(2)** A person shall not carry out any development in respect of which permission is required by subsection (1) of this section, save under and in accordance with the permission granted under this Part of this Act.

Section 84 of the Act of 1963 provides as follows:

> **(1)** Before undertaking the construction or extension of any building (not being a building which is to be constructed or extended in connection with afforestation by the State), a state authority
>
> > **(a)** shall consult with the planning authority to such extent as may be determined by the minister, and
> >
> > **(b)** if any objections that may be raised by the planning authority are not resolved, shall (save where the construction or extension is being undertaken by the minister) consult on the objections with the minister.
>
> **(2)** In this section *'state authority'* means any authority being
>
> > **(a)** a member of the government,
> >
> > **(b)** the Commissioners of Public Works in Ireland, or
> >
> > **(c)** the Irish Land Commission.

The material issue in *Howard* was whether, under these provisions, it was necessary for the respondents to apply for planning permission for the building of the visitors' centre as "a development of land", or whether, as a "state authority" such permission was not required. The case arose from two related High Court actions on the correct interpretation of this legislation, the *Luggala*[397] and *Mullaghmore*[398] cases, respectively. In the *Luggala* case Lynch J, in finding for the Commissioners, applied the principle that legislation is presumed to have some "rational effect" on a consideration of the plain meaning of the statutory language. That is, Lynch J found that unless one construed s.84 of the 1963 Act as implying the exclusion of state authorities from the requirements of planning permission beyond the obligations already imposed on state authorities under section 24, the legislation was absurd and could have no effect. Thus, Lynch J found that s.84 gave rise to a necessary implication exempting state authorities from the provisions of s.24, given that it would be absurd for the respondents to apply to both the planning authority and

[397] Unreported, High Court, 27 November 1992.
[398] Unreported, High Court, 12 February 1993.

the Minister - the rationale being that these requirements necessarily pull against each other.

However, in the *Mullagmore* action Costello J found that the wording of section 84 was clear and unambiguous and did not give rise to an absurdity, nor did it relieve the respondents from complying with s.24. Costello J allowed the applicants' submission that planning permission was in fact necessary for this development:

> Here the words of s. 84 are clear and unambiguous: if the result is that state authorities must apply for permission in all cases under s. 24 and consult in some cases under s. 84, this is not such an absurd result as to require the court to construe from it a legislative intent to exempt state authorities from the equally clear obligations imposed by s. 24 and, in effect, rewrite the section. Furthermore I do not think that I should infer that the legislature intended by this section to create the claimed exemption when, for the reasons already given, I think there is a reasonable inference that no such intention existed.[399]

Thus, there was a direct interpretative conflict in High Court judgments concerning the possible internal absurdity of the same statutory provisions. Such a state of affairs undermines the prevailing theory that literal interpretations apply as things in themselves, as there should be no room for interpretative conflict, particularly where literal meaning is concerned, in such an interpretative scheme. Nevertheless, Lynch J and Costello J, respectively, took different positions on the statutory absurdity. In the former, Lynch J considered the potential for contradiction between sections 24 and 84 of the 1963 Act necessitated an inference that State authorities were exempted from the provisions of section 84; whereas, having regard to the intentions of the legislature, Costello J found no such absurdity existed and refused such an inference - however, it is clear that Costelloe J still had to consider the question of absurdity.

Interpreting section 3(1) in the Supreme Court, Finlay CJ found that the work being carried out by the respondents constituted "development" for the

[399] [1994] 1 IR 101, at 129.

purposes of the section, holding that, in spite of the correctness of the submission of the respondents that it might have been "illogical and incongruous" under s.84 for the Commission to apply for planning permission for the building of the visitors' centre, this did not excuse the Commissioners from the express statutory obligations of s.24:

> The combination ... of what appears to be the unambiguous meaning of the words contained in s.24 in respect of a building constructed by the commissioners and the equally unambiguous terms of the words contained in s.84 as leading to an incongruous or even an absurd result, cannot in my view, upon the principles applicable, entitle the courts in interpreting this statute to insert, as it were, into s. 24 an implied exemption for development of any description carried out by the Commissioners of Public Works which is nowhere expressed in that section.[400]

Thus, the apparent absurdity of necessitating the Commission to satisfy the requirements of both provisions did not entail an implication under which the literal meaning of the statutory text could be circumvented. The remit of s.84, then, was much narrower than that as submitted by the respondents who argued that the section applied to all forms of development. Rather the section was found to apply only to extensions and construction of buildings, - which in this case, along with mere construction, included significant landscaping works and the construction of car parks. While on the surface this appears to be an uncontroversial application of the literal rule, following from my discussion of the absurdity doctrine in the previous chapter, this is a clear indication of a judge analysing the potential absurdity of a statutory provision before being satisfied that there is no such absurdity and the literal rule can apply. This interpretative method clearly pulls against the prevailing conception of literal interpretation, as asking questions about potential absurdity prior to formulating literal interpretation necessarily undercuts the status of such as a "literal" interpretation *per se*.

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[400] [1994] 1 IR 101, at 139.

At the beginning of chapter 3 I outlined the prevailing approach to the literal rule, quoting a section of the judgment of Blayney J in the *Howard* case.[401] The statement of Blayney J is as close an articulation of literal interpretation to the prevailing conception of the literal rule as one could hope for. However, our examination of the literal rule in the previous chapter has falsified this conception of the formal application of literal meaning. In the event that the literal meaning of the statutory text is absurd but applied anyway, the conditions under which purposive interpretations are applicable would be null and void because this implies that the sole reason for invoking purposive interpretation - the frustration of legislative intent - is irrelevant, as the text *as it appears* is the most fundamental interpretative aid. Blayney J's approach to literal interpretation here cuts against my analysis of the decision of Finlay CJ above. Indeed, the discussion of the *Rahill* decision has suggested that the prevailing conception of the rule and the rule as applied in practice are fundamentally different. Thus, Blayney J's conception of literalism does not stand up to scrutiny because it espouses a "literal at all costs" interpretative approach, which is inaccurate. It has been shown that the resort to statutory purpose plays a significant role in the construction of statutory meaning, and that the courts do not apply statutory language in such a clinical fashion. Rather, conceiving of the consequences of statutory absurdity establishes that judges intentionally search for reasons why statutory terms should not be accepted.

Considering the example of the people in the train station in chapter 3, it is clear that judges, such as Finlay CJ in this instance, are always conscious of potential absurdity when considering the intentions of the legislature. Thus, potentially absurd results inform the appropriate "literal" interpretation in the circumstances. Cases such as *Howard* and *Portmarnock* are indicative of situations where there are two opposing interpretations of the same issue vying for acceptance on the grounds that either one is *the* literal meaning to be applied by the court, one which is to be accepted as correct, the other rejected. Yet the interpretative "tipping point" in such instances is a contestable issue. The prevailing theory assumes that once the plain meaning of the statutory text does not give rise to an absurdity or an ambiguous state of affairs that will be the statutory meaning. Like the example of passenger 3 in

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[401] [1994] 1 IR 101, at 151; see note 274 on page 73 above.

my third example, there are instances where the courts are able to apply literal or plain statutory meaning, as implied in the *Howard* case in the judgment of Finlay CJ; yet the fundamental point is not that literal meaning was identified and applied. Rather, the most significant point is that the line postulated between literal and purposive interpretation under the prevailing theory cannot be drawn definitively. In order to apply literal statutory meaning judges must consider statutory purpose or possible absurd consequences of a literal interpretation. This cannot be carried out solely in the context of the text as a whole, without reference to the actual case.

4.3 The Default Role of Purpose and Context

Despite the underlying role played by the context of the case in the construction of statutory meaning, the courts routinely assert the importance of textual considerations in formulating such meaning. For example, in the case of *McGrath v McDermott*[402] the court stressed the importance of limiting judicial deviation from the statutory text, implying that while the literal rule does not necessarily require the formal realisation of language, the courts will follow the words of the text as far as possible, taking contextual issues into account.[403] Irrespective of this lack of certainty as to how the courts themselves are to engage interpretative methods, one certainty is that all of the criticisms of the prevailing theory of statutory interpretation invariably lead to the idea of purposive interpretation.

Even though the decision of the court in *Rahill* and *Howard* are widely considered as authoritative statements of the Irish courts on the application of the literal approach, it has been shown that the actual literal quality of these interpretations does not reflect the prevailing theory. Consider again the summary of the plain meaning rule in chapter 2 as communicated in *Dreidger on the Construction of Statutes,* whereunder the task of the court is complete upon applying the literal meaning of the statutory text. It is not exaggerative to claim that this theory postulates a non-contextual, pre-interpretative state of affairs; yet, conversely, as manifested in decisions such as *Rahill* and *Howard*, the authoritative statements of the Irish courts point to the fundamental role played by the statutory

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[402] [1988] IR 258.
[403] Dodd, *Statutory Interpretation in Ireland*, at 117 - 118.

purpose and the context of the case in ascertaining the plainness of statutory meaning, which does not arise formally on foot of a "literal" interpretation.

This suggests that while the courts seem to intuitively distrust the bland literalism espoused under the prevailing theory and routinely engage a purposive approach, judges are nevertheless intuitively distrustful of their own propensity towards judicial activism; there is an intuitive commitment not to overstep the (indeterminate) bounds of interpretation and lapse into judicial law making. However, presupposing a default resort to the literal rule does nothing to achieve such constraint. I contend that textual constraint cannot be conceived in terms of the statutory text alone, but is effectuated by a consideration of statutory purpose in relation to the intentions of the legislature as denoted by the text. Indeed, I have shown that both the interpretation of vague statutory language and a consideration of circumstances that do not allow for an application of "literal" meaning weakens the prevailing position. Yet courts are not free to construct statutory meaning in an ad hoc fashion.

I will now consider decisions where the underlying resort to purposive interpretation is shown as the default interpretative device of the courts and attempt to offer a more adequate account of the interpretative practice of the Irish courts than that offered under the prevailing account.

4.3.1 Statutory Purpose and Text Reflective Intent as the Key Indicator of Meaning

Despite the default interpretative role conferred on literal interpretation under the prevailing theory, the courts have in rare instances noted that purposive interpretation does play a more significant role in ascertaining legislative intention than the literal rule. One such instance was in the case of *DPP (Ivers) v Murphy*[404] which concerned the interpretation of s.6(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997. Section 6(1) of the 1997 Act provides that evidence as to the arrest, charge and caution of persons who have been so arrested and charged in relation to a specified offence be included in a certificate issued by the arresting Garda. The central question in *DPP(Ivers)* was whether a literal interpretation of

[404][1999] 1 ILRM 46.

s.6(1) of the 1997 Act was said to give rise to a patent absurdity in light of the provisions of s.6(4) of the same Act, and therefore could not capture the intention of the legislature. S.6(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 provides:

> Where a person, who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member and stating that that member did, at a specified time and place, any one or more of the following namely –
>
> **(a)** arrested that person for a specified offence,
>
> **(b)** charged that person with a specified offence, or
>
> **(c)** cautioned that person upon his or her being arrested for, or charged with, a specified offence
>
> shall be admissible as evidence of the matters stated in the certificate.

However, Section 6(4) of the Criminal Justice (Miscellaneous Provisions) Act 1997 states that:

> In any criminal proceedings the court may, if it considers that the interests of justice so require, direct that oral evidence of the matters stated in a certificate under this section be given, and the court may for the purpose of receiving oral evidence adjourn the proceedings to a later date.

The material issue in the case concerned whether there was evidence to suggest that the accused was arrested otherwise than under a warrant. The accused had been arrested initially by a member of an Garda Síochána, and later charged by a sergeant, with two certificates being issued, one for each transaction. The accused submitted that the words 'who has been arrested otherwise than under a warrant' in s.6(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 was a 'condition precedent', that is, a pre-emptive condition requiring that there be evidence as to the arrest of the accused. It was also submitted that the existence of the certificate could not lead to an inference that the accused was arrested otherwise than under a warrant, and that if such a presumption existed, it would place an onus on the accused to prove the details of her arrest. Counsel for the accused argued that if this

had been the intention of the legislature, it would have been explicitly stated in the provisions of the statute. The prosecution submitted that to order the presence of the arresting Garda to provide evidence of arrest other than under a warrant under s.6(4) would be deleterious to the effectiveness of s.6(1), as the intention behind the provision was to allow for the possibility that the arresting Garda might not be present in court to give such evidence.[405]

Prior to the enactment, the issues of arrest, charge and caution had to be considered as matters of oral evidence given by the arresting Garda in court. The effect of s.6(1) was to allow for the absence of oral evidence on the part of the arresting Garda in respect of those three issues through the provision of certificates which would provide for same. However, section 6.(1) did not provide that an arrest made otherwise than by a warrant could be provided for in the certificate and used as evidence of the arrest otherwise than under a warrant. That is, s.6(1) did not provide that the matters provided for in the certificate could be used as evidence. Thus, in cases where an accused was not arrested under a warrant, such certificates would not be admissible as evidence of the arrest, charge or caution.

In the High Court McCracken J held that even in the case where certificates had been furnished, they would not have been admissible as evidence. He found that the wording of s.6(1) was clear and unambiguous, and agreed with the submission of the accused as to the existence of a condition precedent in relation to the admissibility of evidence that the accused had been arrested otherwise than under a warrant. This amounted to "essential proof of the prosecution" and was such that had to be cited prior to the submission of the certificate. Thus, he rejected the submission that s.6(4) assisted the prosecution, stating that it was left as a matter of discretion for the judge whether to include oral testimony evidence as to the relevant arrest, charge, caution and certificates, if compelled in the interests of justice to do so. McCracken J speculated that the legislature had probably intended that details as to the arrest under s.6(1) of the 1997 Act would not have to be given;

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[405]On this point of law the Law Reform Commission have noted that if the provision was to prove operational in any case, on a literal reading of the section the presence of the arresting Garda was necessary, LRC [61-2000], at 14.

but held that he could "not construe a Statute which is quite clear in its wording in accordance with ... the intention of the legislature" to that effect.[406]

The Supreme Court unanimously overruled McCracken J's finding that he could not depart from literal import of the statutory text. Denham J found that a strictly literal interpretation of s.6(1) as submitted by the defence would prove an absurdity, as it required the arresting Garda to give evidence of the arrest, even though the provision of certificates under s.6 required that such presence was not essential. The practical solution according to Denham J was to adopt a purposive approach in view of this patent absurdity, affirming the circumstances under which the court are allowed to circumvent the literal approach to statutory interpretation outlined in *Nestor* and *Howard* and further entrenching the notion that the conception of the literal rule as outlined in *Rahill v Brady* is not identical to that assumed under the prevailing theory.

> While no method of statutory interpretation could be adopted which would impinge upon the constitutional role of the Oireachtas as the legislative organ of the State, if the court adopted a literal approach to the interpretation of s.6 of the 1997 Act it would produce the absurd result of requiring the presence of a Garda in court to prove that his presence was not required. Therefore, the court was entitled to look at the purpose for which the provision was enacted, which was to obviate the necessity of having the arresting Garda in court to prove preliminary, technical matters. By adopting this purposive approach it was clear that the legislature could not have intended that the arresting Garda should be in court to prove that the arrest was otherwise than by warrant.[407]

In addition to outlining her preference for a purposive approach to the interpretation of s.6(1), Denham J stated that the provision was an "enabling section", that is, descriptive, and did not necessitate the presence of a Garda to give oral evidence of the arrest, charge and caution. Referring to decision of Lord Blackburn in the English case of *River Wear Commissioners v Adamson*[408] she noted

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[406] [1999] 1 ILRM 46, at 50.
[407] Ibid, at 47-48.
[408] [1877] 2 App Cas 743.

two other interpretative rules which she considered bound with the literal rule - the golden rule and mischief rule:

> ... we are to take the whole statute together, and construe it all together, giving the words their ordinary significance, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary significance, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear. [409]

According to Denham J such an approach allows the court to "consider the entirety of an Act or section when the literal interpretation produces an absurdity",[410] similar to the finding of the court in *Nestor v Murphy.* Thus, the judgment of Denham J evinces an obvious, intuitive distrust of the prevailing conception of literalism. Much like the discussion of the absurdity doctrine above, it is clear that not only does Denham J consider purposive interpretation as central to discerning the intention of the legislature, but in quoting the landmark English decision in *Pepper v Hart,* [411] she was of the opinion that literal interpretation did not square with "contemporary judicial practice"[412], thus questioning the default position of the literal rule in the Irish context:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation ....[413]

In seeking to effectuate the statutory purpose Denham J stated that s.6(1) was enacted so that evidence of arrest, charge and caution could be given by certificate and that the arresting Garda did not have to be present in court to give oral evidence pertaining to such. Thus, the submission of the respondents would

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[409] Cited in *DPP(Ivers) v Murphy* [1999] 1 ILRM 46, at 59.
[410] Ibid, at 59.
[411] [1993] 1 All ER 42.
[412] Ibid, noted by the L.R.C. [61-2000], at 14.
[413] Ibid, at 50, cited in [1999] 1 ILRM 46, at 59.

therefore necessitate the Garda's presence in court to confirm that his presence was not essential - a patent absurdity.[414] She found that s.6 was part of a "preliminary process" which brought an accused to court, holding that the words "who has been arrested otherwise than under a warrant" did not require or necessitate oral evidence under s.6(4) before the admissibility or production in evidence of the certificate. Yet despite her obvious preference for purposive interpretation generally and in the present case, Denham J stated that due regard must also being given to the intention of the legislature. However, it is unclear whether Denham J envisages a distinction between the labels intent and purpose, underlining my claim that the Irish position on this aspect of statutory interpretation is very unclear.

> ...in construing the section in light of the full process, it is an important factor that the purpose of the legislature in passing the section was to enable a certificate to be utilised to avoid the necessity of the arresting guard giving oral evidence of arrest, charge and caution, thus the section is rendered absurd if that same guard is required to give evidence that it was not an arrest by warrant. The intention of the legislature was to avoid the necessity of the Garda attending court at this stage of the process.[415]

It is undoubted that Denham J's rationale here implicitly acknowledges the underlying role of statutory purpose and referring to the context of the case in the articulation of statutory meaning. However, I submit that her acknowledgment of the due respect that she as a judge must accord the legislature in discerning statutory meaning is extremely significant; insofar as the orientation towards legislative intent provides the text-bound interpretative constraint that is espoused in decisions of the courts, yet inaccurately prescribed as an offshoot of the literal rule under the prevailing theory. Indeed, the notion that a consideration of legislative intent necessarily orientates the reader towards the statutory text will prove a significant aspect in the discussion of interpretative theory in the next chapter, in the attempt to rationalise how judges construct statutory meaning on a purposive reading of the statute, but in a manner that is reflective of the words of the text. Thus, the purposive approach should be conceived as a default, non-literal

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[414] Ibid, at 60.
[415] Ibid.

reading of the text, the effectiveness of which is judged by the courts in terms of how well it carries out the legislative intent on a consideration of the application of the statute in the context of the case.

4.4 The Nature of Purposive Interpretation

Thus far in our case analysis we have illustrated the various interpretative methods employed by the courts in discerning statutory meaning. By way of comparison it has been suggested that the prevailing theory does not adequately or accurately account for the actual practice of the courts. The Irish courts do not in fact deal with statutes as the prevailing literalist theory claims that they do and ought to do. The disparity between the prevailing theory and the practice distorts our understanding of how the courts articulate statutory purpose. Indeed, the prevailing theory is unhelpful insofar as it fails to explain what purposive interpretation is, apart from stating that courts must take the text of a statute as a whole into account in discerning legislative intent. Thus, no definitive conception of the purposive approach is readily communicated, beyond the oft repeated stipulation that in the event of unclear, ambiguous or absurd statutory language the courts must have resort to statutory purpose. Yet, as noted, there are instances where the courts candidly use this interpretative approach. Thus, we must analyse the nature of the test for the purposive approach in cases where it is openly acknowledged that the courts engage in purposive interpretation. Indeed, given the underlying resort to statutory purpose and context as claimed in this thesis, we must consider whether all non-textual forms of interpretation must be categorised as "purposive" interpretation.

The decision of the court in *Mulcahy v Minister for the Marine*[416] has been identified as an "exemplar" of the purposive approach by the Law Reform Commission.[417] In discerning the legislative intention behind s.15 Fisheries (Consolidation) Act 1959, a provision concerning the granting of fishing licences, Keane J's description of the purposive approach confines the notion of purposive interpretation to the text oriented notion of purpose - the idea of considering the purpose of the text as a whole - that has been criticised in this thesis. The applicant

[416] (Unreported), High Court , November 4 1994.
[417] Donlan and Kennedy, 'A Flood of Light?: Comments on the Interpretation Act 2005', at 116.

in the case claimed that the granting of licences by the Minister under the section was unlawful. When interpreted literally and in isolation from other related enactments s.15 Fisheries (Consolidation) Act 1959 authorised the exercise of Ministerial discretion in relation to the permission of various aquaculture projects. However, the applicant argued that the statute had to be interpreted in the context of other relevant Fisheries legislation, submitting that the Fisheries Act 1980 was designed specifically for the task of regulating fisheries, not the granting of licences.[418] While a literal reading of the section allowed for the granting of licences by Ministerial discretion, the Law Reform Commission argued that the legislature could not have intended such a Ministerial power on the enactment of the section.[419]

In looking to the purpose of the section the court outlined a test for the purposive interpretation of statutes. This consisted of a two-step approach with the judge initially examining the "plain language" of the Act, and upon looking to the plain language, if ambiguity remained the judge would continue to deduce the "plain intention" of the legislature by reference to Act as a whole, and other supplementary interpretative aids.[420] Keane J outlined the reasons for the adoption of such an approach where literal interpretations are inappropriate:

> While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.[421]

This signifies a clear intentionalist motivation, yet Keane J's rationale here is circular. It appears counter-intuitive for Keane J to assert on the one hand that he cannot alter the statutory text in order to circumvent unjust results, but imply that he is not prevented from adopting an activist stance which allows bypassing the literal meaning of the statute. This, in effect, dilutes the significance of the concept

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[418] LRC [61-2000], at 13.
[419] Ibid.
[420] Ibid at 117 - 118.
[421] (Unreported), High Court , November 4 1994, cited in *Monahan v Legal Aid Board*, [2009] 3 IR 458, at 478.

of legislative intent as a means of "faithfully reflecting" more just results than those effectuated by a literal interpretation, as Keane J's conception of purposive interpretation here is stringently text bound. Thus, while Keane J clearly supports the notion that judges must, in particular circumstances, avoid literal interpretations, his rationale for adopting a purposive method undercuts the idea of purposive interpretation because it is inherently textual on his understanding.

This conception of purposive interpretation has been rejected in this thesis, as it is irrational to expect the judge to consider the statutory text only, and not the conditions of the case or how the statute will be applied in seeking the statutory purpose. Indeed, this "text as a whole as context" conception of purposive interpretation does not reflect the constructive work that judges do when interpreting in light of the intentions of the legislature. Keane J's rationale here assumes legislative intent as a text-bound, as opposed to text reflective, interpretative principle. That is, as underlined in the discussion of *DPP (Ivers) v Murphy* above, in considering the legislative intention the default purposive approach of the judge is deflected back to the text in discerning the meaning of the statute - thus, purposive interpretation is tempered by a consideration of intent, which requires the judge to consider the aims reflected in the text. This means that courts do not interpret solely in terms of the language of statutory text. Under the prevailing theory legislative intent loses its value as an interpretative device, becoming merely an implicatory device used together with the literal rule. It has been suggested that the two-step purposive approach adopted under *Mulcahy* was codified with the introduction of the 2005 Interpretation Act[422]; however, it does not fit well with the purported ends of the prevailing theory as it implies that courts do not consider legislative intent as an interpretative principle in itself, in seeking to discern the intentions of the legislature.

4.4.1 Varying Expressions of the Purposive Approach

While the purposive test outlined in *Mulcahy* is sad to be the closest manifestation of the purposive approach legislated for under the Interpretation Act 2005, there have been various other articulations of the approach which will be considered so as to

[422] Donlan and Kennedy, 'A Flood of Light?: Comments on the Interpretation Act 2005', at 116.

arrive at a common understanding of the approach of the Irish courts to purposive interpretation.

The case of *Monahan v Legal Aid Board and Others*[423] indicates one such alternative reading of the purposive approach. *Monahan* involved a construction of the language of sections 5(1) and 29(2) of the Civil Legal Aid Act 1995, and whether the applicant had a right to legal aid under the Act. The crux of the case depended on whether a purposive interpretation of s.5(1) was appropriate in the circumstances, and if a departure from literal interpretation was allowed. Section 5(1) of the Civil Legal Aid Act 1995 provides:

> The principal function of the [Legal Aid] Board shall be to provide, within the first respondent's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act.

Section 29(2) of the Act of 1995 provides, *inter alia*:-

> The Board may, in accordance with regulations under section 37, provide legal aid or advice to an applicant without reference to his or her financial resources and may waive any contribution payable pursuant to this section and to any other regulations under section 37 or may accept a lower contribution.

The applicant was a single woman living with her sister and her nephew, who required care on a full-time basis. She sought assistance from the Legal Aid Board concerning an application made to the Circuit Court for a new tenancy that she and her sister were entering into. Legal aid was refused on the basis that her disposable income exceeded the threshold outlined under the Civil Legal Aid Regulations. This was appealed on the basis that the Legal Aid Board failed to take into account the status of her sister and nephew as dependants, and that in any event, the Legal Aid Board had a "residual discretion" to grant legal aid without reference to the income of applicants. The applicant appealed for a judicial review of the refusal of her case

[423][2009] 3 IR 458.

to the High Court, where on a consideration of the interpretation of s.29(2) of the 1995 Act it was held:

> adopting a literal interpretation of s 29(2) of the Act of 1995, the entitlement of the first respondent to provide legal aid or advice without reference to an applicant's financial resources arose only where it might be done so in accordance with the Regulations and, as the Regulations did not provide for the grant of legal aid without reference to financial resources, the first respondent did not have discretion to grant legal aid or advice without reference to the applicant's financial resources.[424]

Thus, the High Court held that the language of the section 29(2) was clear and unambiguous and it was not necessary to adopt a purposive interpretation of the section, as a literal interpretation would not frustrate the intention of the legislature. It was also stated that, even on the adoption of a purposive approach, the inclusion in s.29(2) of the words "in accordance with the regulations" acted as a limitation on the power conferred on the Legal Aid Board. Furthermore, having regard to the Long Title of the 1995 Act, the Court found it was clear that the legal aid scheme was intended for people who could not afford legal representation and would thus be denied such representation if they did not qualify for legal aid under the regulations. In light of this fact, the first respondents were required to take into account the financial resources of the applicant. The nub of the case settled on the interpretation of regulation 16(3) of the Civil Legal Aid Regulations 1996 to 2006, and s.29(2) of the Civil Legal Aid Act 1995.

Regulation 13(2) of the Civil Legal Aid Regulations 1996, as amended by the Civil Legal Aid Regulations 2006, provide for eligibility for legal aid in relation to disposable income. This provides that eligibility for legal aid shall be considered in relation to the applicant's disposable income and, where relevant, disposable capital. Regulation 16(1)(b) makes provision for income in relation to "dependants", which are defined in Regulation 16(3) as "dependent relatives or other persons permanently residing with the applicant, who are supported by the applicant and who do not have available to them independent means of support."

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[424] Ibid, at 459.

The respondent claimed that under regulation 16(3) the applicant could not avail of legal aid in relation to her nephew, given that the applicant's sister and nephew were in receipt of an independent source of financial support, namely, payments made under the One Parent Family Payment scheme. This was contrary to regulation 16(1)(b), which stipulated that any such dependents living on a full-time basis with the applicant should not be in receipt of any independent financial support. Thus, the respondent submitted that the state provided independent financial support to the applicant's sister, the person on whom the nephew was directly dependent. Concerning s.29(2) of the 1995 Act, the respondent claimed that it was not in a position to grant legal aid to the applicant, by virtue of the fact that she had failed the means test set out in the Regulations, invalidating the Legal Aid Board's discretion to grant legal aid, irrespective of the financial situation of any applicant. The respondent also claimed that a decision could not be made as regards the discretion to confer legal aid without reference to the financial resources of the applicant, as such was subject to the regulations. However, the applicant contended that the Legal Aid Board made a mistake in law on this point, and did not use its discretion by taking into account financial details or resources under s.29(2).

In delivering his decision Edwards J stated that he was guided by the submissions of the first respondent, which outlined "very well" the state of the law as to the general principles of statutory interpretation. He found that the literal rule was the 'default rule' of Irish statutory interpretation,[425] as was outlined by Hamilton CJ in the Supreme Court in *Keane v An Bord Pleanala*[426]:

> In the interpretation of a statute or section thereof, the text of the statute or section thereof is to be regarded as the pre-eminent indication of the legislator's intention and its meaning is taken to be as that which corresponds to the literal meaning.[427]

However, Edwards J found that in light of the relevant Irish case law, the literal rule could be departed from in particular circumstances in favour of an approach that sought to effectuate the purpose of the legislation. Significantly, Edwards J

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[425] [2009] 3 IR 458, at 471.
[426] [1997] 1 IR 184, at 215.
[427] [2009] 3 IR 458, at 472.

identified a section of *Craies on Statute Law* as representing the most cited statement on the interaction of the literal and purposive rules of interpretation in Irish law:

> The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view.[428]

Edwards J found that the intention of the legislature must be "derived from the language of the Act itself"[429] and that in giving effect to a purposive interpretation, the Court is not allowed to interpret "on the basis of speculation as to the subjective intention of the legislature". This rationale, then, similar to that of Keane J in *Mulcahy* assumes that purposive interpretation must be text-centric in order to be legitimate.

Edwards J also underlined the importance of the judgments of Henchy J in *Inspector of Taxes v Kirwan* and Budd J in *Rahill* to the Irish approach to statutory interpretation. While these statements offer a general indication of the conditions under which the Irish Courts will engage in "strained interpretation", as shown, there appears to be no consistent line of thought as to the conditions under which strained interpretation can occur, if we look to the decisions of the courts in *Rahill*, *Kiernan* and, in particular, the *Mulcahy* decision.

Again, the basis under which such interpretation is permitted is the assumption that the literal meaning can be departed from only where to do so would avoid an absurd or unintended result, with the text as a whole the only context the court are assumed to have regard to. Edwards J referred to a summation

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[428] William Fielden Craies, S.G.G. Edgar eds, *Craies on Statute Law*, (7th ed, Sweet & Maxwell, 1971) at 65.
[429] [2009] 3 IR 458, at 473.

of the judicial dicta and state of the Irish law in the area outlined by McGuinness J in *DB v Minister for Health*, outlined above,[430] in which she quoted at length the decision of the Blayney J in *Howard*. Taking these decisions into account, in perhaps the most important section of his judgment, Edwards J pointed to the existence of two alternative approaches to purposive interpretation set out in *DB v Minister for Health*[431] where O'Neill J in the High Court[432] applied a "broad" purposive approach which looks to the overall purpose of the legislation and interprets the wording in relation to such:

> In my view in construing the relevant sections of the Act of 1997 it is appropriate in light of the difficulties of interpretation of s 5 as a whole, dealt with hereunder, to use the literal and purposive approach. I derive guidance in that regard from the judgment of Denham J in *MO'C v Minister for Health*.[433]

In arguing for a "literal and purposive approach" it might be that O'Neill J adverted to the constructive - yet text oriented - hybrid between purposive interpretation and intentionalism in using legislative intent as a text oriented device. Indeed, O'Neill J's statement here is as close as the courts venture in openly acknowledging that the practice evinces a combination of interpretative approaches, as opposed to assuming the default position of the literal approach. Yet, this description of the purposive approach was rejected by the Supreme Court, where it was held that the narrower prevailing approach would have to be taken - that is, an approach which looked to the purpose of the legislation only where the wording was ambiguous or where the literal approach would lead to an absurdity. Presumably, the broader approach outlined by O'Neill J exemplifies what I have outlined above – the notion that courts use a broad purposive approach in constructing statutory meaning and use legislative intention as a guiding principle in effectuating the aims of the statute.

This is a much more realistic account of interpretative practice than that assumed under the prevailing theory. The decision of the Supreme Court to reject O'Neill J's formulation of the purposive method limits the court's recourse to the

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[430] See note 301 above.
[431] [2003] 3 IR 12.
[432] Unreported, 31st July, 2002, at 15.
[433] [2009] 3 IR 458, at 476.

purposive approach to a secondary capacity as prescribed under the prevailing theory. Descriptively, O'Neill J's wider conception of the purposive approach is a more accurate account of the practice of the courts in discerning the intention of the legislature. It seems then, following from the discussion of the judgment of Finlay Geoghegan J in *Dunnes Stores* above, that O'Neill J's description is correct. That is, the courts in fact blend interpretative techniques, as they use aspects of both purposive and text oriented interpretation. This is plausible insofar as the resort to legislative intent, and not an application of the literal rule, represents a form of textual fidelity, as argued for above. Indeed, given the difficulties stated in locating the threshold point between literalism and purpose in practice, the rationalisation of the interpretative process offered by O'Neill J is far more indicative of what the courts do than presented in the prevailing theory.

Thus, aside from the foundational presupposition that the courts move beyond the statutory text in cases of ambiguity and absurdity to consider legislative purpose, there appears to be nothing else necessary for purposive interpretation under the prevailing approach, in either the two step approach outlined in *Mulcahy* and the respective approaches in *Monahan* and *DPP* (*Ivers*). Indeed, even though Finlay Geoghegan J in *Dunnes Stores* considered herself to be applying the literal meaning of the statutory terms, she nonetheless considered the consequences of her interpretation to imply a necessary resort to the context of the case, beyond a consideration of the text as a whole or the statutory history of the orders.

This lack of a definitive account of what amounts to the purposive approach undermines the core aim of the prevailing theory: offering a systematic approach to the various interpretative methods of the courts. Indeed, aside from the inherent complicatedness of such a theory, the lack of surety in identifying discrete interpretative forms ultimately dilutes the persuasiveness of the prevailing theory as an accurate account of statutory interpretation.

4.5 Differentiating between Statutory Purpose and Legislative Intent

As outlined in chapter 3, the prevailing theory of statutory interpretation does not offer a clear account of how the courts consider statutory purpose in practice, and

whether a consideration of legislative intent is required. Indeed, it is not very clear whether these issues are envisaged as one and the same thing under the prevailing theory, as it is intimated that in considering the statutory text as a whole (purposive interpretation) the courts must also have regard to the intentions of the legislature. However, given the co-dependent relationship posited between the literal rule and legislative intent under the prevailing theory, it is reasonable to suggest that the prevailing theory regards the consideration of statutory purpose as taking place in abstraction from intent, because intent cannot speak to both purposes and literal meaning if the literal meaning of the text is automatically assumed as representing the intention of the legislature. Thus, it is not clear under the prevailing account whether the purposive approach necessarily encapsulates a consideration of intent, or whether intent must be considered on its own terms, beyond a consideration of the text as a whole.

In their report on the *Statutory Drafting and Interpretation*, the Law Reform Commission asserted the literal rule as the "governing principle" in the area of statutory interpretation, yet implied that the relationship between legislative intention and the underlying concept of purpose was significant, and that the courts must give effect to an intention reasonably attributed to the Oireachtas on a consideration of the purpose of an Act.[434] Given the Commission's support of the default role of the literal rule, this claim curiously places the underlying role of purposive interpretation in the Irish context on even firmer ground, as it implicitly rejects the prevailing notion that the literal rule and legislative intent are mutually inclusive.

An indication of the overlap between a consideration of statutory purpose and legislative intent can be seen in the decision of Charleton J in *HSE v Brookshore Ltd*[435] where the High Court considered whether a retractable canvas awning in an outdoor "smoking area" of a pub constituted a roof for the purposes of section 47(7) of the Public Health (Tobacco) Act 2002.[436] Section 47(7) of the 2002 Act prohibited smoking in licensed premises or places of work considered to be indoors. The case

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[434] LRC [61 - 2000], at 18.
[435] [2010] IEHC 165.
[436] As amended by s. 3 of the Public Health (Tobacco) (Amendment) Act, 2004.

concerned the smoking area in Grace's Public House in Naas Co. Kildare, which was in the adjoining laneway to the bar. The laneway was "completely enclosed" by the retractable canvas awning between two parts of the premises. The HSE contended that the smoking area was indoors as it was completely covered and offered many of the amenities found in conventional indoor public houses. They charged the respondents with breaching section 47(7) of the 2002 Act, as many customers were found to be smoking in this section of the premises. The respondents submitted that the smoking area technically could not be considered indoors as the awning was retractable. In the District Court Coughlan J dismissed the prosecution, finding that the awning in question did not constitute a roof for the purposes of s.47(7) of the 2002 Act as it was made of soft canvas material, and that the laneway was an "outdoor area". However, he referred questions of fact concerning the nature of the "roof" to the High Court.

In considering the meaning of the word "roof" for the purposes of s.47(7) of the 2002 Act in the High Court, Charleton J explicitly stated the limitations of literal interpretations in such circumstances, affirming the purpose driven decision of Henchy J in *Inspector of Taxes v Kiernan*. Charleton J felt that the wording of the provision in question required "very little in the way of statutory interpretation", intimating the underlying connection between considerations of statutory purpose and context in the discernment of legislative intent. The decision of Charleton J is clearly based on a purposive reading of the statute in the context of the case in question, and whether it was the intention of the legislature to prohibit smoking in such covered areas:

> ...ordinary common sense must prevail. Ireland has a markedly high level of rainfall and it seems to have increased in recent years, especially during the summer months. It is unpleasant to sit or stand outdoors smoking a cigarette and drinking a pint of porter while the rain tumbles down. People want respite from the elements. They do not want their drink to be watered down. Comfort and shelter are clearly the purposes of this awning. It is there to keep off the elements. It also impedes the dispersal of tobacco fumes. It is therefore a roof. It makes no difference if it is made of steel or slates, of canvas, of plastic or of glass. It is irrelevant if it leaks or it provides little in the way of

> insulation. What matters is that a roof is overhead and that, effectively, or less than effectively, it assists in keeping off precipitation and keeping in smoke...

It is very difficult to separate such a purposive reading of the statutory text from a consideration of the intentions of the legislature in enacting the smoking ban legislation. While Charleton J purported to be considering the meaning of the word "roof", it is clear that the case turned on whether for the purposes of s.47(7) of the 2002 Act such enclosed smoking areas were envisaged as coming within the remit of the prohibition and whether the legislature would have envisaged the section as applying to such smoking areas.:

> I am not entitled to construe it so as to extend the area of operation of that offence beyond that which the Oireachtas intended, nor do I propose, and I am not entitled, to so strip it of meaning that the clear purpose of the legislation is undermined.

Thus, taking into account the diagrams representing the different interpretative approaches in chapter 3, it is more apt to conceive statutory purpose as relating to contextual issues in the application of an unclear statute, whereas the concept of legislative intent refers to issues directly concerning the statutory text itself - the intended meaning of the statute. Thus, in the context of Charelton J's decision, his purposive reading of the case considered whether such smoking areas could be considered as indoor areas, but this is a text-reflective interpretation by virtue of a consideration of whether the legislature would have intended such borderline indoor/outdoor smoking areas as coming within the terms of the prohibition. The Law Reform Commission's rationale supports this view. Indeed, in cases where the courts are looking to effectuate the intention of the legislature through a purposive reading of an unclear statutory text, the disordered state of the prevailing theory is apparent in the fact that, in seeking the intentions of the legislature, this interpretative end is achievable by two distinct standards. This cannot be correct. Judges are more likely to encounter a process attuned to the thoughts of O'Neill J as outlined above, a practice of constructive or purposive interpretation tempered by the role of legislative intent, rather than a seamless application of the disjointed aspects of the prevailing approach.

4.6 The Interpretative Criteria: Where do they fit?

As outlined in chapters 2 and 3, the term "interpretative criteria" is taken to be indicative of both intrinsic and extrinsic indicators of legislative intent. The various rules, principles maxims and canons of construction are presumed to facilitate different approaches to particular interpretative problems and are considered as matters of judicial policy by the court, with a view to assisting the courts to arrive at the "true meaning" of the statutory provision in question.[437] While the literal rule is presumed to occupy a default position over other interpretative methods, it is acknowledged that there is no general "pre-ordained hierarchy in respect of the application of the interpretative criteria."[438] Indeed, there are no rules or canons to instruct the judge whether to take one of any number of possible approaches. This not only hinders our understanding of how statutory interpretation works generally, but becomes much more complicated once the issues of vagueness or ambiguity are introduced to the interpretative scheme. Insofar as the prevailing theory is concerned, the pre-eminence of the literal approach as an interpretative device intimates that it is anterior to any single interpretative criterion.[439]

Yet this obscures how we conceptualise the interaction of the interpretative criteria and statutory purpose in the consideration of legislative intent, as this assumption envisages no separation between the foundational interpretative devices of literal rule and purpose, and supplementary interpretative factors. Quoting Cross in the case of *Minister for Justice v Dundon*,[440] Denham J outlined the manner in which the criteria operate but did not advert to the position of the literal rule or any hierarchical scheme:

> ... (in the case of doubt) rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one "rule" points in one direction, another in a different

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[437] [2002] 1 I.L.R.M. 161, at 186.
[438] Dodd, *Statutory Interpretation in Ireland*, (Tottel Publishing, 2008), at 35.
[439] Ibid.
[440] [2005] 2 ILRM 149, noted in Dodd, *Statutory Interpretation in Ireland*, at 35.

> direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular "rule".[441]

Ultimately, then, it is at the discretion of the judge whether to apply any interpretative criterion or particular interpretative approach.[442] This underlines the inherently fluid nature of the interpretative processes, as interpretative plurality negates the authoritativeness of any singular contextually relevant interpretative criterion, given that criteria necessarily pull against each other. This statement of Denham J also significantly attenuates the role of the interpretative criteria as foundational precepts in the prevailing account of statutory interpretation, because it is evident that the courts do not have to take them into account in every instance of interpretation.

Thus, the systematic approach to interpretation presupposed under the prevailing theory is difficult to square with how judges actually interpret. Indeed, by the standard argument literal meaning might be imagined to exist independently of the selection or application of any interpretative criteria. As outlined in chapter 3, it is assumed that the literal approach exists separately from other interpretative methods, as if literal meaning somehow precedes interpretation itself,[443] suggesting that the literal approach is inherently un-interpretative. This is problematic in that advocates of the prevailing theory, like Dodd, posit a dichotomised account of the relationship between the literal rule and the interpretative criteria; insofar as the literal rule is presupposed as the default interpretative device, but concurrently acknowledged as one of multitudinous interpretative criteria that are employed by the judge.[444]

Moreover, it is assumed that the interpretative criteria operate as supplementary aids, and that judges do not need to take them into account where the text evinces a literal meaning. Yet my claim that there is always an underlying resort to purpose in discerning meaning and intent complicates the role of the interpretative criteria, as the resort to statutory purpose intimates that the courts

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[441] Bell and Engle, *Cross on Statutory Interpretation*, at 40.
[442] Dodd, *Statutory Interpretation in Ireland*, at 36.
[443] Neil McCormick and Robert S. Summers eds, *Interpreting Statutes* (Dartmouth Publishing, 1991), at 466.
[444] Dodd, *Statutory Interpretation in Ireland*, at 35.

will have regard to any relevant indicators of intent in any event. Indeed, this confirms my claim in chapter 3 that judges exercise quite a degree of discretion in the application of the interpretative criteria[445], applying them on their own merits in particular cases. This discretionary application, described by Bell and Engle in *Cross on Statutory Interpretation* as a judicial "statement of attitude or approach"[446] undermines the sense that the rules of statutory interpretation, such as the literal rule, operate formally and manifest themselves as actual "rules" *per se*.[447] This "attitudinal" approach is apt to describe the interpretative process as constructive or creative, rather than formulaic.

That is, interpretative decisions do not formally add in the way that 2 plus 2 do in equalling 4. Whether this discretionary application allows the courts to engage in arbitrary forms of decision making is a paramount consideration in identifying whether the processes of statutory interpretation do, in fact, reinforce rule of law instantiation. Yet if the interpretative criteria were rules, following Dworkin's suggestion in *The Model of Rules 1*[448], they would apply in an "all or nothing" fashion and settle all interpretative disputes; however, that is not the case.

4.6.1 The Criteria in Practice

Given Llewellyn's argument that any number of criteria are applicable to more than one aspect of a given case, for the purposes of this section I will elaborate on my claim in chapter 3 that judges often refer to the criteria rhetorically, but do not in actual fact elaborate on their application. Indeed, I will show that judges routinely defer to statutory purpose in instances where they perceive themselves to be applying interpretative criteria. The second claim will consider the uses of one interpretative criterion in particular - the resort to legislative or parliamentary history in the discernment of legislative intent, a primary consideration implied by the constitutional framework outlined in chapter 2.

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[445] See Llewellyn, 'Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed' , at 401.

[446] Bell and Engle, *Cross on Statutory Interpretation*, at 42.

[447] This issue was explicitly adverted to by Murray J in *Crilly*, where it was stated: '...the use of any rule of construction as evidenced in judgments of the courts is rarely other than an ad hoc illustration of its use rather than a decision in principle'. [2002] 1 I.L.R.M. 161.

[448] Ronald Dworkin, 'The Model of Rules 1', in *Taking Rights Seriously*, (Duckworth, London, 1978).

The case of *Crilly v T. & J. Farrington Ltd* [449] is an illustrative example of the "application" of the interpretative criteria in practice. The case stands as a rare example of the courts deliberating over the use of the interpretative criteria or canons of construction, labels which are used interchangeably by the courts. The decision of Murray J in particular is significant, insofar as it affirms the status of the literal rule as the default interpretative criterion and elaborates on the use of other criteria generally. The main issue before the court in *Crilly* was whether the method of calculating a charge by the Eastern Health Board under s. 2 of the Health (Amendment) Act 1986[450], was reasonable, proper, and *intra vires* the 1986 Act. Section 2 of the 1986 Act provides:

> **(1)** Where –
>
> > **(a)** injury is caused to a person by the negligent use of a mechanically propelled vehicle in a public place, and
> >
> > **(b)** in-patient or out-patient services have been, are being or will be provided by or on behalf of a health board in respect of the injury, and
> >
> > **(c)** any one of the following, that is to say, the person aforesaid, his personal representative or dependant, has received, or is entitled to receive damages or compensation in respect of the negligent use aforesaid from the person liable to pay such damages or compensation in respect of that injury, or any loss, damage or expense (or mental distress in the case of a dependant) arising therefrom,
>
> the health board shall, notwithstanding anything in the Health Acts 1947 to 1985, make a charge upon the person who received or is entitled to receive such damages or compensation in respect of the said in-patient services or out-patient services.

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[449] [2002] 1 ILRM 161.

[450] Through the division of annual hospital costs by the number of occupied hospital bed days during the same year.

Section 52 of the Health Act 1970 provides that a health board must make available in-patient services for persons with full and limited eligibility. Under s.55 of the 1970 Act, a health board may make available in-patient services for persons who do not come within the remit of s.52. The board is required under s.55 to charge for any services so provided, which must be approved of or directed by the Minister for Health. Section 2(1) of the Health (Amendment) Act 1986 provides that where a person is injured in a negligent manner in a road traffic accident, and uses, or will at some future time use, in-patient services at a hospital, and is to receive compensation in respect of their injuries, the Health Board in question is entitled to make a charge in respect of those services rendered.

The plaintiff had been severely injured in a traffic accident and received treatment in a number of hospitals the cost of which was in excess of £1 million. The Eastern Health Board made a charge upon the plaintiff under s.2 of the 1986 Act based on an average daily cost method. The trial judge refused this calculation given that it included a supplement for road traffic accidents and, instead, made a "Kinlen Order" for an amount based on the private rate charged by the hospital. In a separate motion between the Health Board and FBD Insurance[451] Geoghegan J held, *inter alia*, that: (a) a charge under s.2(1) of the 1986 Act had to be a reasonable one calculated on a *quantum meruit* basis in respect of the services which the plaintiff had received; and (b) as the patient received treatment within a particular speciality, some averaging within that speciality would be acceptable in arriving at the charge. However, in the view of Geoghegan J, general averaging did not fall within the *quantum meruit* concept and could not be contemplated as a reasonable basis for the charge, unless expressly provided for in s.2(1) of the 1986 Act.

FBD Insurance cross appealed that the words "make a charge" as they appear in s.2(1) of the 1986 Act should be interpreted so as to liken the charge to the fixed charge under s.55 of the Health Act 1970. They claimed that the phrase "make a charge" in s.2(1) should be construed *ejusdem generis*, that is, of the same kinds, class or nature, as the term "charge" in s.55 of the 1970 Act, given that s.4 of the 1986 Act provided for the "collective construction" of that Act with other Health Acts

[451] [2000] 1 ILRM 548.

from 1947 to 1985. It was also contended that the trial judge was incorrect in being influenced by arguments as to the authoritative nature of statements made by the Minister concerning the intention behind the statute as such would be in breach of the separation of powers under Articles 15, 28 and 34 of the Constitution.

Counsel for Mr Crilly argued that the charge made under sections 2(1) and 55 of the respective Acts were unrelated and distinct charges, and that the charge to be made under s.2(1) had to be a "reasonable' charge", which could include some averaging of costs. They also argued that the Court could have regard to Dáil debates and statements of the Minister in order to discern the intention of the legislature in finding whether the charge in question under s.2(1) was different from that as outlined under s.55 Health Act 1970.

The Supreme Court allowed the appeal, granting a declaration that s.2 of the 1986 Act entitled the Health Board to employ a means of calculating the particular charge, which was reasonable, proper and *intra vires* the 1986 Act, and an altogether different charge from that as envisaged under s.55 of the Health Act 1970. Referring to the decision of the High Court, and the role played by the "traditional canons of construction" in that decision, Denham J stated that s.2(1) of the 1986 Act could not be interpreted as necessitating the Health Board to make a charge under the section similar to that as envisaged under s.55 of the Health Act 1970. This was due to the fact that s.55 referred to a "fixed" charge, there being no mention of such a fixed charge under s.2(1) of the 1986 Act. The only criterion laid out in the High Court in relation to the charge was that it be a "reasonable" one.[452]

Denham J found that s.2(1) expressed an unambiguous meaning, from which an inference could be drawn as to the averaging costs under the section. However, she expressly referred to the language of s.2(1) in only one segment of her judgment, intimating how she envisaged the issue of "averaging" would be undertaken. Thus, the section was read purposively as she conceived of the consequences of the respondents' approach to the section - that is, in considering the application of the statute as submitted, she attributed to the legislature an overarching purpose to avoid consequences where individuals injured in such circumstances would be

[452] [2002] 1 ILRM 161, at 176.

charged very large sums of money for the use of hospital facilities that had been provided of necessity, particularly where supplemental charges for road traffic accidents were included. Indeed, it is clear that Denham J conceived of the aims of the statute and the effectuation of the intention of the legislature in supporting her interpretation that the claim of the Health Board could not be correct:

> The charge which the health board is obliged to make upon a person such as the plaintiff in this case, is a charge in respect of the actual in-patient services or out-patient services which that plaintiff received... This does not mean that there can be no element of averaging because some averaging may be necessary in order to assess with any practicality a reasonable price for the services given. But on any reading of s.2(1) of the 1986 Act it is difficult to see how a health board would be entitled to charge a patient in Beaumont Hospital with a broken toe, the identical daily charge as a similar type plaintiff who had to undergo expensive brain surgery.[453]

Thus, it is quite clear that in purporting to apply the clear meaning of the statute, Denham J tested that meaning against the consequences of the submission of the Health Board. She felt that the scheme of calculating costs under the Act was "quite clearly ... artificial"[454] and could not be considered *quantum meruit*, stating that the legislature would have provided for the scheme had it been envisaged as such. Denham J found the inclusion of a mandatory requirement one of the most significant aspects of s.2(1), which provided that the claimant 'shall' impose a charge, although they are free to waive this under s.2(2). The fact that the means of calculation were not explicitly set out in the Act complicated the interpretation of the section, given that such a charge could refer to services already rendered and to future services, as it was envisaged that the charge must relate to services to both in-patients and out-patients.

What is noteworthy about her decision is that Denham J made general statements as to the application of the canons of construction in helping her arrive at this interpretation of section 2(1), but did not elaborate as to the specific canons in question, or the manner in which she would apply them:

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[453] Ibid, at 170.
[454] Ibid.

> ...applying the ordinary rules of construction I am satisfied that the charge under s.2(1) of the 1986 Act must be a reasonable charge in the *quantum meriut* sense... the general averaging as contended for could not be contemplated as a reasonable basis for a charge unless there was a special provision in the section covering it.[455]

Thus, Denham J made a very general statement as to the use of interpretative criteria, but did not elaborate on the role of those rules of construction in the course of her judgment. It is possible that she assumed they self apply as matters of common sense, but this does not explain how the courts envisage their application. Indeed, the mere fact of her reference to the criteria in the plural is suggestive of a general trend of their use in an Irish context. In cases where judges are required to make all-things-considered decisions and an interpretative judgment has to be made in the context of obscure or ambiguous statutory language, such statements are routine. Indeed, it appears almost rhetorical, a token gesture, referencing something important which should be taken into account, or mentioned at the very least. The fact that the courts routinely refer to the canons of construction or the interpretative criteria suggests that judges know they should use them, but may not be sure how to use them in conjunction with the other rules of interpretation.[456]

This goes some way in justifying Llewellyn's claim that selection depends largely on the criterion the judge regards as most obviously applicable to the situation, even though a myriad of criteria might be applicable.[457] Thus, Denham J's judgment illustrates my claim in chapter 3 that the prevailing theory assumes the courts are obliged to consider the interpretative criteria in their routine interpretations, yet do not elaborate on how the canons or interpretative criteria inform their decision.

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[455] [2002] 1 I.L.R.M. 161, at 170.

[456] See, for example, the case of *Paul Walsh v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*, [2009] IEHC 102 unreported, High Court, February 18th 2009, where Laffoy J, engaging in a discussion of the "long established canons of construction", outlined the default position of the literal rule and the secondary role of purposive interpretation as assumed under the standard account, but did not advert to any other interpretative criteria.

[457] Llewellyn, 'Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed' at 404.

4.6.1.1 The Role of the Text in Discerning Legislative Intention

In considering the legislative intention behind s.2 of the 1986 Act, Denham J rejected the argument that the rule excluding Ministerial statements and parliamentary debates in the construction of statutes should be dispensed with in articulating the clear meaning of s.2.[458] Denham J held that parliamentary debates were inadmissible in the construction of statutory provisions, given concerns over democratic legitimacy and "manufactured legislative intents"[459], and that dispensing with the exclusionary rule should not be countenanced.[460] Indeed, the resort to extrinsic interpretative aids such as ministerial statements and parliamentary debates proved one of the most significant considerations in the case, and is one of the most contested interpretative criteria.[461]

The decision of Murray J was quite detailed on the use of extrinsic aids such as ministerial statements. His judgment is important insofar as it is an attempt to impose order on this underdetermined area of Irish law. Murray J found that as a matter of judicial policy there were no grounds to approve abolishing the rule excluding resort to such statements in statutory interpretation,[462] rationalising the prevailing conception of the literal rule in the context of the Irish constitutional framework.[463] In this context he considered the interpretative criteria as "efficient and neutral *aids*"[464] to interpretation.

Given the suggestion that the interpretative criteria manifest as "presumed legislative intents"[465], it is constructive to conceptualise the court's use of the

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[458] [2002] 1 I.L.R.M. 161, at 181.

[459] See Antonin Scalia, *'A Matter of Interpretation'*, at 31 - 35. The theory holds that were parliamentary history considered in the construction of statutes congressmen could prepare statements which would be open to later production in court so as to extend credibility to non-literal interpretations of statutes as indicative of the intention of the legislature in the event of ambiguity or a lack of clarity.

[460] [2002] 1 I.L.R.M. 161, at 178.

[461] See also the judgment of Costello J in *Wavin Pipes Ltd v. Hepworth Ireland Co. Ltd* [1982] FSR 32, where he held that the court could have regard to parliamentary history in order to ascertain the intention of the legislature.

[462] [2002] 1 I.L.R.M. 161, at 164.

[463] Ibid. Per Murray J: 'The intent of the Oireachtas is imputed to it on the basis of the text of an Act adopted and promulgated as law in accordance with the Constitution. To go behind the constitutionally expressed will of the Oireachtas in order to examine a statement of a member of one of the Houses thereof and to impute an intent expressed by that member to the Oireachtas as a whole may risk compromising the legislative process and the role of other members of the Oireachtas…'.

[464] [2002] 1 I.L.R.M. 161, at 185, (emphasis in original).

[465] See Aileen Kavanagh, 'The Role of Parliamentary Intention in Interpretation', (2006) 26 Oxford Journal of Legal Studies, 179, at 185.

interpretative criteria as optioning merely a discretionary facility, as the criteria cannot compel determinate answers in interpretative situations. Indeed, when one considers my arguments that courts construe statutory purpose on a consideration of the likely consequences of an interpretation, it is almost implied that judges will intuitively have some regard to relevant interpretative criteria.[466] However, the prevailing position that judges *must* take the criteria into account cannot be correct, given their discretionary nature. Murray J underlined this uncertainty, offering insightful remarks on how the interpretative criteria operate in the Irish context.

> With a view to addressing the difficulties inherent in statutory construction the common law in the course of its evolution over a long period of time has identified an extensive range of criteria, usually referred to as canons of construction... as efficient objective and neutral aids to the interpretation of statutes... The use of canons or principles of construction, or any one or combination of them in a given case depends on a variety of factors and their interplay - the complexity or clarity of the text in issue, whether applicable precedents exist, whether there are fundamental principles in issue or constitutional considerations - one could go on. The point of departure for the court is always the actual text of the statute to be interpreted and it is a matter of judicial appreciation ... which canons or method of interpretation are appropriate to the nature of the problem which presents itself in the particular case.[467]

Despite this perceived flexibility as to application of the criteria, Murray J rejected the submission of the applicant that the calculation of the charge in the case was to be addressed in light of a ministerial statement. He held that the rule excluding recourse to parliamentary debate in the interpretation of statutes was one of the rules of construction, and that the ministerial statement could therefore not be

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[466] Indeed, Murray J implied as much in rejecting the resort to legislative intent as a legitimate interpretative criterion, stating that courts could always look to statutory purpose in discerning the intentions of the legislature: '... there are a wide range of canons of construction and presumptions available which are more sophisticated than neutral aids to the resolution of such interpretative problems. Also available are methods of interpretation such as the purposive or teleological approach to statutory construction. [2002] 1 I.L.R.M. 161, at 196.

[467] Ibid, at 185

applied in the instant case.[468] The position of the Irish courts on this issue was held to derive from the constitutional framework,[469] that is, the presupposed bond between objective legislative intent - the literal words of the statutory text - and the principle of legislative supremacy as outlined in chapter 2. Yet, noting "interesting and illustrative" developments in other jurisdictions as to the constitutional framework and the judicial role in the interpretation of statutes, Murray J declined to give the question of altering the status of the exclusionary rule in Ireland any further thought:

> Although questions of principle may and do arise in the consideration of this issue, such as the role of the courts in interpreting statutes, once general questions of principle are taken into account the issue in any jurisdiction concerning the use of parliamentary debates is fundamentally a question of judicial policy adopted in the context of its own constitutional framework in such jurisdiction and whether, having regard to judicial practice and experience such use should be considered appropriate or useful in that system.[470]

Considering such judicial policy, Murray J held it beyond the function of the court to engage in analytical discussion of the practice of other jurisdictions in this situation, underlining his preference for the state of the law in Ireland as to the exclusionary rule remain unchanged. However, he did concede that it was the subject of intense debate, both judicially and extra-judicially.[471] He opined candidly that the invocation of any interpretative criterion hinged upon the interpretative conditions in question,[472] yet this does not dilute concerns as the role they actually play, given that the invocation of any criterion is exercised in something of an *ad hoc* matter:

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[468] Murray J cited an authority as far back as 1890, *Herron v Rathmines and Rathgar Improvement Commissioners*, [1890] 27 LR Ir 179 to support his rejection of the submission that the exclusionary rule should be dispensed with.
[469] [2002] 1 I.L.R.M. 161, at 186.
[470] Ibid.
[471] Murray J considered the controversy surrounding 'manufactured' legislative intention, particularly in the US, as another prevailing reason why the state of the law in this jurisdiction remaining unchanged. Ibid, at 187.
[472] Ibid.

> ...the nature of rules of construction as ancillaries to the construction of statutes is such that once a rule is in place whether it is relevant or applicable in any given case in turn depends on the nature of the applicable statute and the interpretative problem which it poses. Hence the use of any rule of construction as evidenced in judgments of the courts is rarely other than an ad hoc illustration of its use rather than a decision in principle...[473]

Murray J, unwittingly or not, identifies one of the core weaknesses in the prevailing theory - the notion that proposing a systematised interpretative scheme in the statutory context is capable of insulating judges from the vagaries of interpretation. The inability of the prevailing theory to negate the potential for loose interpretation is the primary motive for the intuitive judicial orientation towards literalism, purportedly re-enforcing their underlying duty to the legislature. Rather, statutory interpretation evinces a constructive nature given the interplay of statutory purpose and legislative intent, even though the courts regard themselves as interpreting under the auspices of literal interpretation. Indeed, this implies that once judges are satisfied with their role in the interpretation of statutes it is a matter of judicial policy to find whether particular interpretative canons or criteria are applicable or relevant. While this signifies a genuflection to the principle of legislative supremacy and the position of judiciary as the weakest branch of government under the constitutional framework, Murray J's rationale is peculiar, if not circular, given his statements above as to the inherently discretionary nature of the selection process once the courts use the criteria. Indeed, the refusal to engage subjective extrinsic interpretative aids such as ministerial statements is indicative of the text centric nature of the interpretative practice of the Irish courts.

Thus, Murray J's rejection of the notion that courts can have regard to the subjective opinions of parliamentarians in ascribing legislative intent necessarily deflects the interpretative lens back to the text. However, this does not pull against my claim that the initial examination of the text is a purposive one. As I have argued, a consideration of the intentions of the legislature concentrates the interpretative focus of the judge back to the text, in light of the already formulated statutory purpose.

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[473] Ibid.

4.6.1.2 *Conflicting Interpretations of the Same Statutory Provision*

One notable aberration from the trend that the courts do not discuss the interpretative criteria at any great length was the decision of the court *Mullins v District Judge Michael Harnett.*[474] In *Mullins* the court refused to give effect to the literal implications of s.28(1) of the Non-Fatal Offences Against the Person Act 1997, yet, curiously, stated an aversion to engaging in activist statutory interpretation. Under s.28 of the Non-Fatal Offences Against the Person Act 1997, the offence of assault under s.47 of the Offences Against the Person Act 1861 was repealed. Section 28(1) of the 1997 Act did not stipulate whether another assault offence under s.42 of the 1861 Act was also appealed. The main question in *Mullins* was whether s.28(1) applied retrospectively[475] to offences committed during an interim period between the abolition of the common law offence of assault, and the coming into effect of the 1997 Act, as no assault offence existed in that interim.

In considering how to interpret s.28(1) of the 1997 Act O'Higgins J listed a number of interpretative criteria he believed relevant to the case, including the presumption against retrospection, the "public good" construction, the "common sense" rule of construction, the principle against adding words to a statute and the principle against doubtful penalisation.[476] He discussed the relevance of these criteria in turn; however, it was his observations in relation to the "so-called" principle of strict interpretation of penal statutes which proved most interesting in light of conventional wisdom. The principle is outlined by Bennion as follows:

> The *true* principle has never been that *'a penal statute must be construed strictly'*... The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all other relevant criteria.[477]

O'Higgins J opined that, in cases where there is little or no textual ambiguity and the offence in question falls within the parameters of the Act, the construction of the

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[474] [1998] 4 IR 426. Indeed, *Mullins* stands as one of the very few cases where the court used the label "interpretative criteria" in discussing their role in the interpretation of statutes.
[475] Finding that the decision of the court in *Quinlivan v Governor of Portlaoise Prison* [1998] 2 IR 113 was incorrect.
[476] [1998] 4 IR 426, at 430.
[477] Ibid, at 435, See Bennion, *On Statutory Interpretation*, at 382 (emphasis added).

statute will not be any different from that of any other, irrespective of whether it is a penal statute or not. Therefore, according to O'Higgins J the only difference in the construction of a penal statute is that there are additional criteria which must be weighed; rather than certain interpretative approaches being deemed inadmissible in light of the criminal nature of the statute. This necessarily implies that judges are not obliged to take criteria into account as assumed under the prevailing theory, as O'Higgins J's statement suggests that the criteria merely facilitate or justify interpretative conclusions, as opposed to compel them.

Having taken these factors into account, he found that the offence of "common assault" was merely a common law offence and that s.42 Offences Against the Person Act 1861 did not amount to a "hybrid" common and statutory law offence as contained under s.47 of the same Act. This implied that s.28(1) of the 1997 Act did not abolish s.42 in relation to pre-existing charges, and therefore, the convictions could stand. In rejecting the literal approach this decision seems compelled as much by a purposive reading of the statute as applied in context and the consequent ramifications for the perceived intentions of the legislature in relation to s.28(1) of the 1997 Act - assuming that the legislature envisaged the section to apply retrospectively in the circumstances - as much as it was compelled by a discourse on the appropriate interpretative criteria in the case.

When compared to the judgment of the court in *Grealis v DPP, Ireland and Others*[478] the uncertainty as to the "correct'" interpretation where the courts arrive at contradictory "literal" interpretations of the same provision is apparent, as is the notion that the interpretative criteria do not play the role assumed under the prevailing theory. In *Grealis* the court again had to find whether s.28(1) Non-Fatal Offences Against the Person Act 1997 abolished the common law offence of assault. While the court in *Mullins* found that the common law offence had not been abolished and that the convictions stood, in *Grealis* in the High Court O'Donovan J found that the offence had been abolished and that the applicant could not be prosecuted in respect of those common law offences, as the 1997 Act did not specify

[478] [2002] 1 I.L.R.M. 241.

anything about prosecuting offences which had been committed but not convicted before it came into force.[479]

The court in *Grealis* did not engage in a similar consideration of the relevant interpretative criteria as in *Mullins*. Rather, the judgment proceeded on foot of S.21(1) of the Interpretation Act 1937, which provided that where an Act repeals a previous statute, unless there is a contrary intention, the repeal does not prejudice any legal proceedings ongoing when the repealing in question comes into effect. One of the substantive issues in *Grealis* concerned whether "saving provisions" in the Interpretation Act 1937 could be relied on so as to allow for the convictions to proceed, irrespective of the fact that the common law offence of assault no longer existed during the interim period. The High Court found that where the offence was repealed by statute it ceased to exist in the absence of any "transitional saving provisions", given that the language of the statutory text was clear and unambiguous. Thus, the convictions were quashed. This decision was subsequently appealed to the Supreme Court where it was upheld. Yet it is of particular significance to note how both High Court decisions concerned the same statutory provision but led to profoundly different interpretations.

It is clear that both decisions were based on a purposive reading of the sections in question, because both decisions assumed that the legislature could not have intended the consequences of either literal interpretation. That is, in *Mullins*, it would be incorrect to state that the court rejected a literal interpretation of the section in light of the relevant interpretative criteria discussed. Rather, the court imputed an intention to the Oireacthas that it could not have intended gap in the interim period. Similarly, O'Donovan J's opinion in *Grealis* that the convictions could not stand was not compelled by a literal interpretation of the Interpretation Act where no such saving provisions existed. Rather, the decision was formed on foot of the principles of natural justice and fair procedures - that a person cannot be convicted in absence of a crime. From this perspective, then, a literalist rationale for the approach to the statutory language in either case is misplaced, given the prevailing theory holds that clear statutory language permits of only one

[479] [2001] 3 IR 144, at 149.

interpretation. It is clear that non-textual considerations informed the decision of the court in either case.

Yet both courts acknowledged that the meaning of section 28(1) was clear. This does not explain why the literal rule was not followed in *Mullins,* suggesting that if statutory interpretation was merely a case of applying determinate language, such inconsistencies would not occur. It is in such cases that the orientation towards intent on a purposive reading of the statute is manifest. Indeed, statutory interpretation cannot operate on foot of a systematic application of indeterminate interpretative criteria.

While these stand as substantive examples of the courts engaging with the criteria at a level over and above that outlined in the judgment of Denham J in *Crilly,* the decisions in *Mullins* and *Grealis* merely dilute the significance of the interpretative criteria. This is because, in both decisions, the courts rejected the impact of the rule requiring the strict interpretation of penal statutes, yet did not conclusively explain why the literal approach was not followed. This underlines the argument above, that it is in the resort to purpose and intent that the courts effectuate statutory meaning. Proposing that the interpretative criteria fit into a pro-literal, systematic interpretative scheme as assumed under the prevailing theory simply does not work. It is better to conceptualise the criteria as Kavanagh has suggested - they merely act as presumed legislative intents which the courts may have regard to when considering the purpose behind legislation.[480]

4.7 Conclusion

This chapter has shown that the interpretative practices of the courts do not fulfil the core theoretical claims of the prevailing theory outlined in chapter 2. The criticisms of that theory in chapter 3 have acted as a guide, which has been used in turn to illustrate examples of statutory interpretation in practice and corroborate the notion that the foundational precepts of the prevailing theory are misleading.

The prevailing theoretical conception of the literal rule and the rule as applied by the courts in Ireland are profoundly different. The prevailing position on

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[480] Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998', at 185.

literalism conceives an un-interpretative state of affairs; the application of determinate language to determinate facts. However, the analysis of Budd J's classic statement of the literal rule has shown that interpretation does not operate in this fashion, as the courts take the context of the case and the application of the statute into account before conceptualising literal meaning. This is a considerable criticism given the default position of literalism under the prevailing theory. Likewise, the analyses of the conditions under which judges depart from an application of the literal rule have illustrated a disconnect between interpretative theory and practice. It has been argued that, in instances where the courts encounter a lack of clarity, ambiguity or absurdity in statutory language, it is necessary for them to consider issues beyond the text of the statute as a whole, and that the context of the case is necessary to the construction of statutory purpose. Indeed, it has been shown that the notion of statutory absurdity is a necessary precursor to the formulation of what are routinely considered literal interpretations of statutory language.

I have also shown that the prevailing conception of purposive interpretation is incorrect, and that far from there being one definitive purposive approach, purposive interpretation entails a wide, non-textual interpretative spectrum, far beyond the tests of clarity, ambiguity and absurdity. Purposive interpretation, as argued, speaks to a very general issue of use, necessarily raising concerns over judicial activism. It is for this reason that, instead of the prevailing notion of a synaptic relationship between the literal rule and intent; there is a hugely significant relationship between statutory purpose and intent. The resort to intention in light of purposive interpretation issues a text reflexive mode of interpretation, something that is implausible under the prevailing conception of literalism. This argument will prove a significant aspect of the next chapter.

Finally, in the examination of the use of interpretative criteria it has been shown that judges are not duty bound to take the criteria into account on applying their interpretations. The prevailing account holds that courts must apply the interpretative criteria in the interpretation of statutes. Yet because of the vast quantity of criteria applicable in any instance, and by their discretionary nature, judges cannot be obliged to apply them. Rather, it is more likely that a consideration of influential presumptions or maxims occurs during the wide ranging

consideration of statutory purpose and consequences. In addition given the fidelity to the exclusionary rule in the Irish context, deliberation over legislative intent is considered to be text centric, maintaining the text oriented practice of the Irish courts, despite the questionable interpretative influence of the literal rule. Finally, it has been shown that, where the courts disagree over the interpretation of the same statutory terms, concerns for the interpretative criteria and their relationship to the literal rule has very little significance for the final statutory meaning discerned.

Rather, the practice of the courts evince a combined, multi-faceted interpretative approach, under which considerations of purpose, context and intent necessarily pull against each other in the articulation of statutory meaning. The focus of the next chapter will be to analyse a wide range of interpretative theories in order to find whether the rationalisation of the interpretative practices of the courts proposed in this chapter can be substantiated in theory, and offer a comprehensive challenge, both in practice and in theory, to the prevailing account of statutory interpretation.

Chapter 5 Interpretative Debate and the Prevailing Theory

Chapter 2 established the purported constitutional basis for literalism as the default interpretative device in the statutory interpretation. However, the courts are aware that the literal rule cannot solve all interpretative disputes, and have on occasion acknowledged the inappropriateness of the literal rule in certain situations –as was the case on appeal in *Murphy v Bord Telecom* for example.[481] Yet if judges are conscious of the dangers of excessive literalism, this begs the question: should the courts attempt to articulate an approximated meaning where plain meaning is not self evident?

As outlined, the prevailing theory assumes that discerning literal meaning and legislative intent are one and the same, but they cannot be. Speaking to legislative intent draws either on an originalist or intentionalist position with regard to the text - that is, looking to what caused the writer/s of the statute to use the terms they did, what tried to achieve, and attributing overarching intentions and purposes to them in so doing - or interpreting the text literally, finding what is communicated in the words of the text only. The latter is far more restrictive. As a corollary, the prevailing account of the purposive approach advocates a restrictive interpretative licence in itself – one merely looks to the purpose of the legislation in the context of the text, where the text is unclear, ambiguous and/or absurd. Yet very little is said of the court's regard to the context of the case, as if the text as context is the only legitimate context that can be invoked.

Building on the criticisms of chapter 3 and 4, this chapter will show that the prevailing account presents a threadbare interpretative theory in the statutory context. A range of interpretative theories will be analysed in an attempt to capture the practices of the Irish courts - practices which are not adequately accounted for under the prevailing theory. As part of this analysis a number of claims will be

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[481] [1989] I.L.R.M. 53, where court interpreted s.3(c) Anti-Discrimination (Pay) Act 1974 in such a way as to reject a claim from female applicants who could find no equivalent male co-worker getting paid more for 'like work'.[481] The only case they could provide was that there were several examples of men getting paid more money but for work of a lesser nature, which was not found in breach of the section. In the High Court Keane J felt compelled to give effect to the literal implications of the statute in light of the constitutional framework, despite the obvious need for a purposive or contextual reading of the statute. However, this was referred to the European Court of Justice, where the decision of the High Court was held incorrect. See LRC [61-2000], at 15.

made as to the nature of interpretation and, in turn, will be related to wide ranging academic debate over the practice and processes of interpretation.

The first claim is that objective meaning does not exist "out there" as it were, waiting to be discovered by judges as "a brooding omnipresence in the sky"[482] in their routine interpretative practices. The main object of this criticism will be the notion that in discerning literal meaning and original objective intent, the courts readily access a pre-determined, objective statutory meaning. The rejection of this central tenet of the prevailing approach necessarily assumes that judges produce meaning at some level during the interpretative processes and that plurality of meaning is a necessary feature of interpretation.

Secondly, it will be claimed that the interaction between the interpreter and text in articulating meaning is a necessary feature of interpretation. The interaction of reader and text weakens the claim that singular meaning is discoverable, and underlines the role that assumptions or intuitions play in making interpretative choices. In discussing this interpretative co-dependency between reader and text interpretative theories that focus on the significance of interpretative communities will be analysed, as will hermeneutic theories which focus on the interaction between interpreter, text and context. This will discuss the type of context envisaged under non-literal forms of interpretation.

Third, in recognising the creative role of the reader in the resort to purpose and context, it will be claimed that the judge must construct meaning at some level, but that this meaning is in the text. This implies that interpretation is not a "free for all" - that is, it is not wholly subjectivist or relative - as the text acts as a necessary constraint on the interpretative freedom of the judge.

Fourth, I will argue that the rules of official procedure which ensure the impartiality and fairness of adjudication are useful in terms of guaranteeing non-arbitrariness, a central tenet of the rule of law, but they are not decisive in interpretation because they do not establish what interpretation is, or provide answers as to what the correct interpretation is in any situation.

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[482] Ronald Dworkin, 'Civil Disobedience', in *Taking Rights Seriously*, (Duckworth, London, 1978) at 216.

Fifth, in reference to the jurisprudence of Ronald Dworkin, it will be shown that statutory interpretation is necessarily constructive, in that judges create meaning through considering the purpose behind statutes. However, in so doing, Dworkin's prescription of purposive or constructive interpretation will be rejected as too broad in the interpretative licence it affords the judiciary, not adequately capturing the textual constraint evinced in the interpretative practices of the Irish courts.

Finally, outlining the intentional theory of Joseph Raz, his concept of intent, the authoritative intention thesis, will be shown as a better account of the practice in an Irish context. This is because Raz's notion of intention preserves the statute as an authoritative statement of law, necessarily constraining the judge in his interpretative freedom and underlining the authoritativeness of the text, closely resembling the text constrained practice in Ireland. In considering Raz's theory it will be claimed that long standing criticisms of intentionalism cannot undermine the theory's account of how judges preserve the authoritativeness of the legal text.

I will then show that the interpretative practices of the Irish courts evince a mixture of Dworkin's constructive interpretation, in that they necessarily construct meaning, but they carry this out in light of the intention that is most likely aimed at. Thus, considering intention augments the constraining role of the text, placing limits on the judge's consideration of fluid background principles in accessing the best or right answer - principles which necessarily dilute the relevance and authority of the text. Thus, the argument will be that, even though it is difficult to gauge how textual constraint operates, it most likely occurs in light of the court's constructive interpretation of likely intent.

Henceforth, this will be applied to the critique of the four precepts identified in the prevailing theory of statutory interpretation, engaged in chapters 3 and 4. The failure of the prevailing theory to account for the indistinct line between literal and purposive interpretation, from the outset, means that statutory meaning does not exist "out there" and is not discoverable as posited under prevailing theory. Accordingly, it will be claimed that statutory interpretation is, in fact, an exercise in constructive interpretation, but far more textually constrained than a theorist like

Dworkin would admit, and, consequently, is not the "free for all" deconstructive theorists claim.

5.1 The Fallacy of Immanent Statutory Meaning and Intent

From the discussion of the literal rule in preceding chapters it is clear that the prevailing approach envisages the formal application of objective statutory meaning on its own terms, with little or no judicial inference as to the content of that meaning, or the context in which it is to be applied.[483] Again, the organising principle of the literal rule is assumed as ensuring, as far as is practicable, judicial impartiality and objectivity in statutory interpretation. This isolationist interpretative approach is said to avoid interpretative plurality, given that it is incumbent on courts to apply the singular statutory meaning at their disposal, as meaning is "embedded" in the text and can be ascertained without interpretative effort.[484] This is a necessary implication of the rule. That is, plain meaning does not determine the conventional meaning of statutory language, but something "more objective", which, as Flanagan puts it, exists "outside the head"[485]. Thus, the prevailing theory implies that in the reflexive harmonisation between literal rule and objective legislative intent courts access an objective statutory meaning that precedes their interpretation. A core theme of this thesis has been the rejection of the literalist paradigm as communicated thus. Consequently, our first port of call must be to reject the notion that statutory meaning is a discoverable entity. As a necessary corollary, it is essential to address the notion of objectivity presupposed in the relationship between literal meaning and legislative intent, particularly the idea of retrieving objective intention.

While the literalist position receives much support in Ireland,[486] a necessary implication of dismissing the purported link between plain statutory meaning and legislative intent is rejecting the correlative notion that courts retrieve legislative intent from an unidentified objective source. Given my argument in chapter 4 that

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[483] Richard A. Posner, 'Legal Formalism, Legal Realism and the Interpretation of Statutes', (1986-1987) 37 Case W. Res. L. Rev. 179, at 187.

[484] See Stanley Fish, 'Fish v Fiss', in Sanford Levinson and Steven Mailloux eds, *Interpreting Law and Literature, A Hermeneutic Reader*, (Northwestern University Press, 1988) at 251.

[485] Brian Flanagan, 'Revisiting the Contribution of Literal Meaning to Legal Meaning', (2010) 30 Oxford Journal of Legal Studies, 255, at 256.

[486] As illustrated by the decisions of the court in *Howard* and those of Denham J in *DPP (Ivers)* and *Lawlor v Flood*, for example.

the prevailing interpretative theory is inaccurate, it is not apparent if the courts envisage a difference between plain meaning and legislative intent, or whether they are necessarily parts of the same process. I have argued that it is more advantageous to conceive such a link between statutory purpose and intent. It is for this reason that I reject the notion that objective legal meaning exists in the ether as it were, as such a theory has the effect of mystifying the interpretative practices of the courts.

5.1.1 Dismissing the Transcendental Strongbox Idea of Meaning

As outlined, my first claim in this chapter is to reject the notion of objective legal meaning which exists, as Dworkin put it, in a "transcendental strongbox"[487], simply waiting for judges to unlock and apply. A corollary of the "transcendental strongbox" theory of meaning in the context of statutory interpretation is the notion of original intent. The prevailing theory holds that the literal rule identifies an applicable singular literal meaning, and original legislative intentions are implicit in that meaning. Yet our case analysis has shown that, in undermining the importance or functionality of the literal rule to the eventual statutory meaning, the resort to intent still plays a key role in discerning such meaning. Thus, in seeking to reject the notion that legal meaning is metaphysically extant, it is essential to consider whether the resort to intent necessarily infers the objective intentions of the original drafters of the text.

Graham has defined originalism as "that form of interpretation which holds that a statute should be given the meaning intended by its creators"[488], whereby the extant authorial or legislative intent at the time of the enactment's passing is to be uncovered by the courts. It is argued that this indicates an "immutable and predetermined meaning" [489], that is, an objective legislative intent to be ascertained and complied with by the courts, which is said to allow the citizen plan his affairs accordingly. Thus, originalism proposes that when the statute is enacted, it has a singular meaning, and this is the only legitimate meaning applicable to the statute thereafter:

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[487] See Ronald Dworkin, 'Civil Disobedience', in *Taking Rights Seriously*, (Duckworth, London, 1978) at 216.
[488] Randal N. Graham, 'A Unified Theory of Statutory Interpretation', (2002) 23 Statute Law Review, 91 , at 92.
[489] Ibid, at 99.

> The central assumption of originalism is that a statute has only one true meaning, and that this meaning cannot change in response to changing social conditions. The meaning of the provision resides within the words selected by the drafter, leaving little or no room for judicial creativity...[490]

Thus, the originalist approach effectuates the "wishes" of the legislature that enacted the statute[491], positing an interpretative theory which retrieves the original meaning and intent of the enactment.[492] In their defence of "ordinary" meaning as the primary interpretative approach to statutes, Summers and Marshall argue that the link between ordinary meaning and intent is fashioned by the fact that, in implementing statutory provisions, the legislature has regard to the "immediate purpose" or intentions of the statute in using the ordinary meaning of language as their primary drafting tool.[493] Thus, plain meaning is assumed as a precondition of both legislative drafting and statutory interpretation in effectuating the original intention of the legislature, so as to ensure that, as *Salmond on Jurisprudence* puts it, the legislature "has said what it meant, and meant what it has said."[494]

A common criticism of such a conception of objective legal meaning and intent is the phenomenon of plurality in interpretation.[495] Interpretative plurality is said to necessarily undercut the objective quality of any interpretation, as it is claimed there cannot be an objective interpretation in the event of numerous "good" interpretations.[496] Raz regards this form of meaning as unattainable, as such claims are incorrectly premised upon a metaphysical conception of objectivity[497], the idea that an absolute meaning is generated by the text. Yet, the literalist and originalist

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[490] Ibid, at 93.

[491] Martin H. Redish and Theodore T. Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', (1993-1994) 68 Tul. L. Rev. 803, at 812.

[492] Raz rejects the notion that interpretation is a process of retrieving authorial intent and argues that, in order to be objective, interpretations must provide better reasons than merely connecting to what is assumed as an original intent. See Joseph Raz, *Between Authority and Interpretation*, (Oxford University Press, 2009) at 254-263.

[493] Robert S. Summers and Gregory Marshall, 'The Argument from Ordinary Meaning in Statutory Interpretation', (1992) 43 N. Ir. Legal Q. 21, at 221. Summer and Marshall's argument outlines why "ordinary" meaning, as distinct from plain and literal meaning, is the most suitable interpretative starting point in statutory interpretation. However, for the purposes of this chapter I will not address the differences between the different types of text-based meaning.

[494] P.J. Fitzgerald ed, *Salmond on Jurisprudence*, (London, Sweet & Maxwell, 1966) at 132.

[495] Indeed, the argument for interpretative plurality is central to theories which seek to undermine any claims as to objective interpretation in law, see Sanford Levinson, in 'Law as Literature', in *Interpreting Law and Literature, A Hermeneutic Reader*, at 155.

[496] See Owen Fiss, 'Objectivity and Interpretation', (1981-1982) 34 Stanford Law Review, 739, at 742.

[497] Raz, *Between Authority and Interpretation*, at 228.

theories both claim that there is a pre-determined, unchanging meaning that judges are able to discover. Thus, critics who point to interpretative plurality in their rejection of literalism and originalism are correct, insofar as such a conception of meaning is unlikely. Raz holds that the interpreter's duty should be to "illuminate the meaning" of the object of interpretation, rather than aim for absolute objectivity,[498] and is open to the possibility that any number of interpretations might successfully illuminate the meaning of an object. The aim of interpretation, then, should not be to discover a pre-determined meaning or intention that is entrenched in the text, but to interpret the text well. This assumes that the prevailing account of the literal rule and originalism are both incorrect, insofar as they necessarily obligate judges to apply statutory meanings conceived "outside the head" as it were. Thus, Raz's suggestion about the illumination of meaning is helpful in that it recalibrates the debate about methods of interpretation, recommending that we should set our sights lower when approaching the issue of "objective" meaning.

Therefore, the idea that legal meaning is discoverable is deceptive, as it detracts focus from a substantive analysis of the truth of our practices. Indeed, in light of our discussion of the processes of statutory interpretation thus far, the interpretative theory required under the non-substantive conception of the rule of law does just that, insofar as it requires an untenable interpretative practice in holding judges to account to determinate statutory language. With this in mind, it is clear that the prevailing orientation towards literal meaning and original intent is founded on a strong conception of the separation of powers; with the role of "breathing" meaning into statutory text attributed solely to the legislature.[499]

However, Graham correctly identifies the chief weakness of the originalist position - the inability of the theory to explain how the courts tackle and solve interpretative disputes.[500] The main criticism of originalism lies in the contention that statutory meaning, and by implication legislative intention, are neither pre-determined nor unaffected by the interpretative methods of the courts.[501] This is a similar criticism to that of the literalist paradigm, that there is no objective legal

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[498] Ibid.
[499] Graham, 'A Unified Theory of Statutory Interpretation', at 97.
[500] Ibid, at 100.
[501] Ibid.

meaning "out there" awaiting discovery and is indicative of twin faults in both literalist and originalist theory - that the text is capable of reflecting an absolute meaning or intention and that they are settled at the time of enactment. Thus, originalism fails as an accurate account of the interpretative practice because in its static conceptualisation of statutory meaning and the intents that such meaning is said to preserve, it does not allow for those necessary features of adjudication, the processes of contextualisaton, application and re-application of meaning:

> Experienced jurists can testify to [the] phenomenon by which the application of a statute rebounds upon the determination of its true meaning. Consider, for example, the difficulty in proceeding with interpretation of an enactment in the absence of any factual content. Where it is impossible to appreciate precisely the consequences of interpretation, this endeavour becomes particularly difficult, even dangerous. Legal interpretation presupposes, in effect, a constant interaction between law and fact, an arbitration between the requirements of the past, those of the enactment, and the requirements of the present, those manifested by an appreciation of the facts at the time of application.[502]

The role played by factual considerations or the context of the particular case strengthens my claim in chapter 3 that the prevailing account is incorrect in outlining an a-contextual interpretative scheme under which the interpreter or judge can make a decision as to the meaning of a statutory text by looking only at the text, and not the conditions to which it applies. Yet in the orientation towards the strongbox theory of meaning, the literalist and originalist paradigms propose that interpretations are capable of applying in the absence of factual or contextual content.

In departing from the metaphysical paradigm Raz proposes that interpreters must accept that "the meaning of the object is not in the object".[503] This argument holds that the meaning of a particular statute, for instance, is not immanent in the form of the statute itself. This denotes that external indicators of meaning are central

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[502] Pierre Andre Cote, *The Interpretation of Legislation in Canada*, (2nd ed, Cowansville Quebec: Les Editions Yvon Blais, Inc 1992) at 6, cited in Graham, 'A Unified Theory of Statutory Interpretation', at 100-101.
[503] Raz, *Between Authority and Interpretation*, at 230.

to our interpretative practices and that meaning must be external to the interpreted object. If we consider this statement in the context of the prevailing account of the literal rule, the notion of "literal" statutory meaning alters quite significantly. To approximate "good" interpretations to the notion of objectivity intimates the opposite of the standard assumption - that literal meaning represents the rule in the envisaged case and merely needs to be applied to the case at hand.

Indeed, the claim that "the meaning of the object is not in the object" holds that the originalist position is incorrect, insofar as the originalism locates the original intentions of the drafters within the text of the statute itself. Originalism, then, cannot provide an accurate description of the interpretative practices of the courts because the interpretative method denoted under the theory leaves no room for contextualisation or the interplay between reader and text and external indicators of meaning. Raz points to the role of "constitutive reasons" in interpretation - external facts which clarify meaning and confirm interpretations as correct.[504] Constitutive reasons limit interpretative plurality as the potential for variant interpretations is hemmed in, in the legal context, by the overriding importance of ensuring the authority and continuity of law.[505] Thus, legal interpretations are not relativistic because the need to ensure the authority and continuity of the law provides judges with "conservative" reasons for limiting creativity and demanding fidelity to the legal text in interpretation.[506] As noted in the criticism of literal interpretation in chapter 3, the method envisaged under the prevailing approach portrays statutory interpretation as an un-interpretative process of retrieval.

Thus, Raz's conception of objective interpretation does not align with the prevailing notion that the interpretation of a statute must be the only viable interpretation in order for it to be valid. Rather, certain features of legal practice will illustrate whether the interpretation is objectively good or not.[507] The resort to non-textual issues implies that in order for an interpretation to be "objective" and

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[504] Ibid.
[505] Ibid, at 237.
[506] Ibid.
[507] Raz does not make clear whether these features of legal practice are entrenched legal procedures, or interpretative guidelines, for example.

guarantee the authority and continuity of law, the courts must make an effort to approximate their interpretation to the general aims of the law/s at their disposal.[508] Raz's theory, then, locates the objectivity of an interpretation in its success in communicating the intention behind a communication.[509] Most theorists reject such a conception of vacuumed meaning out of hand, implying that the prevailing rationale of the literal rule is incorrect as a presupposition of statutory objectivity.[510]

5.1.2 Internal Incoherence of Originalist Theory

While the criticisms outlined above primarily concern the inadequacy of originalism as a portrayal of interpretative practice, internal incoherencies also undermine the originalist claim that judges can access a strong-boxed statutory meaning. In his criticism of the originalist perspective in *Justice in Robes*, Dworkin differentiates between two forms of originalism: "semantic originalism", which, much like the literal rule, holds that the words of a legal text must be given the meaning embedded in the text by those who enacted it; and "expectation originalism", which holds that the words of the legal text must be given the legal force that is expected of them.[511] Given what we know about the role of literal meaning in the construction of legislative intent under the prevailing theory, it is clear that the Irish courts consider themselves as semantic originalists. However, it is arguable that the courts also make use of the expectation form, particularly where they have to project an approximated legislative intent on foot of what they believed the legislature would have intended. Indeed, in our discussion of intent to follow, this dichotomy will prove very useful in illustrating how the courts construct statutory meaning.

For his part Dworkin argues that semantic originalism is "unassailable", insofar as it attaches general historical notions of meaning to texts in finding objective legal meaning.[512] Semantic originalism is successful, then, if it can be determined as a matter of fact that the meaning of a particular word or phrase was unique to the time of the enactment of the statute, and thus requires such an

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[508] Raz, *Between Authority and Interpretation*, at 236.
[509] Ibid.
[510] This claim will be discussed at length below.
[511] Dworkin, *Justice in Robes*, at 29.
[512] Ibid.

interpretation. However, taking into account what we know about the role of context in interpretation from chapters 3 and 4, we must dismiss the purported determinacy of semantic originalism, because the judge, as interpreter, must always be aware of the context in which he finds himself, with an eye both on the interpretative history that preceded him, and present conditions. Thus, to suggest that historically static word meanings are determinative of a particular legislative intent for a given word, no matter what the interpretative context, is a very difficult position to uphold under interpretative approaches that do not prescribe an originalist reading of interpretation.

Dworkin claims that "expectation originalism" is the interpretative method most often abused by courts when they refer to the intentions of original drafters.[513] The difficulty with expectation originalism is that, when courts defer to an original intent in the context of a certain word or standard, this is often carried out in relation to the legislature's conception of that word or standard, as opposed to the thing in itself.[514] Thus, using the *Portmarnock* judgment as an example; in finding what the "principal purpose" of the golf of the club was, Dworkin would find it incorrect that the court analyse the legislature's conception of such purpose, or what the legislature intended such a purpose to be. Rather, the court should seek to find the principal purpose of the club in reference to the concept of purpose itself.[515] This originalist dichotomy proposed by Dworkin mirrors Reed Dickerson's decoupling of what he refers to "actual" and "manifest" intent.[516] That is, on the one hand, the distinction between the meaning the legislature actually intended people to understand from the language used, and, on the other, a meaning that differs from that intent because of the fact of the open texture of language.

Thus, even on its own terms originalism cannot deliver true or correct statutory meaning and preserve the legislative intention as presupposed, as there are different internal points of view and breeds of original intention within the concept. All of these incoherencies point to the very thing that originalism seeks to negate - some level of judicial discretion or creativity in interpretation.

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[513] Dworkin, *Justice in Robes*, at 30.
[514] Ibid.
[515] Ibid.
[516] Dickerson, *The Interpretation and Application of Statutes*, at 69-70.

While the arguments communicated above seek to rule out the validity of originalism and literalism as indicative of interpretative practice, this does not imply that this thesis rejects the intentionalist paradigm. Rather, as stated above, the value of intentionalism as an account of the interpretative practices will be considered in later sections. At this point it is sufficient to note that the idea that statutory meaning and original intents exist as things in themselves has been discarded. The second claim - that there is a necessary interaction between reader and text in the processes of interpretation and the formulation of meaning - must now be considered. The underlying question for the rest of this chapter is how constrained judges are in their creative licence.

5.2 The Co-Dependent Relationship between Reader and Text in Interpretation

The fact that litigation is not the primary mode of deciphering statutory meaning assumes that there must be more to statutory interpretation than focusing on linguistic determinacy.This is simply because literalism, in any sense, cannot be exhibited as operating in an interpretative, or pre-interpretative, vacuum, and therefore, cannot be shown to compel interpretative decisions.[517] Given the significance assigned to the role of context and purpose in determining statutory meaning in Ireland, it is necessary to engage with interpretative theories that emphasise the relationship between reader, text and context to find how judges, as interpreters, attach valid meaning to texts. The previous section outlined why the literalist and originalist paradigms fail in accounting for the type of objective statutory meaning presupposed under the prevailing account. This section will look to interpretative theories that suggest interdependence between reader and text, and like Raz's claim above, show that the notion of absolute meaning breathed into the text at the time of writing is not the kind of meaning that we should be looking for.

In attempting to explain how interpreters arrive at a final or determinate meaning Scott Soames has proposed a theory which centres on the interpretative value of context. Soames argues that contextual content supplements semantic

[517] See Dickerson's discussion of semantic ambiguity and the tautologous nature of the literal or plain meaning rule, Dickerson, *The Interpretation and Application of Statutes*, at 44-47, and 229-230.

meaning in interpretation, to the point that contextually expanded semantic meaning is much more determinative than literal meaning. This claim undermines the literalist core of the prevailing theory:

> literal meaning is more austere, abstract and less transparent than it is often taken to be ... [it] is not what faithful interpreters should be looking for ... – since even when it is identified, it may fail to determine the text's content. That content, which encompasses everything conveyed or asserted by the text, often includes information that goes well beyond the semantic contents of the sentences involved. Typically, an agent produces a sentence in a context with [1] a communicative goal and topic, [2] a record of what has been supposed or established up to then, and [3] assumptions about the beliefs and intentions of participants. This pragmatic information interacts with the semantic content of the sentence to add content to the discourse... Semantic content is often merely a vehicle for getting to pragmatically enriched content... The semantic-cum-pragmatic information-generating process governing the routine interpretation of linguistic texts and performances may start with literal meaning, but it doesn't end there.[518]

This "pragmatic information" is the underlying reference to the context of the case and subsequent abstract conceptualisation of consequences that must occur in every instance of statutory interpretation, if the text is to have a practical effect. This thesis does not contest that the first point of departure for the courts when interpreting statutes is the statutory text itself. However, the court must have regard to the context of the case at hand if the plain meaning discerned is to prove effectual. As Soames' argument sketches, literal meaning on its own is of no apparent use without reference to externalities, yet the prevailing theory envisages an isolationist literal approach. Thus, the notion that the formal application of statutory plain meaning indicates an objective legislative intention cannot, in practice, effectuate the aims of a statute as is suggested in theory. Similarly, Stanley Fish proposes that

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[518] Scott Soames, "Interpreting Legal Texts: What is, and What is Not, Special about the Law", in *Philosophical Essays, Volume 1: Natural Language: What it Means and How We Use It*, (Princeton University Press, 2008) at 403-404, cited in Brian Flanagan, 'A Fullerian Challenge to Legal Intentionalism', (2011) 24 Ratio Juris 330.

the key to understanding objectivity lies not in notions about determinism or the immanency of language, but in our assumptions as interpreters:

> A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible.[519]

It is clear from this quote that Fish does not subscribe to the idea that literal meanings exist as things in themselves. Rather, for Fish, "objective" meaning arises on foot of the tacit assumptions of those in interpretative communities when using words in certain activities.[520] Fish's treatment of interpretation, then, locates the validity of meaning in the reflexive assent between interpreter and interpretative community. Thus, if the objectivity of meaning depends on the interpretative assumptions of interpreters, the meaning of any text is dependent on the reader of that text. This could be described as a relativistic theory; however, Fish states that there is always a text; it is merely prior to the act of interpretation.[521]

Implicit in this rejection of the idea that objective meaning can be discovered and the correlative notion that determinate language realises formally, is a tacit presupposition judges have an intuitive understanding of the "mutually independent relationship" between the contexts to which rules apply, and the types of issues that arise on applying those rules.[522] Thus, Fish accepts that texts cannot be shown to provide for their own interpretation, as there must be some point at which the judge applies his interpretative assumptions in finding the appropriate context in which to interpret the text.[523] If texts are not internally determinative of the meaning they contain, as Raz puts it, the meaning of the object is not in the object and the judge as interpreter is placed in the position as the assigner of meaning. It is in this sense that his awareness of the appropriate context in which the text should

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[519] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, (Duke University Press, 1989), at 358, cited in Dennis Patterson, *Law & Truth*, (Oxford University Press, 1996) at 107.
[520] Ibid, Patterson, at 105.
[521] Stanley Fish, 'Normal Circumstances, Literal Language, Direct Speech Acts, What Goes Without Saying, and Other Special Cases', in Paul Rabinow & William M. Sullivan eds, *Interpretive Social Science: A Reader*, (University of California Press, 1979) at 246.
[522] Stanley Fish, 'Fish v Fiss', in Sanford Levinson and Steven Mailloux eds, *Interpreting Law and Literature, A Hermeneutic Reader*, (Northwestern University Press, 1988) at 253.
[523] Ibid, at 256-257.

be interpreted becomes significant. This is because the objectivity of interpretations lies in the intuitive sense shared by interpreters and others in the interpretative community that they correctly understand what is required of them as interpreters in particular contexts. Thus, understanding lies in the "norms, standards, definitions, routines, and understood goals that both define and are defined by that context."[524] In light of this reader-centric conception of interpretation I will now consider interpretative theories which situate the reader, text, and the context in which both are found, at the centre of the processes of understanding and meaning.

5.2.1 The Interaction of Reader, Text and Context

In a similar treatment to Fish's rejection of literal meaning, the hermeneutics of Hans Georg Gadamer posits that one cannot draw a distinct line between the understanding of a text on its own terms and what the interpreter reads into it, [525] as the concept of "understanding" implies that a common ground has been reached between interpreter and text.[526] Thus, in identifying the interactive relationship between interpreter and text, the theory necessarily opposes the notion of metaphysically extant meaning discussed above.

Gadamer's theory holds that history conditions the understanding of past and present events and contextualises the interpreter's insight so that he cannot turn a blind eye to the present conditions of the law and defer to an "objective" original utterance.[527] Thus, present conditions and history comprise an interpretative context that places limits on the interaction of the judge with the text, and, as such, an interpretation cannot be arbitrary as it must reflect the historical traditions of the interpretative context.[528] In essence, then, "understanding always presupposes a tradition"[529] as one cannot interpret at all in the absence of such interpretative traditions. Tremblay describes the nature of the interaction of reader and text implicit in Gadamer's theory, and how such interaction both negates the idea of a strongbox theory of meaning and effectuates the common ground of understanding:

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[524] Ibid.
[525] Hans-Georg Gadamer, *Truth and Method*, Second, Revised Edition, (Continuum, London, 2004) at xx-xxii.
[526] Hans-Georg Gadamer, *Philosophical Hermeneutics*, Translated and Edited by David E. Linge, (University California Press, Berkley, 2008,) at 7.
[527] Fred Dallmayr, 'Hermeneutics and the Rule of Law', (1989-1990)11 Cardozo L. Rev. 1449, at 1461.
[528] David C. Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, (1985) 58 Southern California Law Review, at 141.
[529] Ibid.

> Gadamer is concerned with the nature and conditions of understanding. He argues that one's understanding of a text is just a matter of projecting to a text a meaning which is shaped, structured, and conditioned by the very historical and linguistic situation in which one is at any given time. That meaning may be changed and revised as one "penetrates into the meaning" in accordance with the "hermeneutical circle"... Understanding, thus, is conditioned by the whole set of "prejudices" that constitute the reader's own preconceptions about the world and delimit his or her horizon of understanding."[530]

Hermeneutic theories thus are distinguished from epistemological interpretative theories such as literalism and originalism by virtue of an ontological, intertwined relationship between reader and historical text.[531] Epistemological theories, on the other hand, assume a distance between reader, text, interpretation and understanding.[532] Compartmentalising these interpretative processes is necessary under intentionalist or originalist theories, as to posit a unitary process between understanding and meaning, and reader and text detracts from the objective nature of meaning, allowing for relativism[533] and, by extension, arbitrariness in the legal context. This compartmentalisation of the processes of understanding, and application of meaning, is similar to how the literal rule is conceived as operating under the prevailing theory analysed in chapters 2, 3 and 4. That is, the judge is presumed to carry out one of two approaches, both which require the separation of the initial understanding of the text and subsequent application: a) where there is a plain statutory meaning, this is applied in and of itself with little deliberation; and b) where there is textual uncertainty, the judge must have regard to the text as a whole and arrive at the intention of the legislature.

Gadamerian hermeneutics, on the other hand, conceives interpretation and understanding as unitary processes.[534] As outlined, the theory holds that

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[530] Tremblay, *The Rule of Law, Justice, and Interpretation*, at 40-41.
[531] William N. Eskridge, 'Gadamer/Statutory Interpretation', (1990) 90 Colum. L. Rev., at 614.
[532] Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives', at 136.
[533] Ibid.
[534] David C. Hoy, 'Intentions and the Law: Defending Hermeneutics', in Gregory Leyh ed *Legal Hermeneutics; History, Theory and Practice*, (University of California Press, 1992), at 174. See also, Fred Dallmayr, 'Hermeneutics and the Rule of Law', at 1461.

interpretation takes place within the context of a historical interpretative context or "horizon".[535] This horizon acts upon the interpreter in such a manner that there is a conversational dynamic between reader and text;[536] that is, the context against which the text is to be read is central to the reader's ability to make sense of it and establishes boundaries that determine the meaning of the text. Thus, the context within which the interpretation takes place - the context of the case - supersedes the speaker's intention as the central focus of Gadamer's theory:

> for Gadamer ... interpretation is neither the discovery of the text's intended meaning, nor the imposition of the interpreter's views upon the text; rather, interpretation is the common ground of interaction between text and interpreter...[537]

In light of this profitable exchange between interpreter and text, Eskridge has argued that Gadamer's hermeneutic theory is well suited to explain certain characteristics of statutory interpretation, as its resort to historical context compels the reader to look beyond both the statutory text and the intention of the legislature as validating interpretative criteria.[538] That is, in seeking to move beyond the literalism/intent paradigm, Eskridge and other writers have proposed a "dynamic" theory of statutory interpretation which takes a whole range of social issues into account in discerning statutory meaning. This dynamic theory rejects the compartmentalised interpretative practice recommended under the standard account and criticises originalist and literalist theories in failing to account for the "practical reality" of understanding and application of statutory meaning.[539]

Yet ascribing such a "dynamic" interpretative lens to the Irish courts is hardly plausible.[540] While the courts undoubtedly take social issues into account in discerning statutory meaning, to argue that courts have almost absolute

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[535] Eskridge, 'Gadamer/Statutory Interpretation', at 620.
[536] Ibid.
[537] Ibid, at 617.
[538] Ibid, at 613.
[539] Ibid.
[540] The dynamic approach has been described thus by Freeman: "First, statutory construction is a creative process. Secondly, the judge has a choice among different answers. The range of choices is "somewhat constrained by the text, the statute's history, and the circumstances of its application... Third, in making choices, interpreters are normally driven by multiple values. These multiple values form the 'web of beliefs' against which a judge will check his decision." See Freeman, 'Positivism and Statutory Construction', at 15.

interpretative freedom to shape the legislative text in such ways that may not have been foreseen by the legislature[541] is not an accurate portrayal of the Irish practice. Thus far I have endeavoured to emphasise the necessary interaction between the interpreter, text and context as a means of underlining the creative aspects of statutory interpretation. However, the exact nature of the context in this instance is uncertain beyond my claim in chapter 3 and 4 that the resort to context necessarily entails something more than the text as context or "the context of the text as a whole" as is assumed under prevailing theory. In light of the significance attached to the context of the interpreter in Gadamer's theory, then, it is necessary to allow for a brief digression and consider the nature of non-textual context.

5.2.2 Which Context?

In considering statutory purpose the courts necessarily have to consider the statute in context, be that in terms of the internal context of the legislative text, or by reference to non-textual, external indicators of meaning.[542] The attempt to constrain interpretation to the particulars of the text and provide for the interpretative tests for statutory ambiguity and absurdity under section 5 of the Interpretation Act 2005 assumes that, in resort to context, the courts refer to the text as context only. However, considerable doubt has been cast on the veracity of the isolationist, text as context, approach communicated under the prevailing theory, particularly in the discussion of the decisions of the courts in *Rahill v Brady* and *Mulcahy v Minister for the Marine*, thus, the notion of contextual interpretation necessarily assumes that the courts must take the conditions of the present case into account. Yet, while it has been shown that the prescription of the text as context is greatly exaggerated under the prevailing theory, Irish courts are more likely to use the statutory text as far as it will take them as an interpretative guide. This implies that wholesale departures from the general purpose or intention behind the statute would not be tolerated in an Irish context.

In relation to the Gadamerian historical context of the interpreter, Dickerson has noted that resort to statutory context is essential insofar as it is impossible to

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[541] Graham, 'A Unified Theory of Statutory Interpretation', at 104.

[542] Kavanagh outlines this resort to internal and external statutory context in, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998', at 185.

attach meaning to any text that is considered in total abstraction from the "culture that it presupposes".[543] The resort to context thus must go beyond mere textual reference and take into account "the coordinate fund of habits, knowledge, values, and purposes that are shared by the great bulk of the speech community of which both author and audience are members..."[544]; that is, the interpretative assumptions of the interpretative community. Yet Dickerson is cognisant of the fact that implicit in this broader contextual scheme is the "narrower sense of syntactical structure"[545], the idea of text as context. However, the fallacy of the prevailing description of contextual interpretation lies in the assumption that the broader contextual scheme is relevant only in the attempt to preserve the pristine application of literal statutory meaning and originalist intent.

Thus, contrary to the prevailing rationalisation of interpretative practice, it is not sufficient for the interpreter to ask "what does this document mean taken by itself?" Rather, in order to interpret effectively and attain meaning at all, Dickerson argues that the interpreter should ask "what does this document mean in its proper context?"[546] The Gadamerian historical context or "horizon" intimates a contextual consideration similar to the interpretative values, habits and purposes outlined by Dickerson. The horizon of the judge necessarily demands that he look beyond "the historical significance of the law's promulgation", that is, the historical or original meaning and intentions evinced therein. Similar to Raz's argument about intentional interpretation above, Gadamer proposes that the recognition of the authority of law supersedes merely knowing what the law is; thus, the judge will have an intuitive understanding of what the law requires in light of his historically shaped horizon, as guided by the text.[547]

5.3 The Constraining Nature of the Text

Thus far it has been proposed that conceiving of a co-dependent relationship between reader and text is a more accurate reflection of interpretative practice than that assumed under the prevailing theory. The hermeneutic discussion above

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[543] Dickerson, *The Interpretation and Application of Statutes*, at 105.
[544] Ibid, at 106.
[545] Ibid, at 108.
[546] Ibid, at 108-109.
[547] Gadamer, *Truth and Method*, at 325-326.

elaborates on the reflexive connection between reader and text, and the necessary role that context plays in the construction of statutory meaning. It is possible that the interpretative licence afforded to the judge under the Gadamerian position is more comprehensive than reflected in the Irish practice. That is, the traditional contextual spectrum intimated under the hermeneutic approach is quite vague in terms of the interpretative licence afforded to the judge.

While Gadamer's position is correct about the nature of interpretation, there are inevitably un-interpretative, political judicial choices made in cases, the arbitrariness of which is tempered out of respect for the rule of law. Thus, it is necessary to discuss the possible or likely degree of textual constraint within this interaction. As noted in the introduction, the aim of this section is to argue that interpretation is not a relativistic "free for all" whereunder meaning is in the eye of the beholder. In order for this claim to stand up to scrutiny, the text must be shown to exercise some interpretative constraint, as it has been shown that the Irish courts will use the text as a guiding interpretative device as far as is practicable.

5.3.1 The Significance of the Text under Gadamerian Theory

In order for the judge to make sense of the text in his resort to internal or external statutory contexts, Gadamer's theory focuses on the text itself as the guiding interpretative device[548]; therefore, the prevailing significance of the text as the starting point of interpretation is retained, but the focus is placed on the context in which the text is to be read, as opposed to the effectuation of literal, objective meaning. Critics of this perspective argue that the correctness of the context depends too much on the outlook of the interpreter, making it a subjectivist, relativist theory.[549] Yet Gadamer's contention is that the reader's context changes over time and ultimately conditions his understanding of the text.[550] Thus, the theory avoids relativism because the historical context and tradition within which

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[548] See Richard Weisburg, 'On the Use and Abuse of Nietzche for Modern Constitutional Theory', in Sanford Levinson and Steven Mailloux eds, *Law and Interpretation, A Hermeneutic Reader*, at 186, note 20.

[549] Bjørn Ramberg and, Kristin Gjesdal, "Hermeneutics", *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), forthcoming, available at http://plato.stanford.edu/archives/sum2013/entries/hermeneutics/, (last accessed, 29/4/13).

[550] Eskridge has acknowledged that this historical-contextual interpretative method does not "tightly constrain" the interpreter in the way that legal orthodoxy assumes that texts guide judges. This might imply that the theory is indeed relativistic; however, I regard this as a refutation of the interpretative determinacy posited under interpretative theories such as the prevailing theory of statutory interpretation. See Eskridge, 'Gadamer/Statutory Interpretation', at 612.

the text must be understood is determinate[551] - that is, the interpreter cannot interpret the interpretative tradition in which he finds himself. Hoy states that on this understanding "the text must seem to the reader to resist wilful misreading, or on rereading, to correct initial misunderstandings."[552]

Therefore, the stabilising influence of the historical context arises out of the recognition on the part of the interpreter that he is part of an interpretative tradition, and cannot arbitrarily interpret in a manner inconsistent with that tradition. Indeed, this theory of interpretation mirrors Dworkin's thoughts on what he calls "proper" interpretation, which holds that the interpreter must take "both text and past practice as its object."[553] This is considered Gadamer's chief refutation of originalist theory, as the text cannot have any meaning until it is interpreted.[554] Indeed, Gadamer perceived no difference between the jurist in a case who seeks the purpose of an enactment, and the attempts of the legal historian (originalist) to discern the original meaning of a legal text:

> The jurist understands the meaning of the law from the present case and for the sake of this present case. By contrast, the legal historian has no case from which to start, but he seeks to determine the meaning of the law by constructing the whole range of its applications.... He is apparently only concerned with the original meaning of the law, the way in which it was meant, and the validity it first had when it was promulgated. But how can he know this? Can he know it without being aware of the change in circumstances that separates his own present time from that past time? Must he not do exactly the same thing as the judge does - i.e., distinguish between the original meaning of the text of the law and the legal meaning which he as someone who lives in the present automatically assumes? The hermeneutical situation of both the historian and the jurist seems to me to be the same in that, when faced with any text, we have an immediate expectation of meaning. There can be no such thing as a direct access to the

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[551] David C. Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives', at 138.
[552] Ibid.
[553] Ronald Dworkin, *Justice in Robes*, at 118.
[554] See Freeman, 'Positivism and Statutory Construction: An Essay in the Retrieval of Democracy', in Stephen Guest ed, *Positivism Today*, at 15.

> historical object that would objectively reveal its historical value. The historian has to undertake the same reflection as the jurist.[555]

Thus, Gadamer rejects outright the notion presupposed under the prevailing theory that judges must access a historical artefact, either by channelling "objective" legislative intent, or through a formal application of clear language. The interpreter necessarily interacts with the text, with his pre-understandings and the present context and conditions of the case bearing on the meaning applied to that text. Thus, the text is placed at the centre of the interpretative scheme, constraining the freedom of the interpreter, given that it is the fulcrum of the reflexive interaction between the historical context within which interpretation is taking place, and the interpretative tradition of which the judge is part. This textual significance attenuates concerns as to legitimacy or relativism.

5.3.2 Does the Connection between Interpreter and Text Necessarily Denote the Text as a Constraint?

At the beginning of this section I outlined Fish's theory that the reader occupies a primary position in the interpretative scheme, and, as such, the notion of literal meaning is untenable. Yet Fish's argument implies that in order for interpretation to be "rational" there must be some sort of constraint hedging the interpretative freedom of the reader.[556] In attributing significance to external indicators of meaning in identifying the objective quality of interpretations Fish's theory appears correct, as it denotes the importance of the tacit assumptions of members of interpretative communities and the relationship between interpreter and text in that interaction. However, a necessary implication of Fish's theory is that the text becomes merely incidental to the fact of interpretation. Indeed, while he recognises the essentiality of the text as the object the reader is trying to make sense of, he rejects its constraining effect as it does not become a text proper until the interpreter has assigned "purposive design" to it; that is, until the reader has figured out the intention of the text.[557]

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[555] Hans-Georg Gadamer, *Truth and Method*, at 322-323. See also, Fred Dallmayr, 'Hermeneutics and the Rule of Law', at 1463.
[556] Stanley Fish, 'Intention Is All There Is', (2007-2008) 29 Cardozo L. Rev. 1109, at 1114.
[557] Ibid.

Patterson argues that this completely neutralises the effects of textual constraint on the interpreter[558] as Fish locates interpretative validity in the agreement between those in interpretative communities who have a similar "interpretive template".[559] Thus, Fish locates the hallmark of objectivity in the assumptions of those in the interpretative community seeking the intention of the text, undermining the impact of the text as an indicator of meaning. Patterson finds this problematic as Fish assumes that meaning lies solely in the act of interpretation.[560]

Illustrating this point, Patterson gives the example of a person encountering a road sign, and, noticing a directional arrow on the sign, asks himself, "what does this arrow mean?"[561] His rejection of Fish's theory lies in the claim that uttering "let's interpret the arrow on the sign in order to find its meaning", does not resolve the question of meaning as there may be a multitude of possible meanings - none of which has any normative force over any other.[562] Thus, "something more"[563] is required in fulfilling the nexus between text, context, interpreter and meaning. Patterson identifies this as the criterion of interpretative "action", the use of words and signs in particular contexts in order to beget meaning.[564] Patterson's critique of Fish lies in the charge that the interpreter must do more than merely engage with the text as an interpretative object in order to assign meaning to it. Rather, the interpreter must apply or relate that meaning back to the object before him in order for meaning to arise. In this way the text acts as a constraining device, as it is an intermediary between the interpreter and the separate action of interpretation. Patterson's critique is therefore similar to the Gadamerian position in the emphasis it places on the relationship between text and interpreter.

Thus, Fish's interpretative theory is useful insofar as it places the interpreter at the centre of the articulation of meaning in his resort to context and interpretative assumptions, eliminating the strongbox theory of meaning from our understanding of interpretation. Yet Fish's theory cannot be used here to explain the textual

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[558] Dennis Patterson, *Law & Truth*, (Oxford University Press, 1996) at 111.
[559] Ibid.
[560] Ibid, at 112.
[561] Ibid.
[562] Ibid.
[563] Ibid.
[564] Ibid, at 113.

constraint evinced in the interpretative practice of the courts given the interpretative freedom conferred on the judge.

5.3.3 Interpretative Rules furnishing Textual Constraint

If, as Patterson suggests, something further than the act of interpretation itself is required in order to constrain interpretations, it is worth considering whether interpretative rules are capable of placing limits on the interpretative freedom of the judge in the attempt to retain textual fidelity. In *Objectivity and Interpretation* Owen Fiss proposes a theory of legal interpretation which seeks to preserve interpretative objectivity and retain fidelity to the legal text through insisting on the integrity of adjudicative procedures and practice. Fiss also openly discards the notion of an externalised, metaphysical objectivity, rejected above.[565]

His theory is a rejoinder to deconstructive interpretivists who point to interpretative plurality in rejecting the purported objectivity of court decisions.[566] Legal deconstructivists, Fiss argues, posit a nihilistic conception of law and adjudication by reading too much significance into claims that there is "nothing outside of the text". Such theories delegitimise claims about juridical impartiality and detachment, given the interpretative freedom of the judge in the "incessant movement of recontextualisation"[567] and in determining the "correct" meaning in that particular instance. Indeed, the absolute interpretative freedom proposed under Fish's theory implies this unrestrained subjectivity.

Fiss's argument, however, holds that the concept of "objective" interpretation does not rule out the role of subjective interpretation. Rather, objective interpretations are objective by virtue of their reflecting legal standards, which themselves reflect external "notions of correctness".[568] That is, Fiss holds that courts arrive at objective legal decisions through 1) observing "disciplining rules", standards which govern decision making processes and allow for the critical appraisal of judicial interpretations by 2) those within the particular "interpretative

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[565] Fiss, 'Objectivity and Interpretation', at 744 .
[566] Ibid, at 741.
[567] Jacques Derrida, 'Afterword: Towards an Ethic of Discussion', in *Limited Inc.*, (Northwestern University Press, 1988), at 136.
[568] Fiss, *Objectivity and Interpretation*, at 744.

community" where interpretative decisions are made.[569] This, in turn, recognises those disciplining rules as authoritative within the interpretative community.[570] "Objectivity" in this sense, therefore, indicates objectivity in decision making which prioritises the legal text, as opposed to the literal rule/originalist forms of objective meaning denoted under the prevailing theory.

Compliance with disciplining rules and the recognition of those rules as authoritative and binding in that particular interpretative community is said to comprise a "bounded objectivity" [571], a form of procedural fairness which ensures non-arbitrariness in the decision making process. Indeed, Fiss claims that "bounded objectivity" necessarily implies the inter-subjective role of the judge, yet hems interpretative freedom in light of the significance of the disciplining rules for those within the interpretative community. Therefore, the interaction of the subjective lens of the judge and the objectifying role of the disciplining rules ensures there are no concerns as to invalidity, as Fiss's notion of objectivity is concerned with "the constraining force of the rules" and not notions about judges articulating absolutely determinate interpretations. [572]

The concept of "bounded objectivity" thus demarcates a particular type of objectivity that those engaged in legal interpretation seek out - an interpretation which allows for a determinate legal resolution which, in turn, implies constraint and faithfulness to original texts.[573] Applying this theory to the prevailing account of statutory interpretation in Ireland, the theory posits that judges do not have to be conceived as a conduit, in abstraction from the statutory text. Rather, human interaction with the law is a necessary feature of adjudication; it is the rules and procedures of such that gauge the "objective" quality of interpretations:

> The idea of objective interpretation accommodates the creative role of the reader. It recognises that the meaning of a text does not reside in the text ... it recognises a role for the subjective ... At the same time, the freedom of the

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[569] Ibid.
[570] Ibid.
[571] Ibid, at 745.
[572] Ibid, at 750.
[573] Julie Dickson, "Interpretation and Coherence in Legal Reasoning", *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.), URL http://plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/ (last accessed 10/5/13).

> interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material ... as well as by those that define basic concepts and that establish the procedural circumstances under which interpretation must occur.[574]

Thus, it is the disciplining rules and interpretative procedures under Fiss's theory that ensure textual constraint. Indeed, not only does it situate the interaction between interpreter, interpretative rules and procedures as entailing objective interpretations, bounded objectivity identifies the prescriptive nature of the text as an ancillary constraining feature.[575] Therefore, the prescriptive nature of legal texts constrains the judge, insofar as he must respect the authoritativeness of the text in the assignment of meaning.[576]

That is, legal texts along with the authoritative disciplining rules and the interpretative community, all of which imply standards that the judge must meet in interpretation, supplement the fairness or quality of the interpretation, and denote the success of the interpretation as an objective one.[577] Fiss's theory, then, assumes the necessary interaction between reader and text in interpretation, while proposing a means by which the judge as interpreter is constrained in maintaining fidelity to the legal text. In this the theory offers an adequate riposte to the deconstructivist claim that meaning is in the eye of the beholder and interpretation is essentially a free-for-all, given the innate subjectivity of the interpretative lens.

Of the interpretative theories analysed thus far Fiss's theory approximates closest to the practices of the Irish courts in positing the link between interpreter and text, and the constraining role of the text during interpretation. However, in order to be satisfied that the theory accounts for that practice, we must find whether interpretative rules and legal procedures and practice engender interpretative objectivity and textual constraint.

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[574] Ibid.
[575] Fiss, 'Objectivity in Interpretation', at 751.
[576] Ibid.
[577] Ibid, at 752.

5.4 Procedures and Practice: Objectivity or merely Non-arbitrariness in Interpretation?

The preceding sections have outlined the first three components of the claim that the prevailing theory is an inadequate description of the interpretative practices of the courts. It has been shown that the notion of an objective meaning awaiting discovery is untenable, and necessarily undermines the potency of literalist and originalist theories which seek to build upon such a conception of meaning. The second component concerned the idea that in order to account for the reality of interpretation we must concede that there is a co-dependent relationship between interpreter and text in the articulation of meaning. Thirdly, it has been shown that while the interpreter exercises a creative capacity in this articulation, this creative licence is not all-encompassing, as the text acts as a constraining mechanism. The question of whether ensuring fidelity to procedures and practice guarantees objective interpretations will now be considered.

Insofar as Fiss claims that a combination of disciplining rules and the authoritativeness of those rules within the interpretative community ensure non-arbitrariness in the adjudicative process, there is nothing controversial in the theory. However, to argue that these factors combined with fidelity to legal procedures and practice ensures objectivity in interpretation is inaccurate. This is because as an account of interpretation Fiss's concept of "bounded objectivity" offers nothing more than judicial fairness, or at the very least seeks to entrench the procedures which establish such fairness. Indeed, this idea of judicial fairness does not answer, or seek to answer, what fairness the judicial procedures will guarantee. That is, Fiss assumes that procedures are a central feature of the adjudicative process and that we do not require a working theory of interpretation to understand how they work, given the authoritativeness of the adjudicative rules at the disposal of the members of the interpretative community.[578] In the attempt to undermine criticisms of the perceived partiality and subjectivity of judicial interpretation, the theory unsuccessfully seeks to avoid the substantive question of what judicial interpretation is.

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[578] Ibid, at 739.

Thus, the gap in the theory lies in Fiss's equation of adjudication with interpretation, and the failure to elaborate on this beyond the ascription of procedures and practice as essential adjudicative/interpretative features. Bounded objectivity proposes that judicial procedures and practice place limitations on the ability of judges to engage in arbitrary interpretation; however, Fiss assumes this argument without communicating a theory of what interpretation is, or what it is judges do when they interpret. Indeed, apart from Fiss's claim that the prescriptive form of legal texts implies standards which effectuate the values inherent in those texts, this kind of objectivity has very little to do with questions about legal meaning and everything to do with procedural fairness.

5.4.1 Can Interpretative Rules Guarantee Textual Certainty?

The criticisms above have shown that, if it makes claims about anything, Fiss's theory of bounded objectivity concerns non-arbitrariness in decision making, and not the ability of the interpretative or decision-making process to guarantee textual fidelity. However, this rationale of itself cannot guarantee that the courts, in practice, deliver interpretations which are identifiable as any more objective in nature than those "literal" decisions outlined in the previous chapter - decisions which are presupposed as articulating objective legislative intention. This owes, in part, to Hart's piquant observation in *The Concept of Law* that interpretative rules, themselves, are objects of interpretation[579] and cannot therefore be used as objectifying reference points.

Thus, the disciplining rules are not interpretable in abstraction from the interpretative processes which adjudication necessarily involves.[580] This aspect of Fiss's theory is necessarily circular- he claims that disciplining rules furnish interpretations with a buffer of objectivity based on the authoritative manner in which those rules are observed both by those in the legal (interpretative) community and in the decision of the judge. Yet, because interpretative rules themselves are routinely interpreted, this buffer of interpretative consistency dilutes the strength of Fiss's claim. It is not enough to claim that independently extant rules constrain our interpretative movements, because the interpreter in the first place

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[579] HLA Hart, *The Concept of Law*, (2nd Ed, Oxford University Press, 1994) at 205.
[580] Fish, 'Fish v Fiss', at 1326.

must have some intuitive understanding of how those rules are applied.[581] Interpretative consistency alone, then, cannot be grounds for the kind of objectivity in interpretation that is envisaged under the prevailing theory.

5.4.2 Confirming the Role of Purpose in Interpretation

If this criticism of Fiss's theory is applied to what we know about the practice of statutory interpretation, Patterson's assertion that there is something "extra" that the courts must do, beyond the initial act of interpretation, points to the role played by purpose as outlined in previous chapters. Patterson has suggested that the non-constraining role of the text in Fish's theory intimates that where valid statutory purposes conflict, there is an unavoidable act of discretion on the part of the judge as he has to choose which purpose represents the "overriding value" in the context of the case.[582] That is, Fish argues that in constructing the meaning of statutory provisions judges invariably must have regard to normative standards that exist outside of the text, principles that do not claim to be matters of interpretation.

Reflecting on the discussion of the *Portmarnock* case in the previous chapter, the very fact that judges exercise some choice implies that normative standards are weighed in the interpretation of statutes. Such weighing often determines statutory meaning, over and above the purported ability of statutory language to apply to fact scenarios as denoted under the prevailing theory. This confirms our discussion of the wider interpretative focus of statutory purpose in the previous chapter. Indeed, it has been noted that the requirement of purposive interpretation arises where interpretative complexity reaches such a point that interpretations need to be explained or justified beyond the reference literal meaning or legislative intent.[583]

If the above claims are considered together we may conclude that the statutory text, in itself, is incapable of formal realisation. Given the rejection of the possibility that plain statutory meaning is "immanently intelligible" - the claim that legal understanding comes from the form of law itself - it has been necessary to consider claims about objectivity arising from interpretative fidelity to the original text. Fiss's claim that disciplining rules are capable of objectifying interpretations

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[581] Ibid.
[582] Dennis Patterson, *Law & Truth*, at 115.
[583] See, Twining and Miers, *How to Do Things with Rules*, at 249-250.

such that they preserve the original meaning or intentions of the text has been set aside, given that those rules are themselves interpretable objects.

Likewise, Fish's claim that the act of interpretation, of itself, resolves interpretative disputes has been eliminated as a compelling account of how the courts arrive at a statutory meaning, given that external reference is necessary to find an interpretation more normatively compelling than vying alternatives. Thus, Patterson's claim, in its resort to extra-interpretative considerations of action or word usage, implies a necessary resort to context in order for courts to elucidate the meaning of statutory texts[584] - the vital stage which is overlooked under the prevailing theory, and in the interpretative theories of Fiss and Fish.

Given the importance of context, purpose and the constraining nature of the text in mind, Dworkin's theory of constructive interpretation - which centres on the role of purpose and the creative interpretative lens of the judge in the effectuation of legal meaning - will be considered. Dworkin's account of constructive interpretation represents a considered and persuasive explanation of what legal interpretation is and how it proceeds, something that is not adequately explained in the theories we have analysed above.

5.5 The Role of Purpose: Law as a Constructive Enterprise

The first four sections of this chapter have adverted to my criticism of the default position of literal interpretation and original intent as assumed under the prevailing theory, outlined in chapter 3. Articulating what I regard as a more plausible interpretative scheme, I have pointed to the relationship between interpreter and text in discerning meaning, and the necessary constraining effect of the text therein. I have also rejected the notion that observing adjudicative procedures and practice has the ancillary effect of ensuring textual fidelity, as such an idea does not communicate what actually occurs during the interpretative process. Given the focus I have placed on the role of purposive interpretation in the articulation of statutory meaning up to this point, it is now necessary to find whether it is the resort to purpose that confirms interpretations as successful, objective or legitimate.

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[584] Dennis Patterson, *Law & Truth*, at 112-113.

Communicating the concept of constructive interpretation in *Law's Empire*,[585] Dworkin's theory contests the presentation of the relationship between the legislature and courts under the prevailing theory as that of principal and agent. Rather, under Dworkin's idea of "law as integrity" the courts are tasked with articulating the "best justification" of statutory meaning, conceiving legal interpretation as the construction of a "chain novel"[586] with the courts and legislature as collaborators in the articulation of such.[587] Constructive interpretation has been described as a scheme under which purpose is imposed on an object of interpretation,[588] "in order to make it the best possible example of the form or genre to which it is taken to belong."[589] With this purposive drive Dworkin's theory rejects both positivistic and originalist accounts of pre-determined statutory meaning under the prevailing account - the idea that when the legislature enact statutes, it vests in them the only meaning they will ever need or have.[590] Thus, applied to the area of statutory interpretation, Dworkin's theory underlines the importance of purpose to the effectuation of statutory meaning:

> Integrity requires [the judge] to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force.[591]

In a legal system that embodies law as integrity, it is claimed that effectuating statutory purpose necessarily connects to the background moral and political principles that imbue the legal system, ensuring that interpretations uphold the "rights conception" of the rule of law outlined in chapter 1. Therefore, the default preference accorded to literalism under the prevailing approach is downplayed in Dworkin's theory, in favour of a purpose-oriented rights based theory of law as interpretation.

Considering the prevailing position on purposive interpretation, where the statutory text is unclear, ambiguous or absurd, it is plausible to suggest that the

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585 Ronald Dworkin, *Law's Empire*, (Hart Publishing, Oxford, 1998).
586 Ibid, at 228.
587 Freeman, 'Positivism and Statutory Construction: An Essay in the Retrieval of Democracy', at 13.
588 Dennis Patterson, *Law & Truth*, at 109.
589 Dworkin, *Law's Empire*, at 52.
590 Ibid.
591 Ibid, at 338.

courts merely construct the "best" statutory meaning available. In seeking the purpose of an enactment under Dworkin's theory, the courts are attempting to arrive at the best interpretation of the statute which both fits the legislative scheme and offers a justifiable interpretation which shows that statute in its best light.[592] Yet, given the theoretical rejection of the separation of literal and purposive forms of interpretation as distinct interpretative devices in chapter 3, it is necessary to find whether it is correct to label the interpretative practices of the courts as innately constructive. If the dismissal of the prevailing distinction between the literalism and purposivism implies that all forms of statutory interpretation are purposive or constructive in character, one must ask whether the legislative intent paradigm operates as the standard by which statutory interpretations are measured as correct.

It has been argued that in rejecting the default preference for literal interpretation we are implicitly appealing to statutory purpose as the chief indictor of statutory meaning. Elaborating on this theme, Fish has suggested that when a judge interprets a statutory text, neither the plain meaning nor the ambiguity of that text is determinative of the statutory meaning. Rather, Fish identifies statutory purpose as ultimately constitutive of statutory meaning. That is, where judges are faced with plural literal interpretations statutes contain meanings that are different, but "no less plain"[593] and the decisional impetus behind the correct interpretation lies in weighing statutory purpose.[594] In such situations it is the resort to purpose which resolves interpretative plurality, and not a consideration of the varied plain meanings on their own terms.[595]

Thus, Fish holds that while the interpretation of statutes routinely takes place under the guise of plain statutory meaning, it is in choosing competing statutory purposes that interpretations are effectuated. This communicates a purpose driven concept of interpretation, but does not acknowledge the residual importance of the

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[592] Dworkin uses the standards of "fit" and "justification" as the tools through which constructive interpretation proceeds. Judges will have a limited number of interpretations of a law that will "fit" the fact scenario before them and past decisions that have come before. They use the latter standard to show how the interpretation they choose shows the law in its best light and "justifies" their decision. See *Law's Empire*, Dworkin outlines how fit and justification work under law as integrity at 254-258.

[593] Patterson, *Law and Truth*, at 115.

[594] Ibid at 117.

[595] Stanley Fish, *'Is there a text in this class?' The Authority of Interpretive Communities*, (Harvard University Press, 1982), at 280.

text in the Irish practice, as I have argued that the text necessarily provides the platform from which to critically judge the purposes therein. Thus, the text plays a role, albeit a much less determinative role in comparison to that assumed under the prevailing theory. The rationalisation of purposivism under Dworkin's constructive theory will now be analysed to find whether the text is downplayed in a similar fashion to that intimated in Fish's theory.

5.5.1 Constructive vs. Conversational Interpretation, and the Rejection of Intention

Dworkin's task in *Law's Empire* is to analyse the internal perspective of the interpreter and question whether interpreters look to the intent behind objects or impose purpose on them.[596] Thus, Dworkin's interpretative theory and Gadamerian hermeneutics are similar insofar as they posit an ontological conception of interpretation, which centres on the internal perspective of the interpreter. Yet under Dworkin's theory, constructive interpretation marks the identification of purpose against a background of moral principle as the guiding interpretative force; thus, the significance of the text itself is almost secondary. Gadamerian hermeneutics on the other hand focuses on the dialectic interaction between the reader, the text and the historical interpretative tradition in which he and the text exist, cementing the key position of the text in the interpretative process.[597] Therefore, the Dworkinian conception of law as interpretation, while hermeneutic insofar as it prescribes an account of law as an interpretative practice, is markedly different to Gadamerian hermeneutics, given the concentration on principles and purpose, as opposed to context.

In showing how interpreters impose purpose on objects Dworkin contrasts "conversational" interpretation - whereby individuals interpret "the sounds or marks"[598] of another person to find out what they mean by a communication - with constructive interpretation. He argues that the conversational form of interpretation is unsuitable for the interpretation of law, as it is not appropriate to ask questions

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[596] Ronald Dworkin, *Law's Empire*, (Fontana Press, 1986) at 50.
[597] Hans-Georg Gadamer, *Truth and Method*, at 390. Gadamer discusses legal hermeneutics and how the interpreter or judge must conceive his interpretation as an act of application, in order to "concretise" the law, *Ibid*, at 325.
[598] Ronald Dworkin, *Law's Empire*, (Fontana Press, 1986) at 50.

such as "what is the writer trying to say to me" in the case of a legal text, as one would under the conversational paradigm.[599] The core difference between conversational and constructive interpretation, therefore, lies in Dworkin's attribution of causes and intention to conversational interpretations. That is, a conversational interpretation will draw conclusions about the psychological state of the author - what the text or person "intended" by their statement.[600]

Constructive interpretations, on the other hand, are concerned solely with the purpose of the communication from the interpreter's point of view and do not concern the causal factors behind communications, or what speakers intend in communicating.[601] They merely look to the application of that practice or text. Therefore, constructive interpretations seek to propose the "most value" for the practice in the attribution of meaning.[602] The theory concentrates on the internal perspective in the attempt to understand the interpretative character of a social practice like law, which "sets the conditions of [its own] interpretation."[603] Dworkin's foundational claim, then, is that in interpreting social practices like law, the interpreter is not trying to work out what a person intended in a work; instead the interpreter trying to arrive at a constructive interpretation. Thus, interpretation is concerned with purpose and application.[604] The purposes in play are those of the interpreter, and the idea is to "impose" purpose on the social practice in order that it can be the "best possible example" of that particular practice.[605] Thus, the value of linguistic determinacy as an interpretative aid is jettisoned from the theory, as plain statutory meaning or legislative intent has very little to do with Dworkin's interpretative scheme. Rather, in making the statute the best possible statute it can be, Dworkin appeals to the role played by principle in shaping legal meaning.

Dworkin thus rejects the notion that authorial intention is an interpretative principle in law, because interpretations which speak to causes and intentions do

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[599] Ibid.
[600] Ronald Dworkin, *Law's Empire*, at 50.
[601] Ibid at 51-52.
[602] Ibid, at 54.
[603] Ibid, at 65.
[604] Ibid, at 52-56.
[605] Ibid, at 52.

not make a connection to background principle,[606] nor do they attempt to paint a particular law in its best light. This implies a concomitant rejection of the originalist position that authorial intentions are imbued in the work at the time of original creation, [607] given that the act of interpretation, in and of itself, "must apply an intention". In essence, interpretation is anterior to the issue of intention.[608] The idea is that, regardless of the author's intention, this can only be arrived at by virtue of interpreting the object. Intention, then, can only be inferred after interpretation, and does not co-exist at the time of the drafting of a text, as assumed under the originalist perspective. Thus, in an effort to remain true to the author's intention, one inevitably deviates from it in the act of interpretation. Dworkin holds that this rejection of intent allows for a realistic interpretative theory that is more amenable to internal change than the "crude conscious-mental-state conception"[609] proposed under originalism; confirming the notion originalist theories cannot escape the very nature of discretion and interpretation that they seek to remove.

5.5.2 The Stages of Interpretation

Dworkin outlines different interpretative stages in order to show how interpretation both operates and applies to the study of a social practice like law. The "preinterpretive" stage represents something like a loose level of agreement as to the meaning or definition of the object that people are interpreting. In the preinterpretive stage the interpreter must have "assumptions or convictions about what counts as part of the practice" in order for him to be able to give effect to something that is already there, as opposed to creating something new.[610] Thus, if common-understanding does not exist in the preinterpretive stage there is no point in engaging in interpretation at all, as there will be no agreement among an interpretive community as to the possible meanings to be applied to the practice.[611] However, Dworkin does not speculate as to the nature of this underlying level of agreement that allows interpretation to move from the preinterpretive stage to the interpretive stage, merely assuming that such agreement exists of itself. Presumably

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[606] See Dworkin's rejection of the intentionalist paradigm in 'The Forum of Principle' in Ronald Dworkin, *A Matter of Principle*, at 33.
[607] Dworkin, *Law's Empire*, at 56.
[608] Ibid, at 55.
[609] Ibid, at 57.
[610] Ibid, at 67.
[611] Ibid.

this underlying level of agreement comprises the pre-understandings which inform the interpretative "horizon" of the interpreter under Gadamerian theory, such that in order to interpret something at all, one must have some intuitive understanding of the object of interpretation and the practice itself.

The interpretive stage is the stage at which the interpreter arrives at some "general justification" for his interpretation of the practice identified at the preinterpretive stage.[612] This stage involves Dworkin's twin ideas of "justification" and "fit" outlined above; that is, an assessment of the value that the practice represents, coupled with a realistic "fit" of that practice to what one is interpreting. Dworkin claims that the justification of the practice offered need not fit the practice exactly; however, there must be some acceptable level of fit so that the interpreter is able to appreciate that he is interpreting a practice - something that is already there - as opposed to creating something entirely new.[613] In order for the justificatory interpretation articulated in the interpretive stage to be an interpretation of that practice, the interpreter must have "substantive convictions" about the degree that the justification fits the "standing features" of the practice; thus showing the practice in its best light.[614] The idea that the interpretive stage of justification does not have to fit the practice exactly is how Dworkin explains the issue of interpretative change. This form of interpretation takes place in the final stage, the post-interpretive stage.

In the post-interpretive stage the boundaries of the social practice adjust or "reform" through interpretation. This occurs by virtue of the interpreter asking what the practice "really requires" so as to comport to a higher degree with the justification offered at the interpretive stage.[615] The post-interpretive stage allows for the potential for change, in light of the best interpretation of that practice in the interpretive stage.[616] Therefore, the interpretative theory doesn't have to "fit" everything in order for interpretations to be the best that they can be.

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[612] Ibid, at 66.
[613] Ibid.
[614] Ibid, at 67.
[615] Ibid, at 66.
[616] Ibid.

5.5.3 Constructive Interpretation and the Courts

In light of the interpretative approach of the Irish courts, the claim that statutory purpose plays a default role in determining statutory meaning implies that Dworkin's theory is worth looking at closely to see whether it can prescribe a better account of the Irish practice. Indeed, decisions such as *Rahill* and *DPP (Ivers)* suggest that the court's reference to purpose may supersede the determinative role played by intention as a guiding principle. Given our observations in chapter 4 that there is no clear line of thought as to what exactly comprises the purposive "approach" in the Irish context, Dworkin's account of interpretation as a constructive practice is an apt description of the what the courts actually do when they are interpreting statutes. It is for this reason that Dworkin's theory appeals where theories outlined above have been found wanting - in the prescription of what interpretation actually is.

Allied to the rejection of literalism as the default interpretative tool in the statutory context, Dworkin's account of legal interpretation as a constructive enterprise marks a compelling explanation of the experience of the Irish courts. Indeed, conceptualising interpretation as a constructive or purposively driven practice accounts for many of the gaps in the prevailing theory, which have been questioned consistently throughout this thesis. The notion prescribed under Dworkin's account of presenting a statute in its best light illustrates something about adjudication that the nexus between plain meaning, intent and, thereafter statutory purpose in light of the text as a whole under the prevailing theory fails to capture in its attempt to conform to the principles of legislative supremacy and democratic legitimacy.[617]

Moreover, Dworkin's idea of constructive interpretation becomes more convincing an account of interpretation given what we have learned about the canons of construction, or all interpretative devices. As indicated by Murray J's statement in *Crilly*, the application of such criteria amounts to an "ad hoc illustration of ... use rather than a decision in principle", [618] supporting the claim that the criteria manifest and operate as interpretative principles, which may or may

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[617] See Freeman, 'Positivism and Statutory Construction: An Essay in the Retrieval of Democracy', at 18-20
[618] [2002] 1 I.L.R.M. 161, at 187.

not be taken into account in the purposive reading of a statute. In the statutory context, where there is uncertainty as to what the case requires, all interpretative criteria manifest as legal principles which must be balanced in accordance with the concept of "weight", as argued by Dworkin in *Model of Rules 1*.[619] Combined with the failure of the prevailing theory to split literal and purposive interpretation into distinct categories; the notion that interpretative criteria do not compel particular decisions and do not have to be considered during the process of purposive interpretation adds to the profundity of the rejection of prevailing doctrine. Indeed, Kavanagh's claim that interpretative criteria are invoked as "presumed legislative intentions"[620] clarifies Dworkin's theory that statutory interpretation is no different to any instance of adjudication as a constructive enterprise, and affirms our rejection of originalist and semantic theories which underlie the prevailing approach. Thus, Dworkin's theory illustrates how it is in the resort to purpose and non textual context that statutory meaning is articulated:

> The words of a statute, which alone articulate a mandate of the legislature, can never be a sufficient justification for a judicial decision, for those words must be consistent with "some justification that fits and flows through that statute".[621]

In order for Dworkin's theory of fit and justification to be correct, and therefore in order for any interpretation to be correct, there must be some resort to external indicators of meaning, beyond the statutory text, or the intentions of the legislature, which validates that interpretation.[622] This validating source under Dworkin's theory is the backdrop of political and moral principle.

5.5.3.1 Is Constructivism an Apt Description of the Irish Approach?

Constructive interpretation as envisaged under law as integrity necessitates a connection with matters of right, suggesting there is little or no residual text-centric drive in purposive interpretation. Intuitively, the Irish courts cannot be described as operating on a wholly constructive platform. Even if the claim that legislative

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[619] See Dworkin, 'Model of Rules 1', *Taking Rights Seriously*, (Duckworth, London, 1978).
[620] See Kavanagh, The Role of Parliamentary Intention in Adjudication Under the Human Rights Act 1998, at 185.
[621] Dennis Patterson, 'Law as Interpretation, The Jurisprudence of Ronald Dworkin', in *Law and Truth*, (Oxford University Press, 1996) at 77-78.
[622] Ibid, at 78.

supremacy cannot necessitate literal interpretations is accepted, Murray J's statement in *Crilly* that the starting point of any interpretation is the text strongly intimates that the Irish courts are unlikely to completely depart from the statutory text. It is difficult to ignore this intuition, and many of the instances in which the courts have expressed an unwillingness to impugn the legislative function should not be discarded as empty or rhetorical.

Thus, while Dworkin's account of constructive interpretation certainly captures something of the creative nature of adjudication, it is difficult to accept as a clear indication of the interpretative practices of the Irish courts on the whole. Indeed, it has been argued that courts which favour purposive interpretation would be unwilling to depart from a clear reading of a statutory text which effectuated the purpose of that statute.[623] Thus, while it is clear that the Irish courts certainly employ a purposive method in most instances, the interpretative licence afforded to judges under Dworkin's theory is incongruous with the Irish practice due to the modest significance attached to the text as a guiding or constraining device. While it is accurate to describe the interpretative method of the courts in the statutory context as constructive to a degree, the constraining nature is not an operative theme under Dworkin's theory. This is because the interpretative scheme of law as integrity assumes judges are unconstrained in interpretation; the overriding concern is that they articulate a best light interpretation of the text in connecting to the background moral principles at stake.

Indeed, it is arguable that the adjudicative process under Dworkin's theory is more aptly described as justify-justify, insofar as the overriding concern is that the decision offers a justificatory reflection of the practice in respect of the background moral principles in play. That is, Dworkin extends relatively little significance to textual interpretation in any form as constructive interpretation is concerned with the internal perspective of the interpreter. Yet the Irish courts are reluctant to discard the text in interpretation, suggesting that the judge must at some level relate back to the text in preserving it as an authoritative statement of law. This residual element of textual constraint interpretation explains the role of intent in the

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[623] Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 816.

interpretative scheme, as the notion of intent is used as a "fitting" device from which the judge can estimate whether the meaning he has constructed is accurate or not.

Thus, in an attempt to give the best account of the Irish practice, intentional theories of interpretation will be analysed to find whether it is in the resort to the intention that the courts effectuate a balance between applying statutory purpose in the constructive interpretation of such, while at the same time reflecting an approximated account the actual statute in question.

5.6 Channeling the Intentions of the Legislature -An Approximated Intention or Juridical Edifice?

As argued in chapters 2 and 3, the prevailing theory presupposes that the legislature has an intuitive understanding of the interpretative method of the courts, the rationalisation being it would be impossible for the courts determine the intentions of the legislature were this assumption not in play.[624] Taking into account the primacy afforded to the legislative intent paradigm under the prevailing theory in Ireland, one should ask what the alternatives are if we dispense with the concept? That is, thus far the analysis of interpretative theories it has been suggested that the literalist/originalist paradigms of objective meaning are both inaccurate and unworkable because of the necessary role of the reader and the predisposition towards purpose and context in interpretation. Consequently, interpretative theories which, respectively, highlight the significance of context and purpose in the interpretative enterprise have been analysed. However, while aspects of these theories have certainly shed light on what interpretation is and how it proceeds, they are not a satisfactory reflection of the Irish practice.

In *Lawlor v Flood*, [625] Denham J held that if courts failed to give effect to the intention of the legislature the result would be a usurpation of the legislative function by the judiciary, a clear disregard for the separation of powers and,

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[624] Kavanagh notes this assumption in 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act', at 183 - 184. Dodd has also stated this presupposition is directly responsible for the link close between literal statutory meaning and the intention of the legislature, Dodd, *Statutory Interpretation in Ireland*, at 31.

[625] Ibid, at 117. See *Lawlor v Flood* [1999] 3 IR 107.

ultimately, a breach of the rule of law. Thus, it is necessary to engage with intentional theories of interpretation, and, allied to the main criticisms of the prevailing approach in this thesis and what has been learned about interpretation as discussed above, it will be shown that this intentional theory entails a more plausible account of how the courts interpret in practice.

5.6.1 Raz's Conception of Intentionalism: The Authoritative Intention Thesis

The Authoritative Intention thesis is Raz's attempt to move away from the originalist conception of intention. In rejecting the originalist version of intent, Raz outlines what he calls the "Radical Intention Thesis" - a restrictive conception of originalism which holds that "*an interpretation is correct in law if and only if it reflects the author's intention.*"[626] However, Raz rejects the radical intention thesis, as the basic notion behind legislative intent assumes that legislatures intend to enact the statute in question, and that court interpretations should approximate to that intention;[627] whereas the radical intention thesis suggests that an interpretation can only be legitimate by conforming absolutely to the original utterance or text.

This originalist conception of intention is rejected in favour of the "Authoritative Intention Thesis", which holds: "*to the extent that the law derives from deliberate law-making, its interpretation should reflect the intentions of its lawmaker.*" [628] Thus, the authoritative intention thesis preserves the notion that interpretation speaks to the intent of an original object, but rejects the idea that an interpretation must reflect the original intention absolutely. [629] Rather, under the authoritative intention thesis the intention to which the courts should have regard is "the intention required to legislate."[630] Thus, statutes, in particular, should be interpreted in such a way as to preserve the law-making prerogative of those who drafted them. Consequently the authoritative intention thesis recognises that people or institutions have been given law making powers, and act on those powers with the

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[626] Raz, *Between Authority and Interpretation,* at 273 (emphasis in original).
[627]Ibid, at 274-275.
[628] Ibid, at 275, (emphasis in original).
[629] Ibid, at 274.
[630] Ibid, at 285.

intention to make law.[631] The authoritative thesis therefore allows for the fact that, in certain circumstances, courts or interpreters cannot or do not know the original intention of the statute and must interpret that intention by attributing an intention to the legislature, had it envisaged the interpretative problem.

Thus, the interpretation must mirror the intention of the "actual" legislature[632] as represented in the text of the enactment, without necessarily capturing that meaning exactly.[633] This teases out the intentionalist rationale that the interpreter must consider how the actual enacting legislature would have solved the interpretative difficulty facing the court.[634] The legitimacy of the authoritative intention thesis lies in the normative assumptions of lawmakers, and those to whom laws apply, that the purpose of law is to successfully describe "social institutions and practices". In order to fulfill this assumption it is expected that interpreters must intend to arrive at meanings which are objective, real and accurate.[635] Thus, interpretation for Raz is an inherently intentional act,[636] the argument being that to conceptualise legal interpretation as an unintentional act is nonsensical because legislation addresses some practical issue and courts must find the aims of that legislation. Consequently, both legislating and interpreting are inherently intentional enterprises.

Legislation, and by extension interpretation, are said to require a necessary connection to intention, as the legislature must intend to enact *the* statute they are drafting if it is to constitute a legitimate piece of legislation at all.[637] This, for Raz, is very different from suggesting that interpretations are aimed solely at retrieving

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[631] Ibid, at 274.

[632] Redish and Chung outline the intentionalist orientation towards the intentions of the *actual* enacting legislature as a distinguishing mark between intentionalist and originalist theories, whereunder the courts are tasked with effectuating or retrieving original intention. See, Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 812.

[633] In a recent examination of the nature of legislative intent, Ekins suggests that interpreters should speak to the "intended meaning" of the statutory text. Ekin's theory is quite useful to this thesis on this point, in that the notion of intended meaning implies that intention is a text reflective concept. See Richard Ekins, *The Nature of Legislative Intent*, (Oxford University Press, London, 2012), at 247. However, Ekins argues that the close nexus between intentionalism and purpose negatively undercuts the significance of intent as a principle in statutory interpretation. Ibid, at 250. For this reason, his reading of the notion of intent is only useful here insofar as it intimates the idea of intended meaning.

[634] Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 813.

[635] Raz, *Between Authority and Interpretation*, at 279.

[636] Ibid, at 268, 281.

[637] Ibid, at 282.

original meaning. Thus, Raz asserts that when legislative intent is invoked it is the authoritative intention thesis that is in question, which conceives a minimal intention that all legislators are aware of in the drafting process:[638]

> The minimal intention is sufficient to preserve the essential idea that legislators have control over the law. Legislators who have the minimal intention know that they are... making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture... [639]

Raz's conception of intentionalism therefore identifies the intention that interpreters possess in attempting to communicate an objectively good interpretation of the object. In the context of the prevailing account of statutory interpretation, the theory does not mark the resort to intention as a validating normative standard as to what the "proficient"[640] legislature most likely intended when drafting a statute. Rather, the statute in its present form is *the* statute that the legislature intended to enact, as the legislature does not enact unintended legislation. Consequently, Raz's theory attempts to bridge the gap that we have illustrated between enacted legislative meaning and legislative intent under the prevailing theory. That is, Raz believes it is incumbent on the interpreter to intend to read the meaning of the actual words enacted by the legislature as objectively as possible. This ensures that the meaning of the enactment, as intended, is effectuated, rather than proffering some interpretation of what the legislature may have intended.

In essence, the authoritative intention thesis uses the text to inform intent, as opposed to the prevailing assumption that indicators of intent are used to discern textual meaning.[641] Yet, as outlined in the criticism of the literal rule, the default resort to statutory purpose is still implied in this interpretative scheme. Thus, the authoritative thesis cannot be used as a determinative interpretative device in such

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[638] Ibid, at 284.
[639] Ibid.
[640] Dodd, *Statutory Interpretation in Ireland*, at 25. As outlined previously, it is a basic assumption of prevailing theory that the legislature is aware of all existing laws and the manner in which the courts go about their interpretative practices.
[641] Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 813.

circumstances, as it cannot tell the interpreter whether his interpretation is correct or not. Rather, it merely preserves the authority of the law by presuming we know what the legislator meant where we can figure out the meaning of the legislation.[642]

This conception of intention might pinpoint what is meant, but not adequately explained, under the prevailing theory in posing the interdependence between meaning and intent. However, the distinction is extremely fine and does not extend to situations where the courts have to adjudicate or interpret in the absence of a clear intention, a limitation that Raz himself acknowledges.[643] For example, looking to the decision of Henchy J in *Nestor v Murphy* in chapter 4, it is clear that the courts routinely analyse both the "surface" meaning of statutory provisions, and the purpose behind the statute in balancing literal meaning and intent where a literal or plain meaning approach would effectuate an absurd state of affairs. However, in the discussion of constructive interpretation above, the Irish courts do not discard the text in speaking to the purposes of legislation. Rather, as evinced in the decision of Henchy J, where the text can be shown to constrain the judge in his interpretative approach, it is most likely that the judge seeks the purpose of the statute initially, and refines his approach by considering the intention of the statute in relation to the statutory text. Conceiving of intention as a narrower interpretative device than the purposive approach preserves the close link between plain meaning and intent, but discards the preference for literalism under the prevailing theory as this has been shown as unworkable.

Thus, rejecting the literalist bent of the prevailing theory does not necessarily entail rejecting intentionalist interpretative theories. Yet, it is difficult to defeat claims that Raz's conception of intention exposes the potential for arbitrariness, as subjective indicators of intent are drawn from the statutory text, irrespective of his claim that there is an obligation on courts to intend to interpret the actual statute that has been enacted. With this in mind, Raz's conception of intention is clearly an attempt to deflect textualist and originalist claims as to the subjectivity of intentional theories of law. Thus, it is necessary at this point to briefly discuss some theories which reject intentionalism as an account of legitimate interpretation.

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[642] Raz, *Between Authority and Interpretation*, at 287.
[643] Ibid, at 289.

5.6.2 Objections to Legislative Intent as an Interpretative Device

Criticism of the concept of legislative intention holds a long-standing pedigree. Writing in 1930 James Landis likened judicial resort to the principle of legislative intent, where such "intent" was unclear, to the "atavistic practices ... of the medicine man".[644] For the most part Landis believed that discerning intent in cases of clear statutory language was a straightforward issue, once the judge respected the limits of institutional competence.[645] Yet he cautioned that the intentions of the judge are channelled in instances where statutory language requires the courts to engage in strained interpretation, masking the danger of judicial legislation under the guise of the "fictitious intents".[646] In noting the American legal realist overstatement of the case against legislative intent as a valid interpretative device[647], Landis pointed to an important distinction between the resort to purpose and the intended legislative meaning when conceptualising legislative intent:

> The real difficulty is not that the intent is irrelevant but that the intent is often undiscoverable... Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning - the assumption that one or more determinates are embraced within a given determinable. Purpose and meaning commonly react upon each other. Their exact differentiation would require an extended philosophical essay. But it may be noted that intent when used to mean purpose usually will be found to accompany the process of spurious interpretation, whereas intent when used as equivalent to meaning commonly accompanies the process of genuine interpretation...[648]

The importance of this distinction should not be downplayed as Landis identifies an issue that is overlooked in the discussion of the Irish context. Dodd, for example, has suggested that the principle of legislative intention speaks only to the intended application of the statute, and does not concern intended meaning,[649] that is, the

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[644] James Landis, 'A Note on Statutory Interpretation', (1929-1930) 43 Harv. L. Rev. 886, at 891.
[645] Ibid.
[646] Ibid.
[647] Landis's argument addressed the claims of Max Radin in particular, who claimed that legislative intents were "undiscoverable". See Max Radin, 'Statutory Interpretation',(1929-1930) 43 Harv. L. Rev. 863.
[648] Ibid, at 888.
[649] Dodd, *Statutory Interpretation in Ireland*, at 115.

concept of intention orientates towards a consideration of the application of the statute in the context of the case on a purposive reading, and does not relate solely to what the legislature considered the words of the text to mean. This implicitly verifies the claim as to the nature of purpose and intent in chapters 3 and 4, insofar as purpose occupies the default interpretative position and is oriented towards the application of the statute. Thus, Landis' rationale confirms the claim that legislative intent is text reflective and is employed by the courts as a means of narrowing their purposive interpretative lens. Thus, concerns as to the legitimacy of the legislative intent paradigm such as Landis' are warranted, insofar as legislative intent is capable of offering the judge an untrammelled discretion. Yet this depends on how intent is envisaged as operating.

Indeed, it is arguable that a "systematically ambiguous" notion such as intent applies to a whole array of interpretative factors, and concerns as to whether it pertains to the purpose, intended application, intended meaning or intended scope[650] of the statute depends on the manner in which an interpretative theory orders the triumvirate of meaning, purpose and intent. Given the failure of the prevailing theory to account for the synaptic connection between statutory meaning and legislative intent, this claim has the two-fold effect of mystifying the relationship between statutory meaning and intent on the one hand, and perpetuating the lack of a distinction between legislative intent and legislative purpose on the other.[651]

5.6.2.1 Is Intention an Interpretative Device?

In light of the uncertainty as to the uses of intent during the interpretative process and Raz's admission that the authoritative intention thesis does not act as an interpretative aid, it is necessary to consider some criticisms of the theory. Stanley Fish's critique of intentionalism centres on the idea that intentionalism does not tell the interpreter what to do in interpretation; rather, it just shows him that interpretation is an intentional matter because he is trying to attach meaning to something, like law, that has been designed for its authoritativeness. This lack of an

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[650] For a very useful comparison of these labels and the differences in their emphasis and application see Twining and Miers, *How to Do Things with Rules*, at 151-152.

[651] Reed Dickerson outlines thoroughly the distinction between legislative intent and legislative purpose in Dickerson, *The Interpretation and Application of Statutes*, at 98.

interpretative scheme in intentionalism is one of the chief reasons why Dworkin's prescription of the stages of interpretation in his theory is so compelling. Indeed, Fish's critique applies to Raz's notion that interpretation as an intentional act, because Fish argues that intending to do something, and actually doing it, are different matters:

> One of the unfortunate consequences of thinking of intentionalism as a method and a theory is to saddle it with expectations it could not meet and should not be asked to meet; the expectation, for example, that the intentionalist thesis - a text means what its author or authors intend - will direct you to the text's meaning, or rule in or out evidence of its meaning, or provide a set of directions for realising its imperative. It has no imperative; it doesn't go anywhere; it just specifies where you already are when you try to figure out where to go next. You already are operating within the assumption of something designed (intended), for if you were not - if you regarded what was before you as an *object* rather than as a message - there would be no reason to assign it a meaning, or (and this is the same thing) no reason to reject any meaning someone wanted to assign it.[652]

Fish's claim here is indicative of some of the questions raised as to the relevance of intent as a guiding interpretative device in chapter 3. Indeed, it is clear that there is much disagreement over the use of legislative intent as an interpretative device, insofar as it acts, or does not act, as an operative interpretative principle in moulding statutory meaning. As outlined, the Gadamerian interpretative theory rejects the uses of original intent as it said to be of no use in the context in which the reader and text exist at the moment of interpretation. Thus, if intent cannot place limits on the interpretative lens of the judge, then something other than intent is used as an interpretative device when the courts invoke it.

Yet the resort to intent has long been a mainstay of statutory interpretation theory. Raz's claim that courts effectuate an approximated intent and interpret the statutory text in light of this - not vice versa - is difficult to reject when the importance of the underlying resort to purpose in the Irish context is considered.

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[652] Stanley Fish, 'Intention Is All There Is', at 1114 (emphasis in original).

This is particularly true in light of the contention that a consideration of intention allows the courts to reroute their purposive consideration of the text in the context of the case back to a consideration of the statutory text.

5.6.2.2 Textualism and the rejection of Intent

Textualism is regarded as an updated and more realistic account of the originalist position and an alternative to intentionalist modes of interpretation.[653] The textualist focus maintains the default preference for literal meaning under the originalist paradigm but excises the resort to controversial legislative intentions from the theory.[654] That is, textualists do not make approximate guesses as to likely legislative intent, legislative history, or the consequences of absurd results.[655] The rule of law is regarded as one of the pillars of the theory,[656] which focuses solely on the implications of the statutory text. Indeed, textualism is thought of not so much a theory, but a practice of the superior courts in the United States.[657]

Whether there is a contrast between textualism and literalism is difficult to ascertain. "Literalism" has been suggested as implying a reference to narrowed dictionary meanings in an isolated context, whereas "textualism" is comparable to the "text as context" interpretative procedure required under section 5 of the Interpretation Act as it does not conceive a pure literal approach.[658] According to Redish and Chung textualism combines a "formalistic conception" of constitutional theory with the originalist focus on "the primacy of the legislature in the policymaking process."[659] Therefore, the theory promotes a default reliance on the literal rule, but explicitly rejects the inclusion of intent as a guiding principle in discerning statutory meaning. Thus, the meaning of the statutory text in the context of the text as a whole and related legislation is the legitimate indicator if statutory meaning.

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[653] Ibid.
[654] Ibid.
[655] Ibid.
[656] Ruth Sullivan, 'Statutory Interpretation in the Supreme Court of Canada', available at http://aix1.uottawa.ca/~resulliv/legdr/siinscc.html, (accessed 14/05/2013)
[657] Redish and Chung, Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation, at 818.
[658] See Nicholas S. Zeppos, 'Justice Scalia's Textualism: The "New" Legal Process' (1990-1991) 12 Cardozo L. Rev., 1597, at 1615.
[659]Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 806.

The name foremost associated with textualism is Antonin Scalia. Justice Scalia has remarked that the idea of legislative intention does not fit with particular rules of statutory construction[660], such as the exclusionary rule outlined in the discussion of *Crilly*. Similar to Dreidger's rationalisation of the processes of statutory interpretation outlined in chapter 2, Scalia has argued that when the meaning of statute language is obvious there is nothing more to add or interpret.[661] Thus, Scalia's preference for textual interpretation centres on his conviction that courts must discern what the legislature enacted within the terms of the statute itself, as opposed to speculate what the legislature intended on foot of those terms.[662] Textualism has thus been open to criticism as a "formalistic" account of interpretation; however, Scalia has openly welcomed such a label, highlighting the relationship between formalism and the rule of law, and intentionalism and that of the rule of men:[663]

> ... if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.[664]

For Scalia this intimates that the courts discern legislative intention and statutory meaning in accordance with prevailing political/social values, which might have

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[660] Antonin Scalia, A *Matter of Interpretation, Federal Courts and the Law*, (Princeton University Press, 1997), at 15-16.

[661] Ibid, at 16.

[662] Kavanagh broadens the scope of the dichotomy employed by Scalia between what is *enacted* and *intended*, through a discussion of enacted and unenacted intentions. However, Scalia's argument, and the orthodox position in Ireland refuses the validity of unenacted intentions as they require a resort to legislative history, see Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998', at 181

[663] Discussing the jurisprudence of Christopher Columbus Langdell, Sanford Levinson draws a similar comparison: "For Langdell law was essentially a literary enterprise, a science of extracting meaning from words that would enable one to believe in law as a process of submission to the commands of authoritative texts (the rule of law) rather than as the creation of wilful interpreters (with submission concomitantly producing the rule of men.) See Sanford Levinsion, 'Law as Literature', in Sanford Levinson and Steven Mailloux eds, *Interpreting Law and Literature, A Hermeneutic Reader*, (Northwestern University Press, 1988) at 155.

[664] Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law*, (Princeton University Press, 1997) at 17-18, (emphasis in original).

very little to do with the initial envisions of the statute. For Scalia, judicial interpretations which speak to legislative intention have regard to what the statute "*should* have meant"[665], undermining the actual aim of the statute and the utility towards which it is directed, viewing this as an attack on legislative supremacy. Textualism, then, rejects legislative intent as a guiding principle, as fidelity to the statutory text ensures the "respect for the legislative process" that is undermined by an intentional reading of statutes.[666] Indeed, Solan has noted that while objections to the concept have altered over time, proponents of the legislative intent paradigm have been reluctant, if not incapable, of comprehensively responding to the more salient arguments against the concept of objective legislative intent outlined above.[667]

However, in the attempt to underscore formalistic rule of law principles and democratic legitimacy it is suggested that textualism suffers from significant internal incoherencies. Indeed, in its absolute rejection of legislative intent in any form, textualism presupposes that statutes are drafted without any conception of, or agreement as to, statutory purpose[668] because textualists do not consider purpose to be a relevant interpretative device. Correlatively, while textualists reject any form of intent in interpretation, it has been noted that they routinely endorse the aims and objectives of legislation, something which "implicitly imports a notion of intent."[669] Indeed, somewhat ironically, it is argued that the prohibition of intent or other non-textual indicators of meaning within textualism renders courts impotent in the face of statutory ambiguity.[670] This implies that where literal meaning is not encountered, the textualist judge has no option but to forgo interpretation and declare the statute meaningless and ineffective as his only interpretative option is to apply the literal rule.[671] This posits an unrealistic account of the drafting and interpretative processes and implies that courts routinely expect to encounter

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[665] Ibid, (emphasis in original).
[666] Manning, 'The Absurdity Doctrine', at 2390.
[667] Lawrence M. Solan, *The Language of Statutes, Laws and their Interpretation*, (The University of Chicago Press, 2010), at 84 - primarily the argument that courts cannot attribute an "objective" intention to a multi-member governmental institution.
[668] Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 819.
[669] Greenwalt, *Statutory and Common Law Interpretation*, at 49.
[670] Redish and Chung, 'Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation', at 819.
[671] Ibid.

pristine legislation. Ruth Sullivan has pointed to the core difference between textualism and intentionalism as interpretative theories:

> ...for an intentionalist a formal finding of ambiguity in the text of legislation is not a prerequisite for looking at considerations other than literal meaning. The meaning of the text is important, and when it appears to be clear and precise, it should receive significant weight. But even when the text is apparently clear and precise, the court is still obliged to consider other cogent evidence of legislative intent... This is the key difference between textualism and intentionalism. Textualists keep their eyes on the text and refuse to look at anything that might contradict the literal meaning. Intentionalists go looking for trouble.[672]

While there is an element of truth in Sullivan's notion that intentionalists go looking for trouble, the claim in this thesis that intent acts as a text-oriented constraining effect still stands, because the courts ultimately use intent as a device to legitimate what they regard as authoritative statements of law. Textualism cannot defeat this underlying application of intentionalism. Thus, the resort to intent conceptualised as such should not succumb to claims that intentionalism is utterly discretionary, because, as has been shown, interpretation is inherently creative in any event. In light of these claims textualism suffers from many similar defects as the prevailing account of the literal rule, and cannot overcome the necessary resort to underlying purpose in discerning statutory meaning. Indeed, in light of my suggestion that the practice of the courts shows a preference for purposivism augmented by an intentionalist reading of statutory texts, it is necessary to consider whether proposing a hybrid between intentionalist and purposive theory proves helpful in best illustrating the practices of the Irish courts.

5.6.3 Constructive Intentionalism

Raz has suggested that while there are undoubtedly "political consequences" arising from the courts' assignment of intentions to the legislature in the interpretation of legal texts, they have no choice in the matter as they are only doing

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[672] Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada, available at http://aix1.uottawa.ca/~resulliv/legdr/siinscc.html, (accessed 1/06/13).

what is necessary if they are to follow the letter of the law.[673] Irrespective of such pragmatic reasoning for the retention of legislative intent as a validating interpretative standard, it might be that the strict fidelity to legislative intention through the plain meaning rule derives more so from a "rhetorical concern for legislative supremacy"[674] as opposed to substantial concerns over the legitimacy of the judicial function. Indeed, it has been noted that the prevailing theory of statutory interpretation, and the primary role played by the legislative intent paradigm therein, is only retained because interpretation under the prevailing theory ensures that "implicit in the construction of every statute is a theory of democracy."[675]

Yet there is great appeal in Raz's rationale for the authoritative intention thesis - the idea that the courts have no other option but to articulate an approximated estimation of what the statute that was enacted, and must discern statutory meaning in this light. It is for this reason that I believe the practice of the Irish courts is best illustrated by proposing a combination of the constructive element of Dworkin's theory with Raz's idea of authoritative intention. Such a hybrid blends the interpretative creativity noted as absent in the prevailing theory with the textual constraint evident in Raz's intention thesis, but which is impossible under the interpretative freedom granted under the Dworkinian account of adjudication. Yet in *Justice for Hedgehogs*, Dworkin argues that statutory interpretation, specifically, "aims to make the governance of the pertinent community fairer, wiser, and more just" - judges must decide "which of the semantically available interpretations of a controversial statute would produce the best law."[676] Thus, it is at least arguable that Dworkin himself concedes that there must be some textual constraint, even if the judge in question must aspire to construct the best possible example of statutory meaning in the circumstances.

Therefore, the Irish courts invariably attempt to construct the best light example of statutory meaning in particular cases, but cannot proceed without any

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[673] Raz, *Between Authority and Interpretation*, at 275.
[673] Dworkin, *Law's Empire*, at 265.
[674] Freeman, "Positivism and Statutory Construction: An Essay in the Retrieval of Democracy", at 13.
[675] Ibid.
[676] Dworkin, *Justice for Hedgehogs*, at 85.

constraints in accessing moral and political principles as Dworkin would have it. Rather, the courts routinely defer to authority of the statutory text in channelling the appropriate legislative intent. The concerns as to the legitimacy of legislative intent as an interpretative device raised by Landis and Scalia above are undoubtedly warranted, particularly if it is shown that the courts resort to artificial intentions as a means of cloaking normative decisions with a veneer of legitimacy. However, the fact that the Irish courts habitually construct statutory meaning in light of the ends at which those words are most likely aimed intimates something about the authority of the statutory text, and the fact that it must be so interpreted. Thus, insofar as intentionalist theories such as Raz's identify the underlying need to maintain the authority of law during the processes of statutory interpretation, criticisms raised by those such as Scalia are unfounded because they propose to explain the inexplicable by removing the interpretative lens from the picture. In contrast to textualists and those who advocate the prevailing doctrine, in attempting to rationalise the interpretative practices of the courts we must reject the prevailing theory as it does not reflect interpretative reality.

5.7 Conclusion: Ramifications of Interpretative Analysis for the Prevailing Approach

The interpretative analysis above has attempted to offer alternative ideas as to what judges do during interpretation, in light of the criticisms of the prevailing theory in chapter 3 and the application of those criticisms to the practice in chapter 4. As discussed at the beginning of chapter 3, four core problems have been identified in the prevailing theory which cannot be substantiated in either theory or practice.

The first claim was a theoretical argument concerning the constitutional framework which postulated that the institutional framework cannot require the courts to interpret literally. Insofar as the notion of literal interpretation has been rejected, which will be discussed further below, it is possible that the constitutional framework comprises a significant part of the interpreter's "horizon" discussed in the analysis of Gadamer's hermeneutics. The other three claims, the default preference for plain meaning, the separation of literal and purposive interpretation and the role of the interpretative criteria will be discussed in turn.

5.7.1 The Constitutional Framework as the Interpretative "Horizon"

In his analysis of the Gadamerian position, Eskridge claims that if the interpreter is cognisant of his interpretative tradition interpretation cannot be subjectivist, as the interpreter constantly interacts with the text at a historical/contextual level.[677] That is, the interpreter's "horizon" is conditioned by interpretative "traditions" such as precedent and not "idiosyncratic prejudices".[678] So the judge in interpreting a statute will have an intuitive understanding of how to go about discerning meaning in light of the interpretative culture created by the judiciary, of which he is part. This stands in stark contrast to deconstructivist claims, similar to those countered by Fiss above, which envision the judge as capable of manufacturing any meaning, by virtue of interpretative plurality and the lack of restrictions on the interpreter on articulating that meaning. Thus, the prevailing theory assumes the interpretative approach of the judge is hedged by traditional boundaries - the institutional presumptions on foot of Articles 15.2.1° and 6 of the Constitution, and previous understandings or interpretations applied to the statute in question.

While routine statutory interpretations presumptively accord to these constitutional norms, the failure of the prevailing account lies in the presupposition that literal interpretation is necessitated in light of them. Gadamer's hermeneutical position intimates the importance of such validating normative principles to the interpretative horizon of the judge, but denies the notion that interpretations can produce a literal meaning which is subsequently applied. Rather, the judge takes his interpretative cues from the history and culture which precedes him, and discerns meaning accordingly:

> ... the text and its tradition are not so constraining that they do not give rise to more than one approach to a textual issue ...Just as the horizon of the text changes over time, partly through interpretative encounters, so too the interpreter's viewpoint, or horizon, is transformed in the encounter. The historical conditioning of our understanding does not preclude revising our pre-understandings in light of the text. The... process of interpretation works thus: Upon our first approach to the text, we project our pre-understandings

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[677] Eskridge, Gadamer/Statutory Interpretation, at 626.
[678] Ibid.

> into it. As we learn more about the text we revise our initial projections ... Essential to the interpreter's conversation with the text is her effort to find a common ground that will both make sense out of the individual parts of a text and integrate them into a coherent whole. The assumption that the text has something to teach us, therefore, exercises a constraining influence on interpreters." [679]

Solan states this process takes place routinely in the context of statutory interpretation, as there are always viable competing interpretations at play.[680] Yet the fact that the courts defer to doctrinal interpretative positions in no way assumes that statutory interpretation is a one way street. Indeed, our discussion of the *Portmarnock* decision in the previous chapter illustrates that, far from relying on the meaning of statutory terms, the courts will look to the purpose and likely consequences of legislation as a indicator of that meaning, and still disagree what statutes mean.

Thus, a Gadamerian conceptualisation of the interpretative process offers a sophisticated account of the significance of constitutional imperatives which does not strike the reader as intuitively suspect.[681] Indeed, it also has the correlative benefit of rejecting the contention that statutory meaning of the statute is "out there", waiting for the interpreter to discover and apply to the issue at hand. Rather, the interpreter and the text are involved in a dialectic process. In the context of statutory interpretation, this theory assumes that to arrive at a statutory meaning the judge first approaches the statute from the perspective of his pre-understanding. As outlined, the judge's intuitive understanding of his duties *vis-à-vis* the legislature and how he is to apply the statute will determine the interpretative boundaries at play, from which he will try to resolve the interpretative difficulty in terms of the legislative text.

However, the obvious problem in Gadamerian hermeneutical theory concerns the interpretative nature of the historical context of interpretation, or the horizon

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[679] Ibid, at 627.
[680] Solan, *The Language of Statutes, Laws and their Interpretation*, at 84.
[681] For a succinct argument as to how the prevailing doctrine masks what judges do when they are interpreting see Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998', at 264.

itself. The traditional legal context within which the courts interpret is informed by the pre-understandings of judges. The difficult question in light of this is whether this historical or traditional context within which interpretation takes place is itself the object of interpretation. A criticism of Gadamerian hermeneutics outlined above concerned the relativity of the interpretative horizon. Interpretative presuppositions such as the literal rule, purposivism and the interpretative criteria necessarily must be included within this "horizon", given their nature as interpretative principles. The difficulty, then, becomes how to separate the underlying interpretative nature of these criteria from the background context from which they come, as it must follow that the interpretative tradition itself is an interpretative device. Eskridge acknowledges that critics of Gadamer have questioned the "objectifying" nature of the historical context if it is itself subject to interpretation; however, Gadamer's theory asserts that the core aim of interpretation is not to focus on originalist intent or the plausibility of "unchanging objective meaning."[682] Thus, Gadamer's theory is useful insofar as it prescribes that the role of the judge is necessarily creative and situates the text and context as central to this creative interpretative drive.

5.7.2 Literalism, Purpose and Interpretative Theory

In this chapter it has been argued that objective meaning is rejected by interpretative theorists. Such a conception of meaning is unhelpful, insofar as both literalist and originalist conceptions of the interpretative process offer very little to our understanding how the courts arrive at an approximated legislative intent. The analysis of interpretative theory above has shown that theorists are generally agreed in their rejection of the notion that a pre-determined legal meaning awaits discovery by the judiciary, irrespective of their varying positions on the nature of interpretation. Indeed, bearing in mind the significance of the literalist paradigm, this claim alone proves very damaging to the authenticity of the prevailing theory as a reflection of the practice. Thus, my argument that interpretation necessitates a reflexive relationship between the reader and text all but dismisses the standard position that the judge merely applies and does not construct statutory meaning.

This dismissal of literal interpretation as a central precept of the practice acts as a domino effect, in terms of the veracity of the other foundational precepts of the

[682] Eskridge, Gadamer/Statutory Interpretation, at 624.

prevailing theory. That is, the claim that literal meaning is not immanent necessarily means that the courts cannot decipher accurately the point at which literal interpretation breaks down and where purposivism is required. Therefore, not only is it implausible that literal rule is the default interpretative mechanism, but the demarcation between literal and purposive approaches dissipates by dint of this argument. Moreover, my analysis of the theories of Gadamer, Fish and Fiss has shown that interpretation involves the interaction of both interpreter and text, and that literal meaning cannot be shown to exist in a vacuum. However, this does not imply that textual meaning offers no use as an interpretative guide. Rather, the notion of objectified literal meaning assumed under the prevailing theory is untenable, and that this has knock-on effects for how the courts interact with the statutory text and how they discern statutory meaning, purpose and intent.

These arguments have pointed to the relationship between interpreter and text, and the creative role of the interpreter in articulating meaning, but have asserted the constraining role played by the text in the discernment of statutory meaning and intent. Thus, it is more realistic to conceptualise the practice of statutory interpretation as reflected in the relationship and tension between creative reader, and the constraining effect of text and context, rather than an unsophisticated interpretative theory which posits the discovery and application of clear meaning, and the resort to alternative interpretative approaches in the absence of such. However, conceptualising the interpretative approach of the courts as necessarily creative, yet tempered by the text, requires a compromise between the constructive and intentional approaches outlined above. That is, Dworkin's prescription of what judges do in the stages of interpretation captures something of the nature of interpretation that is absent from other interpretative theories, be they focused on linguistic objectivity, procedures and practice or the intent behind the text. Yet for all the appeal of the constructive element of Dworkin's theory, to adopt this as a description of the Irish practice would be inaccurate as it does not evince the textual constraint that is clear in the practice. In attempting to identify this textual constraint a choice must be made between textualist and intentionalist approaches. The analysis of textualist approach above discounts it as an accurate account of how the discern statutory meaning, because, as outlined, the textualist

among other things, is conceived as refusing to interpret in the event of unclear or ambiguous statutory meaning. Thus, the objections to the literalist paradigm outlined in chapter 3 apply equally to textualism.

In order to retain the creative aspects of the constructive account of interpretation, then, the Irish practice is best understood in an intentionalist context, but one which allows the courts to construct meaning purposively rather make a stab at an approximated intention. The Irish courts routinely engage with statutes from a platform of purpose - enquiring as to the aims of the statute at a general, normative level. However, it is in the resort to intention that statutory meaning moves from that general purposive level to the particular. So from this point of view, the prevailing theory is somewhat correct in that the relationship between purpose and intent are intimately intertwined with that of statutory meaning, but the prevailing theory fails in the prescription of the difference between them, and how they operate. Indeed, it may be that Raz's theory implies that the courts must constructively interpret to some degree in order to fulfil their duty required of them by the legislature. It is in this respect that I find the Dworkinian and Razian theories almost complementary.

That is, if we conceive of the interpretative lens as a microscope, the wide lens - the level of general abstraction - is the Dworkinian constructive enterprise, assigning purpose to the object of interpretation. When we assign purpose to something we arrive at some general idea of what it is aimed at through a normative consideration of the object. This indicated Dworkin's pre-interpretative stage. However, it is in the narrowing of the lens that we speak to intention, and this necessarily entails the scenario that Raz describes - the courts are bound as an institution to uphold the legislation as an authoritative statement of some social reality and must make an attempt to interpret it accordingly. Therefore, they must attempt to communicate the aims that are intended to be achieved through the statutory text. This complimentary fusion of constructive and intentional interpretative approaches aims to defy the myth that statutory interpretation is not a creative enterprise, but in acknowledging such, attempts to place limitations on the discretionary role of the judge and the interpretative spectrum to which he can have regard.

In the analysis of the prevailing theory purposive interpretation is assumed as the initial interpretative mechanism, and the retention of the determinative characteristics of the text in the consideration of intentions satisfies the institutional balance which the courts must observe, irrespective of whether they deliver literal interpretations or not.

5.7.3 The Indeterminate Role of the Interpretative Criteria

The exact role of the interpretative criteria is a complex question. If the Gadamerian notion of the interpretative horizon is correct, then, as noted above, it is arguable that the criteria manifest as presumptive legislative intents to which courts resort to in deciding whether to read a statute one way or another. However, the manner of their selection is somewhat inexplicable given the *ad hoc* nature of the interplay between rules and fact situations. Indeed, in light of the arguments above it can be maintained that the various canons, maxims and presumptions act as *post hoc* rationalisations of what the courts do during their interpretative endeavours. If, the Irish courts construct a statutory meaning that is an approximated of what the statutory words are said to achieve, the import of those criteria is downplayed significantly. Indeed, in considering statutory purpose and the consequences of likely interpretations, the relevant criteria will occur to judges in any event, without their having to be selected at random.

However, the prevailing theory does not make sense on its own terms as it is counterintuitive to suggest that selected interpretative criteria will furnish plain meaning in situations where a plain meaning is already observable. That is, it is difficult to accept that courts are obliged to take interpretative considerations into account when those considerations routinely effectuate competing, yet no less clear meanings. Thus, my claim is merely that, in light of the interpretative theories discussed above, the significance of the interpretative criteria is relatively modest at the moment of construction, because the courts determine the statutory purpose in relation to the context of the case and the possible consequences of application, not in terms of antiquated maxims and canons.

This is not to say that they play no role, there are situations where a canon, presumption or maxim will bear a particular influence on the interpretation of a

judge, but it cannot be shown, as is claimed under the prevailing theory, that the criteria are central to every instance of statutory interpretation. Yet it must also be acknowledged that the criteria are often of no use, and as this thesis has shown, in most instances where there is a foundational consideration of purpose or absurdity, certain maxims, such as "*cessante ratione, cessat ispa lex*"- "the reason of the law ceasing, the law itself ceases"[683] suggest that the criteria oftentimes are ineffectual, as the courts will have to resort to the purpose of the law to envision its application. Indeed, Llewellyn's theory that the canons are both multifaceted and pull against each other confirms this.[684]

Thus, while the courts routinely refer to interpretative maxims or canons in justifying and outlining reasons for their decisions, the claim under the prevailing theort that the judge is obliged to take them into account in the course of his interpretation is an untenable suggestion. Rather, it is more realistic to suppose that judges construct statutory meaning in the attempt to make it the best it can be, while at the same time ensuring that their interpretation bears a genuine relation to the statutory text. If their interpretation can be justified in light of one or more common law interpretative criteria then that is no bad thing. Thus, it is arguable that the interpretative criteria are useful insofar as judges will have some foresight of unjustifiable interpretations, but their use is most effectively illustrated by Llewellyn's idea that there are innumerable criteria or canons that pull against each other, a situation of "thrust and parry" [685], where the use of one canon or criterion is weighed against another which is just as applicable. To posit that such an unstable scheme is a central feature of an interpretative theory which proposes to instantiate a non-substantive conception of the rule of law is internally incoherent, as the discretionary nature of thrust and parry essentially defies the interpretative certainty that is assumed to underlie the prevailing approach.

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[683] See Twining and Miers, *How to Do Things With Rules*, at 158.
[684] See Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes Are to be Construed', at 396.
[685] Ibid, at 401.

Chapter 6 Interpretation and Limits of the Non-Substantive Conception of the Rule of Law

The previous chapters have shown that the prevailing account of statutory interpretation is an inadequate explanation of the interpretative practices of the courts, insofar as it fails to justify the assumed default position of the literal approach, and the apparent straightforward departures from such in the absence of clear meaning. However, my analysis of other interpretative theories in chapter 5 - be they hermeneutic, constructive or intentionalist - has shown that the interpretative practices of the courts are at least varied, and that statutory purpose and context play a more significant role than is presented under the standard account. Thus, the focus of this chapter will be to balance what we have learned about interpretation with the rule of law, and find whether the non-substantive account of the ideal identified in chapter 1 is defensible in light of these observations.

The main question hanging over the rule of law in this thesis has been the consistent argument that the realities of statutory interpretation belie the standard presentation of interpretative practice. If the prevailing account of interpretation is incorrect, then there are obvious repercussions for how it claims to instantiate the rule of law. Our first point of departure, then, is to find conclusively whether statutory interpretation is consistent with a non-substantive conception of the rule of law. This will concentrate on how non-literal interpretation does not reflect the interpretative formality presupposed under the non-substantive conception.

Secondly, in showing that there is no way that such a conception of the ideal can be reconciled with interpretative reality, it must be found whether the method of interpretation identified in chapter 5 can be altered in order to fit the interpretative practices of the courts with the ideal. It will be shown that this cannot countenanced as it is argued in chapter 5 that, despite the necessary creativity involved in interpretation, the courts believe that they are interpreting in as text-constrained a manner as possible. Thus, the non-substantive conception of the rule of law cannot be instantiated in reality as a result.

Third, accepting this conclusion allows for two alternatives: 1) we alter the ideal to account for interpretative practice, dissolving the distinction between non-substantive and substantive conceptions or 2) we live with the tension between interpretative indeterminacy and the rule of law, recognising that the ideal has useful application and effect, but cannot be fully instantiated. Revisiting the argument in chapter 1, I will conclude that the first option will not do as, in the event of such an alteration, we are faced with a very different ideal to the rule of law.

Thus, interpretation dictates that we cannot fulfill the formal conception of the ideal wholly, but as outlined in chapter 5, there are things we can do with interpretation that approximate to the non-substantive conception I prefer. That is, in trying to discover statutory meaning that the legislature would most likely have intended, the interpretative practices of the courts reflect a loosely approximated conception of the non-substantive account of the ideal because the attempt to effectuate the statute envisaged by the legislature is the operative consideration. Yet the notion of trying to constrain interpretation is valuable in itself, even if what we are left with is nowhere near realising the rule of law ideal as is concepualised under the non-substantive account.

6.1 Is Statutory Interpretation Consistent with the Non-Substantive Conception of the Rule of Law?

In the examination of constitutional theory in chapter 2 a combination of separation of powers theory and distinct rule of law features, such as the clarity and predictability of law, were identified as requiring the default status of literalist interpretation. This constitutional framework outlines something similar to the "execution model" of adjudication, which requires that courts do not deliver "novel interpretations" but apply the law as decided in similar cases.[686] Dorf has argued that the execution theory of adjudication requires of the judge in applying a statute what Igor Stravinsky prescribed of the musician playing his music: that it be read, and executed, but not interpreted.[687] Yet that theory cannot be a comprehensive theoretical explanation of the interpretative practices of the courts, as it does not

[686] See Michael C. Dorf, 'Prediction and the Rule of Law', (1995) 42 UCLA L. Rev. 651, at 664.
[687] Ibid.

cover all instances of statutory interpretation. Our criticism of textualism in the last chapter, for example, illustrates that there are instances where the courts must interpret beyond literal or plain meaning and come to a resolution; and that it is unrealistic to expect the courts to refuse their interpretative duty on encountering vague statutory terms.

Indeed, Hart was scathing in his criticism of such formalist theories of interpretation, intimating that in certain circumstances the courts must make law during interpretation, charging separation of powers theorists like Montesquieu with the concept of "judge as automaton"[688]. While this does not advocate extensive judicial discretion as a feature of the rule of law, it is inaccurate to state that all literal interpretations instantiate the ideal, because as this thesis has shown interpretations which are categorised as "literal" require a purposive method in finding the plain meaning of the statutory text. Thus, we are presented with an inherent complexity in the rule of law - the foundational claim that predictable and clear statutory interpretation enables rule of law instantiation is irreconcilable with the underlying role of non-literal considerations in constructing statutory meaning. The primary tension lies in the fact that the prevailing theory of statutory interpretation does not give an accurate account of interpretation, but nevertheless situates the rule of law at the epicenter of the constitutional theory as to how interpretation is to proceed. However, my criticisms of the prevailing theory and the identification of other plausible accounts of the interpretative practice necessitates considering whether statutory interpretation is capable of conforming to a non-substantive conception of the rule of law at all.

6.1.1 Interpretation as a Cost to the Ideal

Given the regularity of its use, Tamanaha has suggested that the rule of law is "the dominant legitimising slogan of law"[689] of our times. As shown in chapter 1, it is a loaded legal and political term capable of a wide range of applications. As with anything, however, when assertions as to the nature of the rule of law are expressed

[688] HLA Hart, 'Positivism and the Separation of Law and Morals', (1957) 71 Harvard Law Review, 593, at 610.
[689] Brian Tamanaha, *A General Jurisprudence of Law and Society*, (Oxford University Press, 2001) at 98.

in absolute terms the ideal becomes a hostage to "conceptual dogmatism"[690] and in danger of losing its status as a discrete ideal.

Chapter 1 concentrated on the various guises of the rule of law in an effort to find an operative conception of the ideal in an Irish context; leading to our analysis of the processes and theory that underlie statutory interpretation. For the purposes of this thesis the rule of law has been considered as a formal or instrumental theory of reasonable government,[691] which, because of the inextricable link posited between the ideal and separation of powers theory, makes claims as to the interpretative powers of the court, *vis-à-vis* the legislature in the development of law.[692] Due to the presupposed link between such a conception of the ideal and the constitutional theory underlying statutory interpretation, I have opted to analyse a non-substantive or formal account of the rule of law to find whether it is instantiated in the interpretative practices of the Irish courts. The restrictive effect of this theoretical presupposition on interpretation in the statutory context is clearly outlined in *Cross on Statutory Interpretation*:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. [693]

Thus, the focus on literalism under the standard account roots itself in a theory that combines the political notion that citizens should be able to avail of the freedoms that foresight of the law affords them, and the constitutional theory that the courts act as agents of the legislature. If legislative supremacy could guarantee an objective, literal application of statutory meaning, the claim that the standard account of statutory interpretation instantiates a non-substantive account of the rule of law would be unassailable. However, this is neither reflective of interpretative reality nor the practices of the courts because we have shown that in the course of

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[690] See Liam Murphy, 'Better To See Law This Way', *83 NYU L. Rev. Vol. 84, 1088*, 2008, at 1089.
[691] For a brief discussion of the relationship between the rule of law and Western liberal democracy see Thomas Carothers, 'The Rule of Law Revival', (1998) 77 Foreign Affairs,95.
[692] Bell and Engle, *Cross on Statutory Interpretation*, at 47.
[693] Ibid, at 154.

"literal" interpretation, courts necessarily resort to statutory purpose and intent in constructing plain statutory meaning. Consequently, while statutory meaning is constructed in light of statutory purpose and guided by an approximated legislative intent in the circumstances, literal meaning cannot exist in some objectively extant "strongbox" that the courts discover in their routine interpretations.

If interpretative reality belies the presuppositions that underscore the prevailing theory of statutory interpretation in Ireland, and thereby dilutes the degree to which such judicial interpretations are capable of instantiating a non-substantive conception of the rule of law, we must question whether it is possible to realise the rule of law at all. Substantive conceptions of the rule of law were rejected in chapter 1 as accurate accounts of the ideal because the inclusion of concerns such as justice, human rights and democracy dilutes the discrete aspects of the rule of law.[694]

Thus, the preference for a non-substantive conception of the rule of law in this thesis is based on the notion that an imperative feature of the Irish legal system derives its legitimacy from the notion that the ideal is reflected in "official fidelity to shared standards and conventions."[695] Yet my analysis of the prevailing account, both in theory and practice, illustrates that routine applications of the literal rule cannot effectuate the rule of law as assumed. This is not to say that the courts cannot comply with a non-substantive conception of the rule of law; Raz, after all, was correct in stating that realising the ideal was a matter of degree.[696] Rather, we must accept that the area of statutory interpretation is an apt illustration of how the rule of law operates, but that the prevailing theory exaggerates the method of instantiation by misrepresenting the ability of a theory such as the separation of powers to derive literal interpretations.

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[694] Even Fuller was sceptical of the over-extension of the ideal - for example, to international relations issues which sought to impose the rule of law "condition" to countries that experienced unstable constitutional government. See, Kenneth I. Winston (ed),*The Principles of Social Order, Selected Essays of Lon L Fuller*, (Duke University Press, 1981) at 99.

[695] Coyle, 'Positivism, Idealism and the Rule of Law', at 274,280. Coyle argues that positivism and idealism are distinguishable from each other, not by virtue of differences in adjudicative method and the theories' conceptualisation of rules, but in reference to the connection the respective theories make to the rule of law.

[696] Raz, *The Authority of Law*, at 211, 222.

While non-substantive conceptions of the rule of law do not necessarily require mechanical adjudication, the default position occupied by literalism in the standard account betrays the basic creativity of judicial interpretation and, in turn, makes instantiating a non-substantive conception of the ideal impossible on the theory's own terms. If we consider that resolution[697] and human interaction[698] are necessary features of the ideal, the theory that interpretations must be literal in order to instantiate a non-substantive conception of the ideal is incorrect, not the conception of the ideal itself. That is, I have merely shown that the interpretative theory is incorrect; this does not necessarily dispute the standing of the rule of law as a discrete ideal. The initial claim that the constitutional foundations of the prevailing theory require a non-substantive conception of the rule of law still stands, but we must find whether purposive and contextual forms of interpretation can "fit" non-substantive conceptions, given that the interpretative practices of the courts cannot be exclusively categorised as literal. Essentially, the problem for non-substantive conceptions of the rule of law, particularly in the context of statutory interpretation, is that interpretations often can change rules or statutes as they are applied, damaging distinct rule of law features such as the predictability and continuity of law.[699]

As we saw in the last chapter, in taking this feature of adjudication into account, Dworkin's appeal to constructive interpretation and purpose is borne out of an attempt to integrate the resort to political principle as legitimate interpretative principles in the statutory context. That is, out of an attempt to expand the rule of law, laterally, to types of adjudication that are not traditionally associated with the ideal under the non-substantive conception. At this point we must consider whether it is possible to instantiate a formal or non-substantive conception of the rule of law in the context of statutory interpretation at all, given that we have identified purposive interpretation as the *modus operandi* of the Irish courts. Indeed, it has been noted in *Cross* that in the wake of the seminal case of *Pepper v Hart*, which altered the default interpretative mechanism of the English courts to a consideration of statutory purpose, the interpretative methods of the courts represent a

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[697] See Endicott, 'The Impossibility of the Rule of Law'.
[698] Raz, *The Authority of Law*, at 212.
[699] Coyle, 'Positivism, Idealism and the Rule of Law', at 266.

"compromise between the requirements of the rule of law and legal certainty on the one hand, and of fidelity to the intention of Parliament on the other."[700] With this in mind, whether the non-substantive conception can be reconciled with the creative aspects of statutory interpretation will be considered.

6.2 Can Interpretation be Reconciled with the Non-substantive Conception of the Ideal?

It is obvious that the interpretative theory required by the non-substantive conception of the rule of law is envisaged as applying to the case of well drafted legislation. The presupposed duty of courts to apply clear and predictable legal rules as they stand confirms as much. However, our discussion of the interpretative practices of the courts belies the aspiration under non-substantive conceptions that the law must exist in clear, predictable rules, as there will always be some resort to purposive interpretation in the statutory context.[701] From the discussion above it is clear that interpretative problems and not issues with the form of the ideal itself impede rule of law instantiation under its non-substantive guise. This is because, as I have shown in previous chapters, judges cannot interpret in a vacuum. My analysis of the interpretative practices of the courts, and indeed interpretative theory, has shown that legal systems cannot instantiate the ideal in such a manner as they simply do not operate in this mechanical fashion.

Thus, the aspirational nature of the non-substantive conception of the rule of law requires absolutely determinate legal rules if it is to be instantiated. Indeed, this interpretative determinacy is a central to the connection posited between the prevailing approach to statutory interpretation and the rule of law. Yet my analysis of interpretative theory in the last chapter has shown that the reality of interpretation is much different to that proposed under the prevailing theory - indeed, the claim that the courts practice a form of "constructive intentionalism" is irreconcilable with the non-substantive conception. This is not to argue that the necessary resort to purpose reduces adjudication to a purely discretionary form. Rather, the resort to purpose merely situates a statute or a legal rule within some

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[700] Bell and Engle, *Cross on Statutory Interpretation*, at 153.

[701] This is a major point of Fuller's rejection of Hart's thesis in his analysis of Hart's description of the core and penumbra in Lon L Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart', (1957) 71 Harvard Law Review, 630, at 663.

context to alleviate interpretative difficulty where some exists. This has necessary implications for the conceptualisation of legal rules under both the prevailing theory of statutory interpretation and the link posited between that interpretative theory and the conception of the rule of law that it seeks to instantiate.

It would be unwise to argue that this compels proposing a more text oriented analysis of the interpretative practice in order to salvage compliance with the ideal in its non-substantive form, as this would be tantamount to reverting to the original position that this thesis seeks to challenge. Rather, my rejection of purely text-based interpretation in the last chapter has shown that such interpretative theories cannot surmount the vagaries of interpretation. These problems simply arise from the nature of interpretation, and not the conception of the rule of law that has been proposed under this thesis. This forces us to reconcile ourselves to the position that the non-substantive conception of the rule of law does not work, as interpretation simply does not operate in the fashion that the conception requires. Indeed, the central theme of the last chapter is that we cannot legislate for interpretation; rather, we must propose a realistic and varied account of interpretation in light of some of the borderline cases we encounter in the practice. With this in mind, we must consider whether it is possible to conceptualise non-literal interpretation in such a way as to prevent the demise of the non-substantive account of the rule of law.

6.3 Live with the Tension, or Alter the Ideal?

The distinction between conceptions of the rule of law that identify minimum requirements for the efficacy of a legal system and those that expand the ideal to connect with political and moral principle, while substantial, are not profound. Non-substantive and substantive conceptions of the rule of law often share a great deal of formal similarity.[702] The separation of powers is said to be central to all conceptions of the rule of law, with substantive theories identifying the judicial resort to underlying political and moral principles as lying in their independence; whereas non-substantive theories locate the requirement of a constrained judiciary in the criterion of "congruence". This judicial restraint conceived by non-substantive

[702] Radin, 'Reconsidering the Rule of Law', at 792.

conceptions is central to the distinction between rule application and rule making under the auspices of interpretation under the prevailing theory of statutory interpretation.[703] However, chapters 3, 4, and 5 have shown that this distinction is not as water-tight as is assumed under the standard approach. In light of this, we must find whether our conclusions about the nature of interpretation dissolve the demarcation between substantive and non-substantive conceptions, or whether we must re-interpret the non-substantive account and make room for a more liberal theory of interpretation. Alternatively, we can acknowledge that judicial interpretation is one of the core problems associated with rule of law theory and accept the necessary ramifications of such for the realisability of the non-substantive conception.

These choices are all interpretative issues and bring to the fore one of the underlying tensions when considering any notion of the rule of law; that is, the tension between the rule of law understood as an aspirational ideal, and the rule of law perceived as a concept - an idea formed in abstraction, the existence of which can be determined through an analysis of social facts. If we accept that the rule of law exists solely as an ideal, we must accept that it can exist in a legal system, but can never be complied with in full because of its aspirational nature. If we perceive the rule of law as a concept, we must recognise the immiscibility of the non-substantive conception with judicial interpretation, underlining its unattainable nature. This is because, as argued in chapter 1, to envisage the rule of law as anything other than a non-substantive conception dilutes those characteristics that make the rule of law valuable in the first place. Both of these alternatives force us to adopt Raz's approach - that the rule of law exists to a greater or lesser degree as an ideal, and is one of a number of values inherent in a legal system.

Thus, the tension boils down to a question of legitimacy ; that is, in accepting the role that non-literal or non-rule-bound interpretation plays in the failure of the non-substantive conception of the rule of law in the statutory context, how much interpretative freedom should we extend to the judiciary? In the previous chapter I

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[703] For an analysis of the fine line between interpretation and law-making in the context of Article 15.2.1 of the Constitution see David Kenny, 'The Separation of Powers and Remedies: The Legislative Power and Remedies for Unconstitutional Legislation in Comparative Perspective, in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects*, (Bloomsbury Professional, 2013), at 208.

have argued that while the interpretative practice of the courts cannot be described accurately under the prevailing theory, neither is it outwardly discretionary, as there is an element of textual constraint at play. For this reason I will consider some of the salient aspects of the Hart/Fuller debate in this context; the issue of interpretation in the penumbra, and whether decisions and interpretations can at least be rule of law compliant. First, however, I will consider whether altering the ideal to a more substantive based approach addresses the tension identified between interpretation and the non-substantive conception.

6.3.1 Re-Interpreting the Ideal

Interpretative practice in the Irish context has been shown to resist compliance with the interpretative theory presupposed under the non-substantive conception of the rule of law. I have argued that the non-substantive account cannot be instantiated as a result, because non-literal forms of interpretation simply do not fit. I have already shown that altering interpretative theory so as to better effectuate a fit between the interpretative practice and the ideal is akin to a fallback on the prevailing theory. That is, it makes no sense to jettison an adequate account of the interpretative practice because it does not suit the conception of the rule of law preferred in this thesis. The alternative, then, is to alter the ideal so as to justify it in light of that practice.

Margaret Jane Radin has suggested re-interpreting the ideal in order to transcend the dichotomy between substantive and non-substantive theories, arguing that the rule of law should be conceptualised as reflected in "pragmatic normative activity"[704], and not fastened to competing notions of how legal rules operate.[705] Radin seeks to avoid the tension between the mechanical jurisprudence implied under non-substantive conceptions and the creative adjudication sought under substantive conceptions, by arguing for an alternative "social conception" theory of rules.[706] Thus, she is dismissive of the formalist theory of rule application preferred under non-substantive conceptions of the ideal, yet holds that substantive

[704] See Radin, 'Reconsidering the Rule of Law', at 813.
[705] Ibid, at 787.
[706] Ibid, at 793.

accounts[707] do not go far enough in capturing the contextual, social conditions that shape interpretations and compel decisions one way or the other.

The "social conception" theory of rules argues that rules are neither determinate of particular situations nor do they exist objectively. Rather, rules are said to be dependent on the social circumstances surrounding their acceptance and practice and cannot formally realise in linguistic form.[708] This is a form of "rule-scepticism", a view which emphasises the indeterminacy at the point where rules are either followed or applied. This follows a Wittgensteinian conception of rule-like behaviour- the idea that to see and understand a rule, there must be some agreement that the practice is indeed a rule. [709] Thus, Wittgensteinian theory assumes that dispute and agreement are determinative of the rule, and not that the rule determines the fact of a dispute or whether there is agreement[710], as is assumed under the prevailing theory. [711] This has significant implications for the realisability of non-substantive conceptions of the rule of law as intimated above, as it poses difficult questions as to how, at the moment of judicial interaction with rules, such rules are applied or even recognised.

Thus, proponents of the social conception theory hold that if it is not conceptually possible to instantiate the rule of law in a legal environment which allows for judicial discretion, we must alter the ideal. In the context of statutory interpretation, then, the formidable role of context and the failure of formalistic interpretative theories of law prove motivating factors in propositions, like Radin's, for an alternative conception to the rule of law. Yet despite the focus on "use" as opposed to semantics, her re-interpretation of the rule of law fails in a similar way

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[707] In her account of substantive conceptions of the rule of law, Radin characterises Rawls' conception as substantive. Rawls' theory of the rule of law was discussed as a non-substantive account in chapter 1 and for the purposes of this thesis will remain so categorised. Radin's identification of Rawls' conception of the rule of law lies in the connection his formal requirements make with liberty in his theory of justice as farness; however, I maintain that such a connection with liberty is a positive by-product of instantiating the formal requirements of the rule of law. That is, the principles of the rule of law necessarily effectuate some degree of freedom, protecting legitimate expectations, or what Simmonds labelled "the interstices of liberty". Just because there is some value to the formal requirements of the ideal does not necessarily make it a substantive ideal as such. As Waldron succinctly puts it, "Principles of legality might have contingent rather than inherent moral value...", See Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response', (2008) 83 N.Y.U. L. Rev. 1135, at 1135.

[708] Radin, 'Reconsidering the Rule of Law' at 800-801.

[709] Ibid, at 798.

[710] Ibid, at 802.

[711] Ibid, at 798-801.

as do other substantive conceptions, as it offers little in the way of a practical application of a discrete ideal. As stated, Radin's rejection of the formal realisability of language acts as the operative factor in her rejection of non-substantive theories of the rule of law, but we have argued that formality in adjudication is not a necessary ingredient of such conceptions. Indeed, insofar as interpretative formality is stated as such a requirement, this is a misapplication of an interpretative theory rather than a correct reading of the rule of law.

Radin's rejection of the formalistic approach to the ideal is mistakenly based on the assumption that non-substantive accounts of the rule of law must be devoid of judicial inferences as to meaning in any event, and that interpretation, of itself, implies discretion. This assumes that the non-substantive conception of the rule of law needs to be instantiated in order qualify as an adequate conception of the ideal at all. That is, Radin's theory prescribes that in order for the non-substantive conception of the rule of law to be accurate, it must be instantiated fully. This is incorrect. This implicitly fuses the concept/ideal dichotomy outlined above. That is, the rule of law is an ideal of aspiration; something does not have to be internally realisable in order to qualify as a conception of it. Rather, there are competing conceptions of the rule of law which posit alternate means of instantiating the ideal; legal interpretation just happens to be difficult to reconcile with the non-substantive account.

Thus, altering the ideal to account for the non-literal interpretative methods offers very little in terms of squaring the rule of law with the realities of interpretation because any such alterations necessarily undermine formality as a central characteristic of the ideal. The expression "cutting off the nose to spite the face" is an apt description of the emasculating effect of such alterations to the ideal.

6.3.2 Living with the Tension: The Hart/Fuller Debate and the Rule of Law

The "open texture" of language has long been regarded as one of the core difficulties in placing limits on the interpretative freedom of judges; indeed, it is remarkable that the prevailing theory posits such a vacuumed theory of legal interpretation given the enormity of the debate over open texture. Hart and Fuller's debate on this issue is central to rule of law discussion, as the notion of legitimacy

depends on choosing between the alternatives of judicial discretion in the penumbra under Hart's account, and the text-bound nature of purposive interpretation as proposed by Fuller. Hart's claim that judges necessarily create meaning in an unconstrained manner proves an ill-fit with what we know about the Irish practice, whereas the resort to purposive interpretation under Fuller's theory appeals to the idea that the courts have some instinctive understanding of the intended application of the statute. Fuller's rejection of Hart's account of the core and the penumbra, in the context of the "no vehicles in the park rule", confirms this form of reasoning:

> If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park, or to save carefree strollers from injury, we know, "without thinking", that a noisy automobile must be excluded.[712]

Thus, Fuller's notion of purposive interpretation appeals to the intuition of the judge in finding what the case requires, rather than assuming Hart's position that straightforward "standard instance" meanings apply in the core, and discretion characterises penumbral cases. My line of argument throughout this thesis comports to Fuller's claim, because, as argued in my criticism of the prevailing theory in chapter 3, one must conceive of the application of the text at some level before meaning can be attributed to it.

The notion of the rule of law was central to Fuller's rejection of Hart's theory of the core and penumbra. [713] This is because Fuller regarded Hart's theory as implying there would be no room for reflecting on the purpose of law where judges or interpreters applied standard instance meanings individually and in abstraction in the construction of legal meaning.[714] Thus, the standard instance application of meaning under Hart's theory implies that the words of a sentence will have static

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[712] Ibid.

[713] Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' at 663-664.

[714] However, Schauer has argued that Hart's theory as to the open texture of language militates against such a conception of language and its application, intimating that Fuller's interpretation of Hart's argument was incorrect on this point. See, Frederick Schauer, 'An Essay on Constitutional Language', in Sanford Levinson and Steven Mailloux eds, *Interpreting Law and Literature, A Hermeneutic Reader*, (Northwestern University Press, Evanston IL, 1988), at 134.

meanings and will evince those singular meanings on their application.[715] This is inimical to the rule of law because, while certainty and predictability are central to the rule of law and linguistic certainty is necessarily intertwined within this, to argue that courts apply the standard instance meaning of words in borderline cases (which may not necessarily warrant the application of that standard instance of meaning) ignores the essential resort to purpose in seeking the objective behind a statute or rule.[716] My analysis of the prevailing theory and the necessary resort to purpose in discerning statutory meaning in chapter 3 is piquantly surmised by Fuller: "...is it really ever possible to interpret a word in a statute without knowing the aim of the statute?"[717]

Thus, Fuller's conception of purposive interpretation hints at the role of legislative intent as a normative standard for finding what the rule "ought to be" in reflecting on textual meaning in instances of interpretative difficulty.[718] This arises from Fuller's claim that interpretative issues almost never "turn" on figuring out the meaning of a single word.[719] In terms of our analysis of some of the decisions of the Irish courts this prescription is correct, insofar as word meaning merely offers a platform from which the judge exercises critical judgment, to which the role of statutory purpose is key. Despite the obvious purposive drive in Fuller's theory of interpretation, and his theory of law generally in *The Morality of Law*, he recognises that purpose can be used incorrectly and can, at times, extend too wide an interpretative licence to courts. The solution to the dangers of over-purposivism is to underline the importance of the concept of "structure" in the domain of purposive interpretation:

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[715] It has been suggested that Hart's theory overlooks one of the fundamental characteristics of language; the idea that we can understand sentences we have never heard before and do not have to consider of words evincing a standard instance in order to understand them. If it was a fact that the meaning of a word existed solely in the context in which it was used - the standard instance - we would not be able to understand each other in conversation because there would be no reflexive understanding of what Schauer calls the "compositional problem of language"- our intuitive understanding of how language actually works. See Frederick Scauer, 'A Critical Guide to Vehicles in the Park' (2008) 83 NYU Law. Rev. 1109, at 1120.

[716] Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' at 664, outlining the railway station scenario cited in chapter 3.

[717] Ibid.

[718] Ibid, Yet Fuller's argument only feeds into the sense that statutory purpose and legislative intent are different standards, but routinely, and misleadingly, interchanged. Presumably Fuller identifies purpose as a general interpretative attitude, and intent a normative indicator of meaning.

[719] Ibid. Dickerson has described this argument as the "one word, one meaning fallacy." See Dickerson, *The Interpretation and Application of Statutes*, at 44.

> A statute ... has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity. This is what we have in mind when we speak of "the intent of the statute," though we know it is men who have intentions and not words on paper. 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. Of course, the structure of which I speak presents its own "problems of the penumbra." But the penumbra in this case surrounds something real, something that has a meaning and integrity of its own. It is not a purposeless collocation of words that gets its meaning on loan from lay usage.[720]

It is implicit in Fuller's theory, particularly his writings in *The Morality of Law*, that this limiting structure and the fidelity to law that it entails is the ideal of the rule of law that the judge must observe when faced with an interpretative difficulty. While Hart's theory of standard instance meaning, on the surface, appears to mirror the focus on objective statutory meaning under the prevailing theory of statutory interpretation, Fuller's account of purposive interpretation is a more accurate description of interpretative practice in the Irish context, despite the fact that it is not rule-bound. Indeed, considering the traditional focus on non-arbitrariness under rule of law theory, Hart's allocation of judicial discretion in the penumbra is problematic, insofar as it is difficult to impose limits on such discretion. Fuller's focus on purpose, while consciously adverting to the dangers of ill-conceived purposive decision making, proves a better "fit" in applying the rule of law to interpretative difficulties, because of the implicit duty of "fidelity to law" that such interpretation requires.

This confirms the argument above that it is the interpretative theory presupposed under the prevailing theory of statutory interpretation, and not the conception of the ideal that it seeks to instantiate that needs to be re-conceived. That is, the non-substantive conception of the rule of law posited under the prevailing theory of statutory interpretation has been adjudged infeasible due to the problems of interpretation, not because there are inherent tensions within the rule of law. That is, ultimately, the ideal is irreconcilable with the necessary, albeit restricted,

[720] Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' at 670.

interpretative freedom that the judicial role requires. As stated from the outset, the rule of law is an ideal, a matter of aspiration. Legal systems can instantiate such ideals to a lesser or greater degree; thus, full compliance or absolute instantiation of the ideal is not realistic, but legal practices can be shown to comply with the ideal to a greater or lesser extent.

Indeed, given what we have learned of the nature of interpretation in the context of the Irish practice in the preceding chapters, the preference for structure and the purposive drive in Fuller's theory combines the appealing, constructive, element of Dworkin's theory with the Razian notion that the authoritative nature of text acts as a constraint. Having pinpointed this hybrid of constructive and intentional interpretative practice as a plausible description of the Irish position, the Fullerian approach to the interaction of rule of law and interpretation looks to be a compelling one. However, accepting the Fullerian notion that purposive interpretation respects the structure and authoritativeness of law does not circumvent the foundational problem that we have encountered in terms of rule of law instantiation. As intimated above, we are faced with living with the tension, accepting that the non-substantive conception of the rule of law cannot be instantiated in the manner presupposed under the prevailing theory of statutory interpretation.

Yet a combination of the constructive and intentional approaches to interpretation puts the interpreter on notice that he is not furnished with absolute interpretative discretion in the Hartian penumbra; rather there are things we can do with interpretation to impose limits on the judge in respecting the authoritativeness of the statute, and enhancing the degree to which the rule of law is complied with. The Fullerian notion of purposive interpretation in light of the rule of law validates this claim. The price is the admission that our legal system cannot instantiate the ideal in the manner that prevailing theory assumes, and, ultimately, the non-substantive conception cannot be instantiated at all.

6.4 Does Altering the Ideal Achieve Anything?

If we are to accept Radin's argument above that the ideal needs to be re-interpreted, some alterations might seem more acceptable than others in reconciling the

traditional model of the rule of law with the realities of interpretation. Recognition that the law necessarily entails some human interaction in interpretation, making it impossible to avoid contravening the "rule of laws and not of men" principle to a degree, is one such alteration. This is a minimal cost to the rule of law, merely recognising the fact that individuals have to make decisions, while retaining the core value of the non-substantive conception. Indeed, this might seem far more satisfactory than Endicott's proposition that the generality of rules and the vague nature of legal language act as a block to instantiation of the ideal.[721] In seeking to negate judicial arbitrariness Radin's alternative conception focuses on the judge as a legal actor of moral integrity.[722] From this point of view Radin's theory is quite Dworkinian, insofar as it identifies the judge as an eminently qualified individual for whom moral judgments are reserved and combines this with a pragmatic, as opposed to constructivist, interpretative outlook.

Following from our brief discussion of the Hart/Fuller debate above, it is clear that the amount of discretion or creative licence afforded to judges represents a tipping point between justifiable interpretation and judicial legislating.[723] Thus, the permitted interpretative licence represents a tensional balance between rule of law instantiation and the exercise of arbitrary power, given the amount of substantive, non-rule based decision making that occurs in penumbral cases.[724] As outlined in the previous chapter, Justice Scalia is one of the most vocal proponents of textualism; however, in *The Rule of Law as a Law of Rules* he is quite happy to accept that in certain circumstances judges must interpret or adjudicate beyond their textual exegesis and decide cases by forming general rules which are informed by the plain meaning of the statutory text.[725] Yet this implicitly acknowledges the role of non-literal interpretative methods in constructing statutory meaning, and the correlative proposition that such adjudicative methods can at least be orientated towards the rule of law. Given the association between substantive conceptions of

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[721] Endicott has argued that the necessarily vague nature of legal language and legal rules lends to the impossibility of realising the rule of law, See Endicott, 'The Impossibility of the Rule of Law', at 4.
[722] Radin, 'Reconsidering the Rule of Law' at 817.
[723] For a discussion of the line between interpretation and judicial legislation in the context of statutory interpretation see Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998', at 259.
[724] Tremblay, *The Rule of Law, Justice, and Interpretation*, at 35-36.
[725] Antonin Scalia, 'The Rule of Law as a Law of Rules', (1989) 56 U. Chi. L. Rev. 1175, at 1184.

the rule of law and non-literal forms of adjudication the implications of Scalia's argument above might identify substantive conceptions as more apt accounts of the interaction between judicial interpretation and concerns for the principles of legality and the separation of powers. I will now consider why this is not the case.

6.4.1 Revisiting the Emptiness of the Substantive Conception

In acknowledging that the threadbare account of interpretation under the prevailing theory cannot adequately describe interpretative practice, we must find whether a Dworkinian theory of the rule of law actually works in its attempt to reconcile the reality of interpretation with the ideal. That is, having argued that literal interpretation in the statutory context cannot work, this comes as a cost to non-substantive conceptions of the ideal. As outlined in chapter 1, Dworkin's attempt to bring non-rule-bound forms of adjudication within a conception of the rule of law is borne out of an effort to expand rule of law theory, and partly out of an attempt to legitimise such principled adjudication, or at the very least insulate it from claims of illegitimacy.

However, as has been maintained throughout this thesis, in its expansion the rights conception of the rule of law and other substantive accounts lose those characteristics that denote the rule of law as a discrete legal entity. In order to reconcile interpretation with the rule of law we are faced with a choice between accepting the Dworkinian rights based approach to the ideal, and losing those characteristics that make non-substantive accounts of the rule of law valuable, or making alterations to the non-substantive conception to cope better with the reality of judicial interpretation. Rather, I advocate that just because or interpretative practices are not accountable to the rule of law does not make them illegitimate, neither does it reduce the rule of law to obsolescence.

In analysing statutory interpretation it has been shown that literal interpretation cannot occupy the default mode of interpretation in instantiating the ideal. Instead, in the resort to purpose, judges attempt to articulate an approximate statutory meaning to the "objective" statutory meaning they are required to discern under the prevailing theory. This is not to say that rule of law requirements are systematically undermined in the processes of statutory interpretation. Rather, per

Fuller's argument, in the resort to purpose the courts adjudicate with one eye on the principle of legality or the rule of law. Yet in pointing to the dissonance between interpretative reality and the conceptualisation of interpretation necessitated under the prevailing Irish approach, adopting Dworkin's account of the ideal does not realise the ideal further. The prevailing theory of statutory interpretation is premised on the notion that the courts ought to accept a rule-bound conception of the rule of law by applying legislation as it is drafted. Dworkin's theory of the rule of law, on the other hand, is concerned exclusively with moral rights. While Dworkin's theory accurately depicts the interpretative work of the courts, the criticism outlined in chapter 1 must be re-iterated - his conception of the rule of law communicates a different breed of the ideal, it cannot address the tension between the semantic concerns under non-substantive conceptions of the ideal, and the reality that statutory interpretation, in practice, does not map how it is conceptualised in theory.

Waldron claims that Dworkin's theory of the rule of law works best when read as a proceduralist theory[726] focusing on what the judiciary do or how they arrive at the right answer in a hard case, as opposed to what decision the judge arrives at under a purely rights-based conception[727] Essentially, then, Waldron interprets the right answer thesis not as a means of defending the position that there is always a right answer in hard cases, but that it is a focus on the procedural nature of legal argumentation,[728] which effectuates the rights conception of the ideal:

> A society ruled by law, according to Dworkin, is a society committed to a certain method of arguing about the exercise of public power. A society shows its allegiance to the rule of law by dint of its commitment to asking certain questions and approaching them in the right way. And it is distinguished, ultimately, from societies that lack such a commitment not to

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[726] Insofar as Waldron labels this "proceduralist", we can assume from Paul Craig's influential article on the issue that the term proceduralist does not intimate the same or similar characteristics as that espoused by formal conceptions of the rule of law, see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework', *Public Law* (1997), 467, at 467.

[727] Waldron, 'The Rule of Law as a Theatre of Debate', at 320.

[728] Ibid, at 328.

> the substance of what it does substantively respecting moral rights, for example- but by the procedures it unflinchingly follows.[729]

Yet, similar to our criticism of Fiss's notion that procedures constrain the judiciary in their interpretations in the last chapter, Waldron assumes that the preservation of the integrity of judicial procedures necessarily protects the rule of law, without defining exactly what those procedures do, and how they interact with interpretation. Thus, while Waldron's argument here captures something about the nature of legal argumentation, adjudication and law in general, it is hard to accept this as an account of the rule of law.

Indeed, if we are to accept Dworkin's conception of the rule of law, we are implicitly accepting what Raz has termed as the idea that the rule of law is the rule of good law. It is clear that certain cases, or certain instances of statutory interpretation, will instantiate the rule of law to a higher degree than others, but this is not to say that the rule of law is never complied with. The interpretative aspect of certain cases is often minute; and in other instances requires activist judicial labour. Instead it is better to recognise another one of Raz's many contributions to the debate and accept that the rule of law - while invoked as a legitimating slogan representative of the value of legal systems it is but one political ideal or value present in that system, and at times can be placed aside in the interests or in balancing other ideals or values.[730]

In light of this, taking the Razian option is preferable. We should not have to alter our conception of what the rule of law is in order to feel better about the possibility of its instantiation in our legal system. Rather, it must be acknowledged that the practice of interpretation in the statutory context, while in theory presented as complying with the non-substantive conception, does not bear through in practice. In light of this ill-fit, what looks, in theory, like a perfect application of the ideal to a routine practice of the courts should not blind us to the reality of that practice. It must be accepted - as proposed by Endicott - that the rule of law is unattainable because altering the ideal in order to fit with interpretative reality emasculates the rule of law, and what makes it valuable in the first place. Indeed, as

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[729] Ibid, at 330.
[730] Raz, *The Authority of Law*, at 228.

outlined above, it is better to have a clear notion of what the rule of law entails and be satisfied that in the face of judicial interpretation it is impossible to instantiate the ideal completely, than suggest alterations and assigning considerable substantive content to it in an attempt to make it more palatable.

6.5 Does Interpretative Practice Comply with the Ideal?

While it has been an aim of this thesis to point to a series of internal incoherencies in the standard presentation of statutory interpretation, and the effect of those inconsistencies on realising the conception of the rule of law proposed under that account, I have not claimed that the courts do not attempt to instantiate the rule of law. As suggested, the rule of law is an ideal which can be achieved to a lesser or greater degree, depending on the legal system in question. In light of this, it is hardly controversial to argue that the Irish courts in their routine interpretations most likely do instantiate the ideal to a greater degree. However, the interpretations of the Irish courts in the statutory context do not and cannot instantiate the conception the rule of law as proposed under the prevailing account for two simple reasons: first, because the theory that requires literal interpretations does not make sense on its own terms, and secondly, because the role of statutory purpose plays a more foundational role in the interpretative practices of the courts than assumed.

Indeed, it may be that the ideal itself is a chief contributing factor in the failure to identify an operative conception of the rule of law in our legal system. Tremblay has suggested that the range of generalities within the ideal lead its indistinct nature; and its status as a juridical-centric ideal only exacerbates this uncertainty given the immiscibility of interpretation and formal rules of law.[731] This may very well amount to the most practical explanation for why the prevailing approach to statutory interpretation does not instantiate the conception of the rule of law which inhabits the core of the theory:

> ...the main reason why orthodox constitutional theory is unreliable lies in its positivist epistemological postulates. According to these postulates, a given legal doctrine is true if its main propositions correspond to a subset of valid material rules of constitutional law laid down in recognised legal sources

[731] Tremblay, *The Rule of Law, Justice, and Interpretation*, at 23.

> such as the constitution, a statute, or a case. These sources should constitute the sole legitimate set of empirically observable, intelligible and meaningful, neutral and independent reference points from which a given representation of law may be constructed and its validity verified. The problem, however, is that we cannot find in these sources any material rules of constitutional law objectively corresponding to the various explicit conceptions of the rule of law. As a set of empirical facts, the sources appear chaotic ... one can easily identify a number of specific elements related to some versions of the rule of law. But these elements may loosely support almost any conception of the rule of law.[732]

Taking into account the claim that the prevailing theory of statutory interpretation offers a constitutional justification for the non-substantive conception of the rule of law; and my critique of the innate link presupposed between the separation of powers, legislative supremacy and the literal rule in light of this claim, Tremblay's argument may be quite compelling. That is, theoretically at least, the nexus presupposed between the separation of powers, legislative supremacy and the default position of literal interpretation in the statutory context makes sense when routine statutory interpretations are rationalised in light of a theory of democracy. However, Freeman has noted that the theory is merely a "chimera" given the failure of literalism in the face of indeterminacy.[733] Thus, it may be that the innate idealism espoused in the rule of law makes it difficult to realise in any concrete fashion.

Yet, it is difficult to ignore Endicott's argument that the ideal is unattainable because of the chimeric character of the ideal in its non-substantive form. This is because the notion that the rule of law should be modified in order to legitimise judicial activism or interpretation generally has been rejected. Rather, certain features of legal practice, interpretation chief among them, undercut the ability of legal systems to instantiate the rule of law, confirming Fuller's claim in *The Morality of Law* that the rule of law features inherent in the internal morality of law are ultimately a matter of aspiration.

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[732] Ibid at 25.

[733] Freeman, 'Positivism and Statutory Construction: An Essay in the Retrieval of Democracy', at 16.

At the beginning of the chapter it was argued that the unattainable nature of the non-substantive conception of the rule of law leaves two options in the attempt to square the ideal with interpretative practice. The first is to alter the ideal, attenuating the distinction between non-substantive and substantive conceptions, the second option being to accept that there is an unavoidable tension between the non-substantive conception and creativity in interpretation, and that we must live with the disconnect. For reasons outlined in chapter 1, the second option is preferable. It is better to have a clear idea of a significant political ideal such as the rule of law than profess that upholding the rule of law necessarily upholds the good, as this inevitably denigrates the actual values that the ideal represents. It is better to know that the rule of law cannot be instantiated fully in the face of our interpretative practice, instead of attempting to make the ideal amenable to our interpretative practices.

In chapter 5 it was claimed that the prevailing theory does not accurately represent the manner in which the courts interact with legislation. There is a necessary co-dependent relationship between reader, text and context in the construction of statutory meaning. However, while statutory interpretation is necessarily creative, the Irish courts endeavour to constrain their interpretative practice to the intentions espoused in the statutory text as much as possible - that is, the courts consider the intended meaning of the enactment. The ramifications of this account of interpretation, as shown, are that the claims under the prevailing theory have been falsified. Yet my argument does not alter reality drastically. Rather, in the attempt to discern the intentions of the legislature through a text reflective interpretative scheme, the interpretative practices of the courts are loosely approximated to the non-substantive conception of the rule of law because, although non-literal, the courts endeavour to articulate the intended meaning of the statutory text. Indeed, this underscores the idealism at the heart of the rule of law - it is not supposed to be fully realised.

Trying to constrain interpretation is valuable in itself, and my arguments in chapter 5 have shown that while literal interpretation does not work and the courts do not access a pre-determined statutory meaning, the inclination towards text-centric intention shows that the courts at least attempt to instantiate the ideal. Even

if this is nowhere near realising the ideal as we encounter it under the non-substantive conception, our interpretative practice is shown, at least, to aspire to that perfection.

Conclusion

At the outset of this thesis it was suggested that the rule of law is most commonly envisaged as a legal ideal that guards against arbitrary state interference by ensuring the clarity and predictability of law. Yet the necessary tension between judicial interpretation and rule application complicates this scheme. In an attempt to resolve this tension the thesis combines an analysis of the debate on the rule of law ideal with an examination of the prevailing theory of statutory interpretation in Ireland, which is said to uphold a non-substantive conception of the rule of law. The thesis proceeds on foot of three inter-related claims in light of this; first, that the non-substantive conception of the rule of law envisaged in the prevailing statutory theory is the only analytically discrete manifestation of the ideal, secondly, that the prevailing theory of statutory interpretation cannot instantiate this ideal - because interpretative reality is utterly irreconcilable with the interpretative theory necessitated under the non-substantive conception of the rule of law - and thirdly, that the default interpretative approach of the Irish courts is purposive.

There is no question that the rule of law is a valuable legal ideal. Yet the difficulties in its instantiation indicate a necessary limitation in its application and use. As outlined at the beginning, this thesis proposes to retrieve the rule of law from rhetoricians and identify an analytically discrete application of the ideal. The thesis is uncompromising in its description of the rule of law as a formal or instrumental theory of government by rule. There is no shame in that, as the area of statutory interpretation - particularly as rationalised under the prevailing Irish account of the practice – purports to apply a non-substantive conception of the rule of law in every routine instance of interpretation. Yet the notion of judicial interpretation is not attuned to compliance with the rule of law in its non-substantive guise, irrespective of how insulated it purports to be from activism or discretionary methods. There are necessary costs to the rule of law when we accept that judges routinely produce meaning at some level. In rejecting the substantive approach to the ideal the thesis has aimed to tease out whether the rule of law and interpretation are fundamentally irreconcilable. In answering this question in the affirmative, two necessarily pillars of thought are essential and must be borne in mind. Those being, first, we should not lie to ourselves about the nature of

interpretation and the determinacy of legal texts in order to feel better about legitimacy and concerns as to the role of the judge, and second, that we should not have to dramatically re-interpret long standing ideals in order to assuage these anxieties.

Conceptualising statutory interpretation as an insulated judicial discipline of formal integrity is an attractive notion. It makes lawyers feel good about themselves. Indeed, it confirms everything law students are initially told about law and its determinacy. However, the determinate picture of statutory interpretation presented in the prevailing theory is steeped in lawyerly pretension - the notion that it is good to always play by the rules. While this thesis maintains that preserving legitimate expectations and the predictability of law in legal systems which aspire to the rule of law are good things in themselves, to posit that the rule of law is realisable in the fashion posited under the prevailing theory of statutory interpretation is undesirable.

Yet this thesis has advocated that we should persevere with this formalistic notion, in spite of its inability to provide for the vagaries of interpretation. This is due to my belief that it is better to be able to know the value that rule of law represents and its inherent limitations, rather than pretend it is something it is not. Indeed, the same position applies to interpretation and interpretative practice. I have argued that while courts in certain circumstances will not have to expend great amounts of interpretative effort in applying statutory meaning, the judiciary should not be expected to observe the formality presupposed in the prevailing theory. This is not a new argument, yet its application to the context of statutory interpretation in Ireland is valuable, because it asks necessary questions about the true nature of statutory interpretation. While purpose is acknowledged as an important interpretative device in the prevailing theory, this thesis has argued that the reasoning processes of the judiciary betrays an underlying purposive method, even in cases which do not appear to require any reasoned elaboration. This alone should force us to re-think how we conceptualise the processes of statutory interpretation, as it devalues the constitutionally mandated role attributed to literalism in the statutory context.

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