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THE CANADIAN LIVING TREE DOCTRINE: A RECONCILEMENT BETWEEN THE PAST AND THE PRESENT IN CONSTITUTIONAL INTERPRETATION

A DOUTRINA DA ÁRVORE VIVA CANADENSE: UMA RECONCILIAÇÃO ENTRE O PASSADO E O PRESENTE NA INTERPRETAÇÃO CONSTITUCIONAL

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Resumo

Este artigo tem como objetivo abordar a questão das restrições à interpretação constitucional à luz da metáfora da Árvore Viva do Direito Constitucional Canadense. Ele examina ainda essa doutrina em contraste com as doutrinas do Originalismo e da Constituição Viva, desenvolvidas nos Estados Unidos. Concluindo, o artigo reconhece que a metáfora da Árvore Viva tem o mérito de propor uma conciliação entre rigidez e flexibilidade na interpretação da constituição. No entanto, a fim de transmitir mais objetividade e restrições à interpretação, ela deve estar associada à consideração dos precedentes e do incrementalismo (jurisprudência evolutiva).

Palavras-Chave: Constitucionalismo Vivo. Metáfora da árvore viva. Originalismo. Restrições interpretativas.

Abstract

This paper aims to tackle the issue of constraints to constitutional interpretation in light of the Living Tree metaphor from the Canadian Constitutional Law. It further scrutinizes this doctrine in contrast to the Originalism and the Living Constitution doctrines developed in the United States. As a conclusion, the article acknowledges that the Living Tree metaphor has the merit for proposing a reconciliation between fixidity and flexibility in interpretation of the constitution. Nevertheless, in

order to convey more objectivity and constraints to interpretation, it should be associated with consideration to precedents and incrementalism.

Keywords: Living Constitutionalism. Living Tree metaphor. Originalism. Interpretive constraints.

1. INTRODUCTION

This paper aims to tackle the issue of constraints to constitutional interpretation in light of the living tree metaphor from the Canadian Constitutional Law. It is often assumed that entrenched constitutions are drafted to endure and normally adopt texts that have a broad significance. These factors combined can lead to a good deal of discretion on interpreting the constitution. Does the leaving tree doctrine offers sufficient constraints to judicial discretion in Canada? Would it in Brazil?

First of all, it is worth putting a simple question: do we live under a solely federal constitution in Brazil? Maybe the majority of people (including jurists) will say that it is. But in a certain sense this answer is wrong. A simple model of adjudication would argue that easy cases maybecan be covered by already existing rules, whereas hard cases involve legal gaps that should be bridged by judges in a quite discretionary way. By doing so judges create new law almost like legislators.

This is the reason why there are approaches in order to constrain discretion in interpreting the constitution. These proposals usually try to design an interpretive mechanism destined to limit judicial discretion (FARBER; SHERRY, 2009, pg. 26). However, they sometimes make the mistake of adhering to opposing views of constitutional interpretation and adjudication: or they are artificially limited or they are purely political.

In spite of many reasons favouring its growing adoption in the world, judicial review has been suffering from a legitimacy crises in many jurisdictions, including in Brazil. This phenomenon has been coined by BICKEL (1962) the “countermajoritarian difficulty”. It focuses on non-elected judges striking down legislation passed by parliament in an unconstrained or little constrained way. As stated by SHAPIRO (2013), the most powerful of the problems concerning judicial review is to reach a balance between judicial independence and responsability.

This normative challenge to judicial review has been strengthened by constitutional law scholars arguing that judicial review asserts itself contrasting the elected branches. As such, it would be under suspicion in a democracy. (GINSBURG, 2003).

Therefore, it should be acknowledged that judicial interpretation of the constitution can be at the same time flexible (discretionary) and principled (constrained by law). This seems to be the proposal of the Canadian Living Tree doctrine. Before we assess the living tree doctrine, we will discuss the Originalism and the Living Constitutionalism doctrines developed in the US in order to later draw a contrast with the Living Tree doctrine.

1.1. Objectives of this paper

The major aim of this article is to investigate if the living tree doctrine applied to brazilian judicial review would offer sufficient constraint to interpretation of the constitution. Or, if the answer is no, what would be effective as a constraint or as constraints upon discretion in judicial review of legislation.

1.2. Methodology of this paper

The methodology of this paper is theoretical. By literature review, it scrutinizes a good share of scholarship about interpretation of the constitution, Originalism, Living Constitutionalism, Living Tree doctrine, precedents and incremental interpretation of the constitution. The sources of research are majorly secondary ones (papers and books).

2. ORIGINALISM

Originalism is credited to the former justice of the Supreme Court of the United States (SCOTUS) Robert BORK (1997), especially in his text *The Tempting of America* (1997). However, other U.S. jurists tell that Originalism was present since the promulgation of the U.S. Constitution. Justice John Marshall, for instance, displayed originalist thoughts referring to the constituent`s intentions in his opinions, even in *Marbury v. Madison* (WILKINSON III, 2012).

Originalism argues that the best guide to interpreting the Constitution is seeking

what the drafters thought about the specific issue, a kind of *mens legislatoris* (meaning of the legislator). The great dilemma relating to the constitution (after BORK) is that in the American constitution two principles in tension must be accommodated: on the one hand, the power of majorities; on the other hand, the liberty of minorities. Courts exist in order to maintain balance between both of them.

According to Bork's view (BORK, 1997), only adherence to original conceptions of drafters would allow courts to act in a neutral basis. Following this reasoning, what matters most is how the constitutional text was understood at the time it was enacted. He even argues that in order to discover this meaning the interpreter should revolve the debates in the conventions at the time, public discussions, newspaper articles, dictionaries in use at the time, and the like.

Undeniably, Originalism has a great virtue in trying to constrain judicial discretion and thus keeping the judiciary branch legitimacy. It advocates that judges should not use their own values in interpreting the constitution. Thus, in order to be legitimized, judicial interpretation of the constitution should be grounded on historical sources and not on subjectivism.

On the other hand, it can be argued that Originalism fails roughly because of its artificialism, since it does not consider that law evolves together with society and that the search for original intent of the drafters can lead to absurd decisions from the contemporaneous standpoint.

Another important contender for Originalism was the late SCOTUS justice Antonin SCALIA (1998). He argued that Originalism (that he nominates textualism) is seen by some jurists as rude or pedestrian. But, the argument follows, it is anything but that. In order for one to be a good textualist, she must not be so limited in order to ignore the wide social purposes to which a law is enacted; or not too shallow to acknowledge that new times require new law. According to his thought, one should only understand that judges have no authority to seek those wide purposes or re-write the law.

Constitutional interpretation, after SCALIA's reasoning (SCALIA, 1998), is special and distinct not because there are specific principles that apply to it, but because common principles are applied to a text that is not common. In textual interpretation context is everything and constitutional context, according to his view, tells us that we should not expect it to be so thorough and to give words and sentences a broad interpretation. But this does not mean that it can be interpreted transcending

the limits of the words (SCALIA, 1998).

He invokes as an example the 1st Amendment to the U.S. Constitution, that forbids abridgement of freedom of speech and of the press. This sentence does not cover all forms of communication, certainly. For instance, written letters are not speech nor press. Nevertheless, no doubt they should be protected, contends SCALIA (1998). In this context, speech and press, the two most common forms of communication, act as a metaphor for all kinds of communication. He argues this is not strict interpretation, but a reasonable one. SCALIA (1998) synthesizes his thought arguing that what he seeks into the Constitution is exactly the same he seeks in acts: the original intent of the text not what its drafters wanted it to mean (SCALIA, 1998).

He argues that the great hallmark on constitution interpretation is not the difference between intent or will of its drafters or the objective meaning, but the difference between original meaning and contemporaneous meaning. And he fiercely criticizes what he calls the ascending school of constitution interpretation, that argues for the existence of a living constitution, a law that grows and changes from time to time, in order to approach the needs of society in constant change (SCALIA, 1998). He also contends that it cannot be said that a constitution suggests mutation. On the contrary, its general purpose is to block change, entrenching rights to which new generations should abide.

In acid critique to the doctrine of Originalism, SUNSTEIN (2009) speculates what could happen if the SCOTUS would interpret the constitution in an originalist basis: gender discrimination by the states would be acceptable; the federal government could discriminate on a racial basis, once the Equal Protection Clause of the 14th amendment, that forbids this kind of discrimination, according to its text, applies exclusively to the states' governments. Actually, state governments could impose racial segregation, once the mentioned clause was not interpreted in order to prohibit it until 1954, in Brown v. Board of Education. And probably, argues SUNSTEIN (2009), the states would be allowed to establish official churches.

Besides that, a problem about the originalist approach is that judges are not prepared for such historical researches. Maybe it is a task that better fits historians than legal professionals. This difficulty or even impossibility of judges undertake historical research, as well the absurdity of decisions based on pure Originalism, instead of reducing discretion could indeed end up by increasing it.

Besides, Originalism rises an intergenerational undemocratic issue. The claim

is that if a constitution is to be interpreted “frozen” in time or guided by the “dead hand of the drafters”, new generations will have no democratic liberty to decide their destinies, because they are constrained by decisions taken decades or even centuries before by people long dead.

For all those reasons, Originalism is quite a problematic interpretive doctrine. It offers no secure basis of interpreting constitutions, let alone constraining judges exercising judicial review.

Another constitutional interpretation doctrine well developed in the U.S. Constitutional Law is the Living Constitutionalism doctrine. Let us explore it in the next chapter of this paper.

3. THE LIVING CONSTITUTIONALISM

Endorsed by William J. BRENNAN JR. (2014), the Living Constitutionalism doctrine argues that constitutional interpretation should consider the meaning of the text at the time of interpretation. Thus, it rejects interpretation based on the framer`s intents or the text’s original meaning and argues that justices read the constitution the only way they can: as twentieth-century americans (BRENNAN JR., 2014). The theory upholds that when the political process fails, judges should enforce the values of contemporaneity. Constitution is in unstoppable evolution and update, once it is alive, dynamic and not static.

Despite its virtue in understanding the constitution as a living being and as such adaptable to new realities, this theory has a great weakness that is the lack of constraints to judges in interpreting the constitution’s words. This lack of constraints undermines the elected branches’ role and lead to a false idea that the judiciary branch will have a remedy for every problem pending a solution in the political arena.

As remarked by WILKINSON III (2012), the supporters of Living Constitutionalism seem to treat the constitution as a solely propriety of the judiciary branch, *i.e.*, the other branches are not called in to have a share on interpretation. He then raises the question if a non-elected branch can be trusted to spot the social values in a given time and place.

It looks as if BRENNAN`S (2014) Living Constitutionalism accepts the premise that a few enlightened jurists know what is better for millions of people. A problem here is the broad discretion granted to judges in interpreting the constitution. It entitles

unelected officials to interpretation and application of open-ended provisions. This takes from the people the task of giving an answer to fundamental moral and political issues – the “discretion problem” (WALUCHOV, 2011).

As well as Originalism, Living Constitutionalism fails in offering consistent basis for interpreting the constitution. If it has the virtue of conceiving constitutions as bodies of law in permanent mutation, it offers no response to the discretion problem.

Shall we now move forward toward the core of this article, the Canadian Living Tree doctrine.

4. THE CANADIAN LIVING TREE DOCTRINE

The Living Tree doctrine is adopted by the Supreme Court of Canada and displays quite unique features that can be contrasted to the aforementioned Originalism and Living Constitutionalism. The Living Tree doctrine is one of the successful aspects determining the prestige of the Canadian Supreme Court in the world.

It is a quite particular model of evolutionary constitutional interpretation. The Living Tree interpretation of the constitution is usually defined in terms of its incompatibility with what is understood in Canada to be the central commitment of originalist interpretation: that the constitution is, in some sense, "frozen" at the moment of its adoption (MILLER, 2009).

The Supreme Court of Canada has repeatedly asserted that the language of the constitution is not to be frozen in the sense in which it would have been understood in 1867 (HOGG, 1987). The Living Tree metaphor was first adopted in *Edwards vs. Canada* (1929), known as the «Person’s Case», by Canada`s highest court at the time, the Privy Council in Britain.

It is worth clarifying that for eighty years after Confederation, Canada’s legal system functioned as a shadow replica of England’s legal system. England’s laws became Canada’s laws. The Canadian Parliament and legislatures passed their own laws in this post-colonial period. And those laws were often uniquely Canadian, as a result of Canadian realities and the country’s federal status (DODEK, 2016).

But the common law of England, private and public, was the common law of Canada, and Canada’s judges applied English law. Canada’s final court of appeal was the Judicial Committee of the Privy Council, sitting in Westminster on the banks of the Thames. The Supreme Court of Canada – which, befitting its secondary status, wasn’t

created until 1875 – was just a stop on the way to London, when it was not bypassed altogether. Only in 1949, with the abolition of appeals to the Judicial Committee, did the Supreme Court of Canada become Canada's final court of appeal (DODEK, 2016).

Back to the "Person's Case", after analyzing the Constitution's use of the term 'persons', which had always referred to men, the Judicial Committee of the Privy Council decided that men and women should henceforward be considered persons and therefore could be equally called to sit in the Canadian Senate.

According to the historically celebrated words of Justice Sankey in the case, constitutional stability and integrity play a key role in interpretation of the constitution. Nevertheless, it planted in Canada a living tree able to grow and expand within its natural limits. The fact that women had not been entitled to vote or hold office in 1867 does not mean that understanding cannot change. As time changes constitutioninterpretation must also change (PIERDOMINICI, 2017).

The Living Tree Doctrine has since then been endorsed several times by the Supreme Court of Canada in interpreting the constitutional text. It has become a major method of constitutional interpretation when the Supreme Court of Canada enforces constitutional rights and decides upon separation of powers. In addition to that, it is associated with a progressive and purposive teleological construction of the Charter of Rights and Freedoms (PIERDOMINICI, 2017).

The doctrine allows interpretation in order to recognize that Canada`s Constitution can change and evolve over time, but acknowledging its own limits. The doctrine aims to balance two apparently opposing aims in constitution interpretation: predictability and flexibility. If interpreted in disregard of its flexibility, the meaning of the Constitution would be frozen in time, tending to obsolescence. The doctrine proposes the identification of purposes and goals of the Constitution in order to provide them with modern significance.

There are some well-known examples of its adoption in Canadian Constitutional Law. It led the Supreme Court in 2004 to interpret Section 91(26) of the Constitution Act 1867 in order to allow same-sex marriage. It also led the Court in 2005 to include maternity leave in the competence transferred to the federal parliament in 1940 on 'unemployment insurance'. The Court then highlighted that Parliament considered unemployment to be an historical urgent national problem. It also reasoned that over time numerous amendments were made to the original Act in order to expand qualifying conditions, increase benefits and eliminate inequities'. As a result, this had to include

maternity leave (PIERDOMINICI, 2017).

Besides being adopted by Canada Supreme Court in many occasions, the Living Tree as an interpretative doctrine was formally endorsed by Canadian constitutional scholars.

There are four central commitments to the Living Tree Constitutionalism in Canada: (1) the doctrine of progressive interpretation; (2) the use of a purposive methodology; (3) the absence of any necessary role for the original intent or meaning of framers in interpreting the constitution; and (4) the presence of other constraints on judicial interpretation (MILLER, 2009).

Progressive interpretation is meant to be a way of interpreting the constitution adapting it to the needs of the interpretation moment. It is opposed to Originalism. Constitution meaning should continuously be adapted to new concepts and ideas (MILLER, 2009). Progressive interpretation in Canada has been used as a means of updating constitutional interpretation accordingly to technological developments that did not existed back in 1867. As examples, the telephone, radio, television, modern labour relations, the professions, business in general, the elaborate systems concerning the welfare state have been litigated in courts, and decisions have been given in a progressive way (HOGG, 1987).

Purposive interpretation means that every right or freedom is “purposive”. The Court stressed that the Charter is supposed to be interpreted in order to fulfill the purpose of being interpreted so as to securing for individuals the full benefit of the Charter's provisions. It is a kind of teleological meaning (MILLER, 2009). Although it may seem trite, this principle is sometimes forgotten because of a certain tendency for the interpreter to focus on individual words or phrases disregarding that they are within a context. The purposive approach is also useful in interpreting words that are especially vague or ambiguous (HOGG, 1987).

The third feature of Canadian living tree constitutionalism lies on the assumption that the original meaning of the words play a role in interpretation of the Constitution. The traditional Canadian conception about it is that original intentions or interpretation may be taken into consideration. However, they do not bind the interpreter (MILLER, 2009).

A fourth feature of the Living Tree Doctrine is that it does not disregard other constraints to judicial discretion, such as precedents.

The doctrine offers an important view of constitutional interpretation. A tree is

attached to its roots and so must be constitutional interpretation – constrained by the words of the constitutional text. At the same time, a living tree grows and expands and this means that constitutional interpretation also has to develop and consider the needs and comprehension of the present moment.

However, the question remains : how can constitutions, as living trees, be consistent with the existence of rules that can safely be applied without fresh official guidance or weighing up of social interests ? The answer may be in common law and its combination of fixidity and adaptability (MILLER, 2009).

In contrast to the American metaphor of a "Living Constitution," or the Australian term, "Living Force," the Living Tree metaphor alludes to roots as well to growth (WALUCHOV, 2005). Underlying it there seems to be a connection with previous decisions and more constrained choices (JACKSON, 2006).

Actually, progressive interpretation does not tell what is being adapted to the present moment, what elements of the reality require the adaptation, the boundaries of adaptation, for instance. It does not give us an account of how the realities are to be accommodated. The doctrine claims that courts should adapt the Constitution to new conditions and new ideas.

Nevertheless, what conditions and what ideas? One important thing to consider is that from the Constitutional Court Jurisprudence it can be inferred that change means change to legal rules, not semantic meaning (MILLER, 2009). We can identify two modes of change regarding legal rules interpretation.

The first are changes brought about by technology and the consequences it brings to social life. As these new technologies could not have been foreseen by the drafters, they have to be considered in interpretation. So, if a Constitution enacted before the internet protects correspondence, interpreted today, this protection should apply to e-mails, even though this technology could not have been considered by the drafters.

Another type of and a much more controversial social change are the ones that involve moral issues. As an example, imagine a constitution that was drafted decades ago and contains words protecting marriage. Interpreted today, is it to be understood in a way that same sex marriages are also protected by the norms of constitution? This kind of change in interpretation is quite controversial and maybe it is exactly here that lies the opposition Originalism x Living Tree.

The issue is exactly how much interpretive license the Living Tree doctrine is

understood to permit judges interpret the constitution. The doctrine says that constitutional text can be interpreted in light of new and unforeseeable realities. However, it does not mean that it can be interpreted in order to mean anything its words may bear. The issue is exactly to establish the boundaries of acceptable interpretation. Living Tree interpretation somehow gives room to increasing uncertainty (HUSCROFT, 2006). It can be argued that based on it Canada Supreme Court reads rights that are not found in the Constitution nor can be implied by its text (HULBURT, 1998).

This is a discretion problem and the Living Tree Doctrine does not seem to give a sufficient response to it, even though it ascertains that a living tree grows and expands but never detaching from its own roots.

5. THE INSUFFICIENCY OF INTERPRETIVE DOCTRINES TO EFFECTIVELY CONSTRAIN DISCRETION. ADHERENCE TO PRECEDENTS AND INCREMENTALISM

In the attempt of bestowing more rationality, security and constraint to interpretation of constitutions, jurists and courts have formulated interpretive doctrines and theories. Underlying these theories are the assumptions that constitutions admit broad interpretation and are normally enacted to endure over decades or even centuries.

The meaning of constitutions is frequently controversial and these controversies normally end up being decided by courts. Constitutional rights depend on what courts say and courts do not always say what they have said before or even act in a coherent way. This raises the question: is objectivism possible in constitutional interpretation and judicial review? Objectivism in constitutional interpretation means that interpretation should be somehow constrained.

Judicial review is a complex process because the legal interpreter extracts norms from abstract words. Uncertainties of words increase the interpreter`s discretion, which means that she will reach a normative result from a choice among multiple possibilities (KUBOTA, 2012, p. 398). If we don’t seek interpretive constraints, we will be completely at the mercy of each judge’s subjective interpretation.

As it has been put, courts and scholars have come up with some interpretive formulations in order constrain judicial discretion. They sometimes believe that the application of their favourite method will automatically give correct and undisputable

answers to complex constitutional issues. By adopting those methods, judges and scholars aim to reduce uncertainties inherent to constitutional texts and therefore limit discretion on interpretation.

WILKINSON III (2012) ironically names these theories *cosmic constitutional theories*. He argues that just as Freud tried to lift the veil of human mind and Einstein tried to find the misteries of the universe, these interpretive theories aim to unveil the misteries of constitutional interpretation.

Certainly, the aforementioned interpretive doctrines are ingenious and have greatly contributed to bringing new elements to discussion on constitutional interpretation. Each of them is contended by important scholars and legal practitioners. Nevertheless, they are not enough ir order to convey objectivity, predictability and certainty to interpretation of constitutions.

Surely, interpretation of the constitution must encounter some internal and external boundaries. However, this does not mean that theses boundaries lead to indisputable anwers for all and every case. Specially in hard cases, reasonable lawyers and scholars can disagree on interpreting constitutional texts.

It is not possible to constrain judicial discretion by giving judges a recipe or a handbook to solve constitutional cases. Instead of ascribing to judges how they could solve constitutional cases, we should rather try to scrutinize how they could decide in a constrained way. This is how judicial review legitimizes itself.

Then, besides scrutinizing interpretive doctrines in order to assess if they are able to convey constraints to interpretration of the constitution, we should push further and try to scrutinize other forms of judicial constraints.

It is acknowledged that interactions between constitutional text and the norms that derive from it can be pretty ambiguous. However, the broad interpretive spectrum of constitutional texts can be constrained by precedents preventing judges from doing or undoing rules as they please. As such, precedents are a force towards objectivity, uniformity and consistency in judicial rulings (CARDOZO, 2014). An appex court`s decisions should not depart from ground zero but from its own precedents (ZAGREBELSKI; MARCENÓ, 2012).

Precedents keep judges away from doing and undoing rules according to their shifting views of convenience and prudence. Precedents are certainly no guarantee towards a reasonable or right decision. This notwithstanding, they are a force leading

towards objectivism, uniformity and consistency in judicial decisions (CARDOZO, 2014, Lecture II).

Without taking precedents into account, it would not be possible to develop a constitutional jurisprudence. At most there would be mere collation of decisions upon the constitutional text, but no progressive construction of a building that develops in a coherent direction. The court's decisions shall take into account what precedents established (ZAGREBELSKY; MARCENÓ, 2012).

The dialogue with precedents should be associated to an incrementalist interpretation, meaning that jurisprudence should cautiously develop in a given direction. Incrementalism and consideration of precedents should together ensure that interpretation of the constitution will follow a slow path of change, progressively, avoiding fundamental sudden changes (FARBER; SHERRY, 2008). These are also important constraints against discretion.

The role of the judge is to understand the purpose of law into a specific society and help it reach this purpose. On the other hand, law changes with society and the judge is an important element of this development. Nevertheless, the need for change requires concern with stability implying that change should come by evolution and not by revolution (BARAK, 2002).

Therefore, precedents and incrementalism must be considered by a court when interpreting a constitution's broad terms.

6. CONCLUSIONS

This paperdeparts from the assumption that broad expressions of constitutions can give judges a good share of undesirable discretion in interpretation. This applies to many jurisdictions that have experienced the ascent of judicial review and a growing power of judges, including Brazil.

The development of judicial review of legislation, on one hand, has led to the construction on the meaning of fundamental rights, as well as their enforcement in many jurisdictions. On the other hand, it gave room for a broad discretion for judges in interpreting constitutions. This lead to a paradox on judicial review: it has become largely accepted but at the same time is has been rising concerns and criticism upon its non rarely too flexible limits.

The paper then scrutinizes some doctrines supposed to guide the interpreter of

the constitution. It analysed the Canadian Living Tree metaphor in contrast to US Originalism and Living Constitutionalism doctrine, in order to conclude that the Canadian Living Tree metaphor is a quite ingenious and interesting method for interpreting the constitution.

On the one hand, the Living Tree metaphor assumes that interpretation of the constitution as a living tree has to be attached to its roots (constitutional purposes and words, as well as original interpretation and precedents). On the other hand, a living tree has to grow and expand with progressive interpretation capable to let it keep up with the flow of society.

The paper's development further acknowledges that the doctrine has the merit of trying to balance fixidity and adaptability on interpretation of the constitution. If associated with a careful scrutiny of precedents and a concern on incrementalism in interpreting the constitution, this doctrine can be a guide for constitutional scholars and judges in Brazil. Therefore, Discretion could so be constrained by means of interpretation of the constitution in such a way that it reconciles fidelity to the past and needs of the present moment, as well as consideration to precedents and careful and slow evolution (incrementalism).

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