

## Judicial Reasoning in Constitutional Courts: A European Perspective

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“In the beginning was the Word.” This quote from the Holy Bible also stands on the ceiling of our discipline’s temple. The job of legal scholarship is interpreting, and the base of every interpretation is the word.<sup>1</sup>

In this paper we are going to analyze how constitutional courts are able to extract the most meaning from a, necessarily, short text,<sup>2</sup> such as a constitution, with the use of sophisticated tricks, or methods, of interpretation. Partly with the help of these methods, and partly on the basis of text-independent speculations, constitutional courts and legal scholars are able to develop a system of concepts (a *Rechtsdogmatik*,<sup>3</sup> or its specific constitutional part, the *Verfassungsdogmatik*) considerably more sophisticated than the one of the actual text of the constitution in order to serve as a helping toolkit for the solution of future cases.<sup>4</sup> After analyzing some preliminary issues in part A, the largest part

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<sup>1</sup> GUSZTÁV SZÁSZY-SCHWARZ, PARERGA: VEGYES JOGI DOLGOZATOK 420 (1912) (author’s translation).

<sup>2</sup> The short and abstract nature of constitutions is not to be explained by a cynical attempt to make it more difficult to control state power, but for such a view see Napoléon Bonaparte: “[i]l faut qu’une constitution soit courte et obscure” (a Constitution has to be short and obscure). The actual reason for this is that the constitution maker could not decide everything beforehand, on the one hand, and that too many detailed rules would inflate the text of the constitution and make it necessary to modify the text often, which would ruin its prestige, on the other hand. See Meinhard Hilf, *Die sprachliche Struktur der Verfassung*, in VII HANDBUCH DES STAATRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 79, 90 (Josef Isensee & Paul Kirchhof eds., 1992).

<sup>3</sup> The German term *Rechtsdogmatik* is normally translated into English either as “doctrine” or as “dogmatic.” I would, however, stick to the German original as “doctrine” is too general and does not express the systematic conceptual nature of the genre, and dogmatic has a rather pejorative connotation in English, which I would like to avoid. One of the reasons for translation problems is that in common law countries the conceptual system as developed by legal scholarship is relatively simplistic—it is done by judgments on a case-by-case basis.

<sup>4</sup> A sophisticated conceptual system also helps (a) to decide future cases the same way, if their relevant facts are the same, and (b) to give reasons for this, i.e., not to decide arbitrarily and not to appear to have decided

of this study will deal with the different methods of constitutional interpretation in part B. Then, the nature of this conceptual system will be analyzed in part C, before turning to the question of styles of constitutional reasoning in part D. The analysis concentrates on the practice of European constitutional courts, though for purposes of classification and comparison, non-European practices will also be mentioned.

### A. Constitutional Reasoning in General

Constitutional reasoning in this paper refers to a special type of legal reasoning, namely, a type of reasoning that uses arguments based on constitutional law in order to solve a case. The concept of “constitutional law” is, unfortunately, not as simple as it looks at first sight. (A) If constitutional law is defined as a legal document, or a group of documents, which is more difficult to amend than other, ordinary statutes, then organic laws may also fall into this category, expanding it too far. (B) If defined as the norms of the highest rank in a legal order on which the validity of all new norms is measured, then it could mean only the *Ewigkeitsklausel* (those provisions of the constitution that cannot be modified), thus narrowing the concept too much. (C) If following Kelsen, a constitution outlines the norm(s) that regulate(s) the creation of statutes, then the standing orders of parliaments would be part of the constitution, which does not conform to the usual understanding.<sup>5</sup> (D) If the constitution is a norm or a bundle of norms that regulate the most important questions of a legal order—e.g., state organization and fundamental rights—then the definition would be very vague, as “most important” can be defined in very different manners. (E) And finally, if constitutions are those documents that bear the name constitution, then the *Grundgesetz* would fall outside of this category. Thus, a more sophisticated definition is needed.

The present analysis will use the expression constitution in the sense of (F) “a norm or a group of norms that are of the highest rank in a legal order in the sense that the validity of all other norms is measured on them.” This definition is different from the above (B), because here we measure the validity of all other norms on the constitution, whereas in (B) we measured only the validity of new norms on the constitution. The difference is important, as we cannot measure the validity of the original, ordinary constitutional text on the *Ewigkeitsklausel*, which are formally part of this document, thus our new definition, (F), does not merge the concept of *Ewigkeitsklausel* with that of the constitution, but it simply conceives the *Ewigkeitsklausel* as part of the constitution. This definition also conforms to the usual use of the word constitution.

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arbitrarily. See Eike von Savigny, *Methodologie der Dogmatik: Wissenschaftstheoretische Fragen*, in *JURISTISCHE DOGMATIK UND WISSENSCHAFTSTHEORIE* 7, 8 (Ulfrid Neumann ed., 1976).

<sup>5</sup> THEO ÖHLINGER, *DER STUFENBAU DER RECHTSORDNUNG: RECHTSTHEORETISCHE UND IDEOLOGISCHE ASPEKTE* 17 (1975).

By constitutional court, I mean the highest court of a legal order, whatever name they bear, which has as one of its tasks the adjudication of the validity of norms by reference to the constitution. In this sense, the United Kingdom (U.K.) does not have a constitution or a constitutional court,<sup>6</sup> only something slightly similar: The Supreme Court, formerly the House of Lords, can declare statutes incompatible with the European Convention on Human Rights (ECHR) without quashing them.<sup>7</sup> Thus, neither the scope, namely only human rights, nor the legal effect of such decisions fulfills the given definitional requirements. But for the sake of comparison, and because it is one of the traditionally expected reference points of comparative lawyers, the U.K. Supreme Court will be included in this paper. The Netherlands and, to a degree, Switzerland, are similar to the U.K. in the sense that they do not have a court that is able to quash federal statutes on the basis of unconstitutionality, and will, therefore, not be included in the comparison.

In situations leading to constitutional court decisions there are three fundamental requirements: (A) The issue has to be decided, (B) the decision has to be sound, i.e., acceptable also from non-legal—e.g., political, social, moral, or economic—points of view, and (C) it also has to be acceptable from a legal point of view, i.e., traceable back to the constitution. Requirement (A) is not within the scope of the present paper,<sup>8</sup> but (B) and (C) sometimes require considerable lawyerly efforts if they are to be met at the same time, and this is exactly what the present paper shall discuss. If taken separately, (B) and (C) can be fulfilled quite easily, but their simultaneous accomplishment may raise difficulties. Therefore, later parts of this paper will focus on how one can have a set of legal arguments which allows for the delivery of a sound decision—i.e., (B)—without being accused of departing from the constitution, as this would result in arbitrariness—i.e., (C) would not be accomplished. The problem here is that making a good decision in a non-legal, non-lawyerly sense does not always qualify as a legal argument.<sup>9</sup> One of the presuppositions of the present paper is that from a lawyerly point of view, there is quite often no single good decision—though sometimes there is—but that some of the possible, legally not absurd, decisions are socially, morally, etc., more acceptable, while others are less so. The problem can be conceptualized in two different ways: Either we can say that finding the legally most

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<sup>6</sup> See F.F. Ridley, *There is No British Constitution: A Dangerous Case of the Emperor's Clothes*, 41 PARLIAMENTARY AFF. 340–61 (1988).

<sup>7</sup> See Human Rights Act, 1998, c. 42 § 4 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1998/42/section/4>.

<sup>8</sup> For such a problem, see the Spanish Constitutional Court's inability to decide about the Statute of Catalonia for several years. See B.G.G., *Cuatro años de encarnizada batalla política*, EL PAÍS, Apr. 16, 2010, [http://elpais.com/elpais/2010/04/16/actualidad/1271405842\\_850215.html](http://elpais.com/elpais/2010/04/16/actualidad/1271405842_850215.html).

<sup>9</sup> See Andrés Jakab, *What Makes a Good Lawyer? Was Magnaud Indeed Such a Good Judge?*, 62 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 275–87 (2007), (discussing purposive (teleological) reasoning as a bridge or a method facilitating the translation of non-legal considerations into legal ones. Teleological arguments are able to respond to new social challenges without modifying the text of the constitution).

acceptable decision sometimes involves subjective factors; or, if we work with a more positivistic concept of law—i.e., if we strictly differentiate between description and prescription as to the content of the law, then—we can admit that sometimes we choose the legally second best solution because of non-legal factors.<sup>10</sup>

One of the theses of the present paper, which will be developed later, is that the presence of subjective factors is not a perversion of constitutional interpretation, but that the presence of subjective factors is a necessary feature. Thus, legal methodology is somewhere between complete, objective certainty and complete, subjective arbitrariness, as to the outcome of legal interpretation. The existence of debates in constitutional law may suggest that there is general disagreement among constitutional lawyers on the most important issues, and that the subjective factor plays a major role in constitutional interpretation. This, however, is a false impression; constitutional lawyers do agree on most problems, but do not discuss these, as it would be terribly boring to keep repeating each other. Moreover, the general, implicit and tacit, opinion of the professional community serves as an objective control mechanism on most questions, thus preventing arbitrariness. This paper reflects the conviction that one may indeed aim for more objectivity, which is required by the rule of law, and its conceptual component legal certainty; but, complete objectivity,<sup>11</sup> like the axis of a hyperbola, can, and should, never be achieved.

Legal norms in general, and the constitution, due to the abstract nature of its text, in particular, mostly allow for different interpretations.<sup>12</sup> To use the words of Neil MacCormick:

In short, rules can be ambiguous in given contexts, and can be applied in one way or the other only after the

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<sup>10</sup> For a traditional positivist conceptualization separating sharply between the interpretation of the text and the actual legal decision as a choice from the different options offered by the interpretation, while criticizing Robert Alexy, Michel Troper, and Ronald Dworkin for not doing this separation, see Otto Pfersmann, *Le sophisme onomastique: Changer au lieu connaître. L'interprétation de la Constitution*, in *L'INTERPRÉTATION CONSTITUTIONNELLE* 33–60 (Ferdinand Mélin-Soucramanien ed., 2005). If following this positivistic path, then the legal theoretical task becomes quite complicated: For the first, interpretative, step one also has to clarify precisely what should be interpreted, i.e., what the law is. See Otto Pfersmann, *Ontologie des normes juridiques et argumentation*, in *RAISONNEMENT JURIDIQUE ET INTERPRÉTATION* 11–34 (Otto Pfersmann & Gérard Timsit eds., 2001). Non-positivists, or non-traditional positivists, have it easier at this point, as they can avoid this hopelessly complicated ontological question.

<sup>11</sup> Here objectivity means the lack of arbitrariness, i.e., “it can be supported by arguments thought to be relevant which are independent from the person of the speaker/author of those arguments.”

<sup>12</sup> Different outcomes of different interpretations are called norm hypotheses (*Normhypothesen*). See, e.g., Karl Korinek, *Zur Interpretation von Verfassungsrecht*, in *STAATSRÉCHT IN THEORIE UND PRAXIS. FESTSCHRIFT FÜR ROBERT WALTER* 363, 367 (Heinz Mayer ed., 1991).

ambiguity is resolved. But resolving the ambiguity in effect involves choosing between rival versions of the rule . . . once that choice is made, a simple deductive justification of a particular decision follows. But a complete justification of that decision must hinge then on how the choice between the competing versions of the rule is justified.<sup>13</sup>

According to European legal traditions, any choice between these options has to be justified; one ought to argue for his or her decision.<sup>14</sup> Such reasoning has to provide a, rational, justification for the solution chosen, on the one hand, and—partly overlapping this—convince, both rationally and emotionally, the audience, on the other.<sup>15</sup> In the case of constitutional reasoning, the audience comprises of the whole political community, yet in practice it is limited, because of the expert knowledge needed to understand such reasoning, to the citizens who have at least some education in constitutional law. Therefore, reasoning is essentially addressed to the latter group: The decision-maker, a constitutional court, wants to show its audience, especially politicians and constitutional lawyers, that its decision was not an arbitrary one (or *horribile dictu* motivated by party politics).

One may argue *before* the actual decision, i.e., searching open-mindedly for the best interpretation; but also *after* the decision is made, i.e., trying to persuade others about one's decision, providing arguments supporting the decision already made. Thus constitutional reasoning can be both an honest endeavor to find the solution for the case, or it can be just an ideological mask to find support for a choice made well before the reasoning actually began. Different schools in legal theory place a stronger emphasis on one, or the other, of these phases, but this paper does not intend to take sides on this issue, and accepts both argumentative situations as possible.

### *I. Constitutional Reasoning and Constitutional Interpretation*

It is important to briefly clarify the relationship between the concepts of *interpretation* and *argumentation*—the latter is used as synonymous throughout this article with reasoning. Interpretation, in the sense used here, means determining the content of a normative text.

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<sup>13</sup> NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 67–68 (1978).

<sup>14</sup> It was not always the case, the practice of the Middle Ages is very diverse from this point of view, see Tony Sauvel, *Histoire du jugement motivé*, 71 *REVUE DU DROIT PUBLIC* 5–53 (1955).

<sup>15</sup> On the difference between convincing and justifying, see Eugenio Bulygin, *Normative Positivism vs The Theory of Legal Argumentation*, in *LAW AND LEGAL CULTURES IN THE 21<sup>ST</sup> CENTURY. DIVERSITY AND UNITY* 221, 224 (Tomasz Gizbert-Studnicki & Jerzy Stelmach eds., 2007). On convincing as the purpose of legal reasoning, see CHAIM PERELMAN, *LOGIQUE JURIDIQUE—NOUVELLE RHÉTORIQUE* (1976).

This determination of content can be argued for, or against, with the help of arguments. Consequently, what is traditionally called “a method of interpretation,” is in fact a type of argument used to interpret a text.

Most arguments in constitutional reasoning aim to interpret the constitution, even if sometimes they just presuppose its existence and debate about some logically secondary question—e.g., the interpretation of a precedent. There are three main exceptions where arguments are not interpretative in their nature: (1) Analogies; (2) establishing the text of the constitution; and (3) arguments about why the text of the constitution should or should not be applied.

### 1. Analogies

Analogies are used if there is a legal gap or lacuna and one wants to solve a problem not covered by the text of the constitution.<sup>16</sup> There are two kinds of gaps, real and technical.<sup>17</sup> Technical gaps exist where the constitution itself raises a question, but fails to answer it—e.g., a provision makes a reference to another provision, which does not exist.<sup>18</sup> Real, or substantive, gaps, in turn, are found where a rule does not regulate a question, so from this would follow an obviously unacceptable legal solution (*planwidrige Rechtslücke*).<sup>19</sup> The difficulty here is that what “obviously unacceptable” means is a question of evaluation. Therefore, if one claims that there is a substantive legal gap, his or her argument has to be supported by a reference to the objective *ratio legis* (C.III.1), the subjective intention of the constitution-maker (C.III.2), or to substantive—e.g., moral—arguments (C.III.3). For this reason, the use of an analogy without particularly firm reasoning to fill a substantive constitutional gap may run the risk of being accused of arbitrariness.<sup>20</sup> Fear of such

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<sup>16</sup> See, e.g., in the judgment by the Spanish constitutional court Nr. 36/82.

<sup>17</sup> See HANS Kelsen, REINE RECHTSLEHRE 100–04 (1934); PAVEL HOLLÄNDER, VERFASSUNGSRECHTLICHE ARGUMENTATION—ZWISCHEN DEM OPTIMISMUS UND DER SKEPSIS 107–08 (2007).

<sup>18</sup> See HEMKE KATJA, METHODIK DER ANALOGIEBILDUNG IM ÖFFENTLICHEN RECHT 43 (2006) (calling these *Existenzlücke* (“existence gap”)).

<sup>19</sup> *Id.* at 44 (calling these *Relationslücke* (“relation gap”), as they exist *in relation* to the legal system or its values as a whole).

<sup>20</sup> One way of escaping the charge of arbitrariness is trying to trace the substantive gap back to provisions of the normative text—e.g., to principles of the constitution, perhaps combined with particular provisions. A thorough argument—i.e., answering the possible counterarguments, especially of the types “Why this very provision?” and “Is there no other, more important principle that would suggest the use of analogy from another particular provision?”—is not used normally.

accusations may explain why in some legal cultures the use of analogies is not accepted at all,<sup>21</sup> and general principles are referred to instead.

The basic idea of analogy is to look for a rule containing provisions not exactly relevant for the case at hand, but relevant for cases similar to it—i.e., the accusation of arbitrariness can be rebutted by showing this “similarity” together with the “gap in law.” The more similar the case, the more convincing the analogy. The typical problems here, are (I) when a case can be regarded as “similar” to another and (II) which of two “similar” cases—being similar to ours in different aspects—is more similar. To answer these questions, teleological arguments may be of some help.

A distinction well known in literature is the one between *analogia legis* and *analogia iuris*.<sup>22</sup> The former means applying a particular, but not immediately relevant, norm of positive law, possibly not even of constitutional rank. While in the case of the latter, the norm to be applied is inferred from general principles not explicitly codified, which may be collected from several enactments.

Analogy is not a method of interpretation, but rather the application of a rule, that of course has to be interpreted too in order to be applied, but actually does not cover the case. If one uses the analogous rule only for interpreting the rule one has to apply, then it is either a contextual/harmonizing argument (*in pari materia*, see below B.II.1) or an “interpretation in the light of doctrinal concepts and principles” (see below B.II.3).

The inverse of analogy is teleological reduction (*teleologische Reduktion*): A norm that covers the case is not applied, as it would contradict a general principle, the objective *ratio legis*, or the subjective intention of the constitution-maker.<sup>23</sup>

Making use of analogy may raise serious doubts in terms of its legality—as the case is admittedly not covered by the norm applied; or in the case of teleological reduction one fails to apply the relevant norm<sup>24</sup>—and is also likely to make the resulting interpretation unforeseeable, thus contradicting legal certainty; therefore, such arguments are usually

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<sup>21</sup> For example, Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 16, 1988, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSLG] No. 11.663/1988 (Austria), demonstrates one of the usual rejections of the use of analogy by the Austrian constitutional court.

<sup>22</sup> See MIKLÓS SZABÓ, ARS JURIS. A JOGDOGMATIKA ALAPJAI 182–83 (2005).

<sup>23</sup> Cf. KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 391–95 (1991). Against teleological reduction for fundamental rights see BVerfGE 51, 97 (110).

<sup>24</sup> Teleological reduction, if used contrary to the statutes, may conceal a decentralized constitutional review. Its disadvantages are even worse as it is not even based on positive law, namely the constitution. For arguments against decentralized constitutional review, see Attila Vincze, *Die unmittelbare Anwendbarkeit der ungarischen Verfassung*, in 1 JAHRBUCH FÜR OSTRECHT 83–94 (2009).

avoided.<sup>25</sup> The most acceptable situation for using analogies is that of technical legal gaps—provided that one’s argument is founded on positive law to the greatest extent possible—i.e., reference to several, concordant provisions of positive law made for similar cases.

### 2. *Establishing the Text of the Constitution*

The second type of non-interpretative constitutional arguments is about establishing the valid text of the constitution which is a preliminary question of interpretation. It can be difficult in times of revolutionary regime changes, when it is unclear whether the new constitution or the old one is valid, or also when constitutional amendments take place, where either the application of the unwritten *lex posterior derogat legi priori* rule might be the issue or some promulgation problem.

### 3. *Arguments on the Applicability of the Constitution*

The third type of non-interpretative constitutional arguments is about whether the valid constitution can be applied or not. This is again a preliminary question of interpretation. Arguments stating that some questions cannot be judged from a legal point of view, as they are too political so the constitution cannot be applied,<sup>26</sup> or about the extra-legal nature of a state of emergency, belong to this category.<sup>27</sup> The latter type of argumentation emphasizes that normativity presumes normality of circumstances.<sup>28</sup> This implies “that norms only apply in normal situations and that the presumption of situational normality is a positive-law precondition of their applicability.”<sup>29</sup> Thus, norms cannot bind the state in exceptional situations in which instead, the state, by necessity, has a right of self-preservation. And, a norm cannot dispense with this necessary right of the state due to the

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<sup>25</sup> This is the reason why most criminal law regimes forbid the use of analogy in disfavour of the defendant, see e.g. BVerfGE 92, 1. Similarly problematic is analogy if used by the state for any limitation of individual rights (e.g. in tax law or in administrative law), see e.g. BVerfGE 71, 108.

<sup>26</sup> For similar Jellinekian arguments, see GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 16–17 (1914) (*Vorbehalt des “politisch Möglichen”*); JELLINEK at 18 (*Vermutung für die Rechtmäßigkeit der Handlungen der obersten Staatsorgane*). For a convincing critique of the latter, see HANS Kelsen, VOM WESEN UND WERT DER DEMOKRATIE 80 (1929). As soon as you try to find a base for such doctrines in the text of the constitution, these doctrines become issues of constitutional interpretation. Without this, they are rather just bold attempts to limit constitutionalism.

<sup>27</sup> For an overview of extra-, or pre-textual constitutional arguments, see András Jakab, *German Constitutional Law and Doctrine on “State of Emergency”*; *Paradigms and Dilemmas of a Traditional (Continental) Discourse*, 7 GERMAN L.J. 453–78 (2006).

<sup>28</sup> See HERBERT KRÜGER, ALLGEMEINE STAATSLEHRE 31 (2d ed. 1966); CARL SCHMITT, POLITISCHE THEOLOGIE 19 (2d ed. 1934).

<sup>29</sup> Carl Schmitt, *Legalität und Legitimität*, in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924–1954 321 (1958).

very abnormality of exceptional situations.<sup>30</sup> It is apparent that this line of reasoning has its basis in natural law, which provides for the state's pre-positive right to existence<sup>31</sup> (*jus eminens*).<sup>32</sup> This right is not merely parallel to the constitution, but rather contrary to it,<sup>33</sup> because the constitution cannot apply, by definition, in an, abnormal, emergency situation.<sup>34</sup> Therefore, this reasoning demands compliance with this positive law only insofar as it is consistent with the state's right of existence. Thus, positive law's normativity must be recognized only within the limits of this right of existence. This is generally the case with positive law, which is only to be recognized within the limits of natural law.<sup>35</sup> The right of existence, although possibly contradictory to positive law, always continues to be directly exercisable, according to this logic.<sup>36</sup> Thus, in this conceptualization, the normativity of constitutional regulation of a state of emergency always depends on uncodifiable pre-legal rules governing emergencies.

Beyond these rare exceptions, the vast majority of arguments are interpretive in their nature. They have to be "rooted into the constitution" if the judge wants to avoid the risk of being accused of arbitrariness and unfounded argumentation. In the U.K., given the lack of such a document, constitutional reasoning is either simply missing in courts, especially

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<sup>30</sup> The state is viewed as a pre-legal institution whose power is originally unlimited, and only tamed by the law. Even moderate state-centred theorists display this Schmittian viewpoint. See, e.g., Ernst-Wolfgang Böckenförde, *Der verdrängte Ausnahmezustand*, 31 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1885 (1978)

<sup>31</sup> See CARL FRIEDRICH WILHELM VON GERBER, GRUNDZÜGE DES DEUTSCHEN STAATSRECHTS 42, margin n. 2 (3d ed. 1880) ("The recognition of emergency powers contains the idea of the state's right of existence beyond its usual constitutional life, a right that appears in abnormal emergency circumstances") (author's translation); ERICH KAUFMANN, ZUR PROBLEMATIK DES VOLKSWILLENS 14 (1931) ("For the extreme case, an ultimate right of necessity exists, alongside standardized and formalized exceptional rights, in the unwritten, natural-law content of every body of constitutional law") (author's translation). See also RUDOLF VON JHERING, DER ZWECK IM RECHT 330 (8th ed. 1923) ("As the individual human being, so too the state has a right of necessity when its existence is threatened") (author's translation). Or from antiquity, see CICERO, DE LEGIBUS III, at 3 ("Salus rei publicae suprema lex esto").

<sup>32</sup> See Meinhard Schröder, *Staatsrecht an den Grenzen des Rechtsstaates*, ARCHIV DES ÖFFENTLICHEN RECHTS 121, 132 (1978) (detailing the history of the term *jus eminens* and citing further references).

<sup>33</sup> See KRÜGER, *supra* note 28, at 31 ("Emergency law, by its very concept, implies recourse to natural law as against positive law") (author's translation). See also KLAUS STERN, 2 DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 1336 (1980) (reasoning identically).

<sup>34</sup> See, e.g., GEORG MEYER & GERHARD ANSCHÜTZ, LEHRBUCH DES DEUTSCHEN STAATSRECHTS 906 (7th ed. 1919) ("Only one thing is sure: the constitution does not intend, cannot intend . . . for the life of the state to stand still . . . Here, constitutional law ceases, and the inquiry . . . is no longer a legal inquiry") (author's translation). See also SCHMITT, *supra* note 28, at 11 (describing the supremacy of this right to existence over positive law: "Sovereign is whoever decides in the exceptional state"). Schmitt claims that positive law cannot bind this sovereign decision-making and this state of emergency. See CARL SCHMITT, DIE DIKTATUR: VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF IX (1921).

<sup>35</sup> See STERN, *supra* note 33, at 1334, 1337.

<sup>36</sup> *Id.* at 1337.

in the former House of Lords, today Supreme Court, like on matters of the relationship between the highest state organs, so the norms are conceptualized as non-legal constitutional conventions or limited to human rights issues as found in the ECHR (cf. Human Rights Act 1998).

## *II. Constitutional Interpretation and Statutory Interpretation*

Constitutional interpretation is just a specific case of statutory interpretation. There is no need to draw a sharp distinction between these two types of interpretation.<sup>37</sup> However, in general, there are two kinds of arguments for a sharp distinction between the two: (a) The constitution is “political law” (*Verfassungsrecht als politisches Recht*), thus it is substantially different from other norms of non-constitutional rank; or (b) the norms of the constitution are much more abstract and/or value-laden than the rather concrete statutory norms.<sup>38</sup>

Ad (a). The first argument is dangerous from the perspective of the rule of law on the one hand, as it places some questions outside the scope of judicial review, and on the other hand, it fails to recognize that statutes below constitutional rank may also have “political” content. Referring to the political nature of constitutions in order to depart from the usual country-specific methods of statutory interpretation is mostly just a way of removing some kind of political activity from constitutional or judicial control, or supporting an interpretation of the constitution which cannot be justified by any of the methods of interpretation, as it rests on the arbitrary, maybe party political preferences. Thus such arguments are hard to reconcile with the rule of law, they should rather be avoided.<sup>39</sup>

Ad (b). Referring to the different nature of norms is likewise mistaken, as it does not take into account the fact that general clauses in civil codes are at least as abstract and/or value-laden as the provisions of the constitutions concerning fundamental rights, and that constitutions also contain a number of rather concrete—e.g., procedural—rules. True, constitutions contain abstract and general provisions in a greater proportion, but this only means that one has to use certain methods more frequently.

The vast literature on constitutional interpretation, which is bigger than the literature on any other particular norm in the legal order, like civil codes or criminal codes, is due to the higher stakes at issue, and not due to an entirely different legal nature. The stakes are higher because the interpretation often concerns the institutional structure of society and

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<sup>37</sup> On constitutional interpretation using basically the general methods of statutory interpretation, with certain differences in degree, see Ernst Forsthoff, *Die Umbildung des Verfassungsgesetzes*, in *FESTSCHRIFT FÜR CARL SCHMITT ZUM 70 GEBURTSTAG* 35, 36 (Hans Barion et al. eds., 1959).

<sup>38</sup> See the description and convincing refutation of these arguments by MARÍA LUISA BALAGUER CALLEJÓN, *INTERPRETACIÓN DE LA CONSTITUCIÓN Y ORDENAMIENTO JURÍDICO* 39–40 (1997).

<sup>39</sup> See WERNER KÄGI, *DIE VERFASSUNG ALS RECHTLICHE GRUNDORDNUNG DES STAATES* 65–66, 120 (1945).

the political power, and also because the lawmaker cannot as easily correct judicial interpretation in the same way as it can ordinary statutes.

The sharp difference in terms of nature is thus rather a myth, and moreover, a harmful one, as it would place constitutional review beyond the traditional limits of *Verfassungsdogmatik*, thus making it more difficult to control. Over-emphasizing the difference can serve two purposes: (1) A rhetorical tool used to make constitutional interpretation look mystical and complex, thus making the author or the court look very smart; or (2) escaping from the control of usual methods, thus being able to smuggle one's own moral preferences masked as the result of some special kind of interpretation. The methods of constitutional interpretation are thus not different from the methods of statutory interpretation, only the emphasis placed on the specific methods and the frequency of their use are different.

Such gradual differences can be explained by the fact that constitutions are more difficult to amend, thus judges have to interpret constitutions often in a more creative way to adjust them to new challenges. Also the degree of generality of constitutional provisions is on average higher than that of statutory provisions, which again indicates a higher probability for creative—i.e., non-literal—interpretation. But this difference is, again, just gradual.

In some legal orders though, there does exist a sharp difference between the style of argumentation in ordinary courts, on the one hand, and that in the constitutional court, on the other. This can mostly be explained by different positive legal rules on how judgments should be delivered in the different courts—e.g., whether dissenting opinions are possible or not. It is also usual that the ratio of university professors or former politicians is higher among constitutional court judges, which influences their typical arguments—e.g., whether they rely on arguments of public morality or of legal scholarship. In some constitutional courts the *locus standi* rules—e.g., the requirement of claiming the violation of a fundamental right—make it more likely that the ratio of fundamental rights cases will be higher, thus usual arguments about fundamental rights—e.g., proportionality tests—will also be more likely to appear. Different *locus standi* rules—e.g., *actio popularis*, in which no fundamental rights violations have to be claimed, constitutional grievances can be conceptualized with the help of general principles, like rule of law or democracy<sup>40</sup>—however, can make such differences diminish.

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<sup>40</sup> In Europe, there are currently four constitutional courts where *actio popularis* exists: Bavaria, Serbia, Montenegro, and Macedonia. In Croatia, there is a similar type of popular claim, but the constitutional court is not obliged to begin the procedure. See BERND WIESER, VERGLEICHENDES VERFASSUNGSRECHT 140 (2005). In Hungary, the *actio popularis* was abolished by the end of 2011, and the new constitution introduced a German-type constitutional complaint in which the violation of a fundamental right has to be claimed.

The differences between the style of argumentation in ordinary courts and that in constitutional courts do not follow from the “nature” of constitutional interpretation as such, they are usual accidental features, which in some countries do exist, and in others do not.

### *III. The Structure of Arguments*

There are three general types of legal argumentative structures: (A) Deploying one conclusive argument, or a chain of arguments following from one another; (B) cumulative-parallel arguments or a reasoning like “the legs of a chair”<sup>41</sup>—several arguments support a certain legal interpretation independently; every argument would suffice on its own, but there are more of them;<sup>42</sup> or (C) mentioning only relevant factors, any of which is not conclusive, but if taken together, they provide a certain solution—discursive or dialogic style; making use of *topoi*.<sup>43</sup> The most transparent is (A), the least (C); depending on the legal culture, different structures are preferred.<sup>44</sup>

Legal argumentation is usually enthymematic in structure—i.e., not all the steps are explained, but some of them are only implied, or based on implied premises.<sup>45</sup> What we find in judicial decisions is therefore necessarily only a sketch or abbreviation of all arguments; only those steps are analyzed which are susceptible to debate.

### *IV. The Need for Clarifying the Methods of Interpretation*

<sup>41</sup> WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* 268 (1982) (following John Wisdom, *Gods*, *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 185, 185–194 (1944)). In the original text of Wisdom, the phrase “legs of a chair” also implied that single arguments are not conclusive, but if we used the expression in this sense here, we could not distinguish between this type and that of topical reasoning. We therefore use the phrase in a sense slightly different from the original (i.e. for a reasoning in which every argument is conclusive in itself).

<sup>42</sup> See e.g., Dec. Hung. CC 41/2005. (X. 27.) AB, ABH 2005, 459, 502 (László Kiss, dissenting).

<sup>43</sup> See THEODOR VIEHWEG, *TOPIK UND JURISPRUDENZ* (1953). On the jurisprudence of the German Federal Constitutional Court sometimes accepting this argument, see criticism by Ernst-Wolfgang Böckenförde, *Die Methoden der Verfassungsinterpretation*, 46 *NEUE JURISTISCHE WOCHENSCHRIFT [NJW]* 2089, 2092–94 (1976).

<sup>44</sup> The third, topical pattern of argumentation is more frequent in German constitutional review, but, e.g. is hardly ever used in Hungary, see András Jakab, *Az Alkotmány kommentárjának feladata*, in *Az ALKOTMÁNY KOMMENTÁRJA* margin n. 5 (András Jakab ed., 2d ed. 2009). A convincing set of arguments against it, namely that it is unclear, uncontrollable, and leads to arbitrary and unpredictable decisions, see ULRICH KARPEN, *AUSLEGUNG UND ANWENDUNG DES GRUNDGESETZES* 54–55 (1987), with further references.

<sup>45</sup> See Franz Horak, *Zur rechtstheoretischen Problematik der Begründung*, in *DIE ENTSCHEIDUNGSBEGRÜNDUNG IN EUROPÄISCHEN VERFAHRENSRECHTEN UND IM VERFAHREN VOR INTERNATIONALEN GERICHTEN* 9, 14–15. (Rainer Sprung ed., 1974).

The methods of interpretation are norms themselves: Norms about how norms ought to be interpreted.<sup>46</sup> Normally they are uncodified, they follow only from the specific legal culture in which they are used and in which they are considered as obvious truths, at least among those who did not do comparative law. Codification of the methods of interpretation arises normally only if the legislator, more specifically, the constitution-maker, wants to change the traditionally cultivated, and sometimes even unspoken, presuppositions about the methods of interpretation. For example, after the downfall of internationally isolated nationalist dictatorships, a typical answer of the new democratic constitution-maker can be to rely explicitly on international law as an aid of constitutional interpretation, especially concerning human rights, as this happened in Spain and Portugal.<sup>47</sup>

Another example where the constitution-maker regulated the interpretation of the constitution is Article R of the Hungarian Basic Law of 2011: "(3) The provisions of the Basic Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith contained therein, and with the achievements of our historical constitution." It lists three methods: The objective teleological method ("in accordance with their purpose"), interpretation in light of the preamble (called "National Avowal"), and interpretation in light of the "achievements of our historical constitution." It defines then in Article 28 what the expression *purpose* means: "When interpreting the Basic Law or legal rules, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good."

The second method, "National Avowal," is considered as being named superfluously, as preambles are always used to help the interpretation of constitutions.<sup>48</sup> The third method, "historical constitution," is considered either as legally inoperable and serving only purposes of historicizing political rhetoric, or as referring to the past case law of the Constitutional Court which was used as an aid of interpretation anyway.<sup>49</sup> The explicit reference to the objective teleological method was necessary because of the socialist legacy of interpretation, mainly in ordinary courts, which had to be broken (see below pp. 1243, 1272), the two others were mentioned only for political reasons.

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<sup>46</sup> Jerzy Wróblewski, *Legal Reasoning in Legal Interpretation*, 12 *LOGIQUE ET ANALYSE* 3, 7 (1969).

<sup>47</sup> See art. 16(2) Constitution of Portugal: 'The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights.' and art. 10(2) Constitution of Spain: 'The norms relative to basic rights and liberties which are recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.'

<sup>48</sup> On the Hungarian traditions of interpretive preambles, see Márton Sulyok & László Trócsányi, *Preambulum*, in JAKAB, *supra* note 44, at 91. See generally Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 *INT'L J. CONST. L.* 714–38 (2010).

<sup>49</sup> András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary* 9 *EUROPEAN CONSTITUTIONAL LAW REVIEW* 102, 108–109 (2013).

None of these provisions, however, contain all the methods, they do not contain the word “only” when listing the methods; some obvious ones, like the literal interpretation, are missing, and they do not give any ranking of the listed methods. A constitution, by its nature, cannot contain handbook of its own interpretation. A detailed guide can only be delivered by legal scholarship. But why should we have a detailed guide at all?

Because it means a standard on which we can measure the judges and their decisions. Having such a standard is a “soft manner” of controlling their power, which at the same time conforms to the idea of judicial independence. Such scholarly critique can be especially effective on those judges who are legal scholars. Beyond scholarly critique, another way to control judges’ power is to use judges of the same court; to allow them to write minority opinions and to criticize the majority opinions as equals “from inside” the judicial branch.

Interpretation inevitably does involve subjective factors, or to put it more mildly, factors that lawyers cannot determine objectively with their traditional legal doctrinal methods; if this was not the case, legal interpretation could be counted out similarly to a mathematical or logical problem, and there would only be one correct interpretation in every case.<sup>50</sup> Very often there is no “single right solution,” just better or worse solutions.<sup>51</sup> Interpretation is, however, not mathematics and the reason why minority opinions are allowed by several courts, including constitutional courts, throughout the world. A minority opinion does not, necessarily, mean that the respective judge made a mistake, that the judge was not properly trained, or misinterpreted the law—even though this can also happen. A majority decision mostly means only that another interpretation was considered more convincing by the greater part of the judges.

The introduction of the institution of concurring and dissenting opinions in constitutional courts reveals the dilemmas; it shows that the law is not straightforward and that the constitutional court judge is not simply “the mouth-piece of the law [or of the constitution],” as Montesquieu put it.<sup>52</sup> Moreover, this institution raises the quality of

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<sup>50</sup> On the (failed) attempt of Leibniz, aiming at this, see Fritjof Haft, *Recht und Sprache*, in EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART 233, 278 (Arthur Kaufmann & Winfried Hassemer eds., 2006); BENOÎT FRYDMAN, LE SENS DES LOIS. HISTOIRE DE L’INTERPRÉTATION ET DE LA RAISON JURIDIQUE 274–77 (2005).

<sup>51</sup> This is also self-understanding of the German Federal Constitutional Court, see BVerfGE 82, 30 (38f).

<sup>52</sup> This makes the style of European continental constitutional court judgments normally more discursive than that of ordinary courts, where normally there is no dissenting opinion, see e.g., Lech Morawski & Marek Zirk-Sadowski, *Precedent in Poland*, in INTERPRETING PRECEDENTS. A COMPARATIVE STUDY 225 (Neil MacCormick & Robert S. Summers eds., 1997). On the institution of dissenting opinions in constitutional courts, see Katalin Kelemen, *The Road from Common Law to East-Central Europe*, in LEGAL AND POLITICAL THEORY IN THE POST-NATIONAL AGE 135–52 (Péter Cserne & Miklós Könczöl eds., 2011).

reasoning, since those delivering a concurring reasoning or dissenting opinion have to explain why they do not agree with the majority—and, in turn, those drawing the majority opinion have to deal with the embarrassing situation in front of the professional audience that a fellow judge is picking to pieces their argument in his dissenting opinion; as is happening *de facto* at times. Certainly one could cite counter-examples, when the majority opinion was not troubled at all, but on the whole its positive influence on the quality of constitutional reasoning is incontestable.

The inevitable subjective factors are to be minimized as far as possible, but full elimination is both impossible and undesirable.<sup>53</sup> Accordingly, the text has to be massaged, with methods of interpretation, until it provides a solution in a given case. The choice between these methods cannot eliminate subjective factors,<sup>54</sup> but (A) the decision has to be traced back to the text, and (B) supported with arguments.

The reason for this is that the text has stronger legitimacy than the judge—in cultures respecting the rule of law. For the text is usually shaped through more transparent steps of procedure and in closer relation to the bearer of popular sovereignty—i.e., the people themselves, or organs representing the people—than judicial decision-making, which, according to its mandate, should be based on the text anyway.<sup>55</sup>

One of the means of minimizing the subjective factor is to review the methods, or canons, of legal—statutory or constitutional—interpretations.<sup>56</sup> The following will give such a review, with the disclaimer that the acceptance of any specific method differs strongly between legal systems.<sup>57</sup> In part D of this article, we will return to the problem of country-specificity.

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<sup>53</sup> Even within the subjective factors, one can distinguish legitimate (e.g. a different conception of democracy) and illegitimate (e.g. party allegiance) ones. The former may be referred to in an argument, while the latter may not. See Ralf Dreier, *Zur Problematik und Situation der Verfassungsinterpretation*, in RECHT MORAL IDEOLOGIE. STUDIEN ZUR RECHTSTHEORIE 126 (1981).

<sup>54</sup> This is reflected in an exaggerated form by the lawyerly adage cited by Schneider: “Tell me who is interpreting the norm and I tell you what it means.” Hans-Peter Schneider, *Verfassungsinterpretation aus theoretischer Sicht*, in VERFASSUNGSRECHT ZWISCHEN WISSENSCHAFT UND RICHTERKUNST. KONRAD HESSE ZUM 70. GEBURTSTAG 39 (Hans-Peter Schneider & Rudolf Steinberg eds., 1990).

<sup>55</sup> Judicial procedures themselves are transparent, but how they shape the interpretation of statutes or constitutions is very far from transparent, only in the rarest case we find an explicit change of former case-law.

<sup>56</sup> The idea of narrowing down the circle of acceptable arguments to a canon, stems from ancient Rome, and is alien to Asian or African legal cultures, see Tony Honoré, *Legal Reasoning in Rome and Today*, 91 S. AFR. L.J. 92 (1974).

<sup>57</sup> The discussion of the methods follows Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES 461, 464–65 (D. Neil MacCormick & Robert S. Summers eds., 1991).

### B. A Scheme of the Specific Methods of Interpretation

In the following, a scheme of specific methods of interpretation will be given. This is meant to be a general conceptual frame, which on the one hand, helps us to understand issues of constitutional interpretation through examples while showing general theoretical features, but on the other hand, can be used when describing the different style of constitutional reasoning in part D of this article.

The following scheme of specific methods of interpretation is not entirely exhaustive, but it does contain the vast majority of arguments and it does contain all binding arguments that are methodologically acceptable. Many other, methodologically unacceptable and unusual arguments can be imagined—e.g., “the Court was bribed yesterday to decide so,” “my spouse told me to quash the statute,” or “it is usual factual political practice, thus it is allowed by constitutional law”—which we do not list in a separate category. Among non-binding arguments, some more types of arguments are possible, like referring to legal history in the same manner as referring to comparative law—e.g., as an inventory of ideas or in order to show that the question was well considered, but not as a decisive argument (see below B.IV.2)—but they seemed to be rather rare and are, therefore, not included.

The argumentation on the choice of interpretation is carried out on two levels: (A) On the one hand, it is about the interpretation according to the various methods discussed below, and (B) on the other, it is about which of those arguments one should use or which of the different interpretations, obtained by different methods, one ought to adopt in a particular case (meta-argumentation). As for the latter, there is no exact and general rule or “a ranking of methods of interpretation,” only an approximate one as outlined above;<sup>58</sup> the subjective factor—i.e., personal conviction of the person interpreting the text—cannot be eliminated. Yet a certain limit is imposed by the interpretational views of the professional community of constitutional lawyers of the respective country.<sup>59</sup> These limits can always be stretched carefully, yet they cannot be completely neglected—without running the risk of being accused of an arbitrary decision, which thereby threatens legal certainty.<sup>60</sup> The popularity of specific methods differs by legal cultures.

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<sup>58</sup> With a focus on German and American preferences in methodology, see David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79–120 (2001). The American ranking of methods: (A) Precedents, (B) textualist and originalist arguments, and (C) others, is discussed by Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189–1286 (1987).

<sup>59</sup> Fish calls these supplementary norms of the interpretive community, into which the new members, in our case young lawyers at the beginning of their careers, are “socialized.” STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 133 (1989).

<sup>60</sup> This kind of limit works only if the “web of beliefs in the legal community” clearly shows the solution to the given, easy, case; if, however, views on the problem diverge or there are no views yet, it being a new problem, then it is a hard case. See STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 125–43 (1985).

A technique of simplification, rather than a method of interpretation, is that of reasoning from hypotheticals, thus it will not be included in the scheme of methods.<sup>61</sup> Reasoning from hypotheticals means that one argues for a certain interpretation in a given case by (A) constructing a simpler case instead of the complicated one that has to be decided, (B) which, in turn, cannot be distinguished from our case in terms of the actual legal issue. Then the solution obtained can be applied to the complicated original, real, case.

*I. The Ordinary or (Legal or Non-Legal) Technical Meaning of the Words*

This method essentially focuses on the dictionary meaning or ordinary meaning (*sens courant*),<sup>62</sup> relying on grammatical, or orthographic, rules.<sup>63</sup> The approach that prefers this method is usually called the textualist approach.<sup>64</sup> It is also referred to as “grammatical interpretation,” and often used if a constitutional court wants to decide the question without examining other methods.<sup>65</sup> In the U.K., the rule providing for reference to this method is called the *literal rule*, in the U.S. it is the *plain meaning rule*. A special form of this method is used when arguments are made not from the current ordinary meaning, but from the ordinary meaning at the time when the respective words were included in the constitution.<sup>66</sup> In American constitutional law, the latter is termed *original meaning*. Antonin Scalia, the foremost advocate of historical-grammatical arguments in contemporary American jurisprudence, describes this method as follows, distinguishing it from another historical originalist method of interpretation—namely, the subjective teleological one:

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<sup>61</sup> See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 99–103 (1988).

<sup>62</sup> *E.g.*, BVerfGE 92, 130 (134); 102, 26 (39)..

<sup>63</sup> The technical meaning is that used by some particular community—*e.g.*, lawyers—as opposed to the whole of the society. See Susan J. Brison & Walter Sinnott-Armstrong, *A Philosophical Introduction to Constitutional Interpretation*, in *CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION* 1, 5 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993). An idiosyncratic terminology makes the text more difficult to understand, but it improves its clarity and thus, contributes to legal certainty.

<sup>64</sup> One of the most influential formulations of the textualist theory is John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *COLUM. L. REV.* 673–739 (1997) (supporting his theory by arguments of legitimacy). Richard Posner’s contrary theory of “pragmatic judgement”—*i.e.*, it is only the best solution of the actual case and the filling of legal gaps that one has to aim for—is critically discussed by Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *MICH. L. REV.* 885, 910–13 (2002–03), with detailed references.

<sup>65</sup> See *e.g.*, Dec. Hung. CC 1/1999. (II. 24.) AB, ABH 1999, 25, 37.

<sup>66</sup> See Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, in *INTERPRETING CONSTITUTIONS. A COMPARATIVE STUDY* 28 (Jeffrey Goldsworthy ed., 2006).

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.<sup>67</sup>

Arguments referring to the grammatical interpretation presume that the norms, in our case, the constitutional provisions, have been drafted without errors—i.e., they expressed everything, and exactly in the way they were meant to—being aware of all grammatical rules and the meaning of words.<sup>68</sup> Yet, even if these conditions are met, which is not always the case, such a grammatical interpretation does not always offer an unambiguous result.<sup>69</sup> The reason for this is partly the vagueness of natural languages, partly that certain questions may be kept open deliberately,<sup>70</sup> or the emergence of new problems, which the constitution-maker could by no means foresee, even in the course of an otherwise perfect codification (technical development).

A special problem arises, if the text of the constitution has several official language versions. The obvious solution for such situations is to give precedence to one specific language version, like Article 25(4)(6) of the Irish Constitution does: “[I]n case of conflict between the English and the Irish version of a law, including laws amending the Constitution, the Irish version shall prevail.” The other solution, chosen by the EU, gives all

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<sup>67</sup> Antonin Scalia, *A Theory of Constitution Interpretation*, Remarks at the Catholic University of America (Oct. 18, 1996), available at <http://www.proconservative.net/pcvol5is225scaliatheoryconstlinterpretation.shtml>. For a convincing collection of anti-originalist arguments [in essence: (a) the constitution has to develop, (b) yet it is difficult to amend, (c) therefore it has to be adapted to the changing circumstances through interpretation] is given (under the heading *open ended modernism*), see ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

<sup>68</sup> See PIERRE-ANDRÉ CÔTÉ, *INTERPRÉTATION DES LOIS* 240 (1990).

<sup>69</sup> See the convincing examples in Glanville Williams, 61 *Language and the Law*, *LAW QUARTERLY REVIEW* 71–86, 179–95, 293–303, 384–406 (1945); Glanville Williams, 62 *Language and the Law*, *LAW QUARTERLY REVIEW* 387–406 (1946).

<sup>70</sup> See CARL SCHMITT, *VERFASSUNGSLEHRE* 31–32 (1928) (calling this *dilatorischer Formelkompromiß*, i.e., when the solution of a question is delayed, and placed to courts by formulating the norm very vaguely).

language versions of the founding treaties equal relevance—even if it is practically quite difficult to conform to this.<sup>71</sup>

## *II. Systemic Arguments: Arguments from the Legal Context*

These arguments do not concentrate on the text of a legal provision on its own, unlike the previously mentioned group, but refer to other legal provisions, legal acts (including judicial decisions), legal principles, and general legal concepts in order to determine its meaning. If there is no relevant provision, one may argue for a legal solution from the very lack of a legal provision using linguistic-logical formulae. These arguments are united by their focus on the legal context and presuppose that law is a coherent and complete system (for more detail on these presuppositions see below in C.I).

### *1. Arguments from the Context, or Harmonizing Arguments*

Contextual harmonizing arguments support a certain interpretation by referring to other legal norms.<sup>72</sup> Legal norms may be a rule from within the same legal act—i.e., from the constitutional document, perhaps a definition among the interpretative provisions or a heading of the constitution<sup>73</sup>—or a provision from another document of equal constitutional rank—e.g., the American principle of *in pari materia*.<sup>74</sup> Constitutional interpretation may conform to a norm higher in rank of the same legal order—e.g., interpreting constitutional provisions in the light of an *Ewigkeitsklausel* or of a basic principle of the constitution which is more difficult to amend than ordinary constitutional law<sup>75</sup>—or to rules of another legal order imposing duties on the legal order concerned—e.g., interpreting the national constitutional law in accordance with EU law (so called

<sup>71</sup> 283/81 *CILFIT* [1982] ECR 3415 para 23-27; Joxerramon Bengoetxea, *Multilingual and Multicultural Legal Reasoning: The European Court of Justice*, in *LINGUISTIC DIVERSITY AND EUROPEAN DEMOCRACY* 97–122 (Anne Lise Kjær & Silvia Adamo eds., 2011); MATTIAS DERLÉN, *MULTILINGUAL INTERPRETATION OF EUROPEAN UNION LAW* (2009).

<sup>72</sup> See e.g., BVerfGE 62, 1 (35, 38ff, 44); 69, 1, 57 (61). Documents containing informal interpretations—e.g., explanatory notes by the ministries—are not like this, as they are not legal acts. Their use is forbidden in Hungary for reasons of legal certainty, see Dec. Hung. CC 37/2001 (X. 11.) AB, ABH 2001, 302, 305, with further references.

<sup>73</sup> This is called *intrinsic aid* in English scholarship. *Extrinsic aid*, in turn, refers to other legal acts or scholarly works, or even parliamentary materials. See e.g., ALISDAIR A. GILLESPIE, *THE ENGLISH LEGAL SYSTEM* 43–50 (2007).

<sup>74</sup> With reference to constitutional law, see CHESTER JAMES ANTIEAU, *CONSTITUTIONAL CONSTRUCTION* 21–22 (1982).

<sup>75</sup> See e.g., VfSlg 11.829/1988, 11.927/1988, 16.327/2001. When interpreting statutes below the rank of the constitution, the usual form of this type of argument is the interpretation in the light of the constitution. See, HARALD BOGS, *DIE VERFASSUNGSKONFORME AUSLEGUNG VON GESETZEN* (1966); JOACHIM BURMEISTER, *DIE VERFASSUNGSORIENTIERUNG DER GESETZES AUSLEGUNG* (1966); PETER RAISCH, *JURISTISCHE METHODEN. VOM ANTIKEN ROM BIS ZUR GEGENWART* 179–80 (1995), with further references. A statutory interpretation in the light of the constitution is essentially a presumption of the validity, constitutionality, of the statute, see Tobias van Reenen, *Tendances actuelles dans l'interprétation de la Constitution de l'Afrique du Sud*, 2 *REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL* 355, 360–61 (2002).

indirect effect of EU law) or with international law.<sup>76</sup> In the case of enumerations, English-speaking countries use the principles of *noscitur a sociis* (the unknown may be known from its companions)<sup>77</sup> and *eiusdem generis* (of the same kind).<sup>78</sup> Here also belongs the well-known principle of *exceptio est strictissimae interpretationis*<sup>79</sup>—i.e., the strict interpretation of exceptions.

Special contextual arguments of German constitutional law are the *Prinzip der Einheit der Verfassung* (principle of the unity of the constitution—i.e., particular constitutional provisions have to be interpreted in accordance with the other constitutional provisions)<sup>80</sup> and *praktische Konkordanz* (conflicts of general provisions [principles] have to be decided by “practical reconciliation”—i.e., finding some compromise, rather than on an all-or-nothing approach).<sup>81</sup> In American jurisprudence, advocates of *holistic interpretation* use a modified version of this argument by claiming that in the interpretation of legal texts later amendments have greater weight than earlier ones, as older parts have to be interpreted in the light of more recent ones, and not *vice versa*.<sup>82</sup>

A historical version of contextual harmonizing arguments is the *Versteinerungstheorie* (petrification theory) of Austrian constitutional law. This means that, as a general rule, the

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<sup>76</sup> On the principle of *völkerrechtskonforme Auslegung* as part of the interpretation according to the general hierarchy, see ERNST ZELLER, *AUSLEGUNG VON GESETZ UND VERTRAG* 372 (1989). In the U.S., this general principle is known as the “*Charming Betsy*” canon, after the first case where it was deployed: *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). An excellent analysis of the topic is Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479–537 (1998). On international law arguments used in constitutional interpretation in American constitutional law, see Gerald L. Newman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82–90 (2004). On the fact that the influence of Strasbourg jurisprudence on national constitutional law is similar to that of the U.S. Supreme Court on the practice of the states, see Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and The European Convention on Human Rights*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 307–34 (2002).

<sup>77</sup> The meaning of a word, particularly in enumerations, can be determined with the help of the words adjacent to it. See ANTIEAU, *supra* note 74, at 22–23.

<sup>78</sup> If words of specific meaning are followed by a more general expression in a list, then the latter has to be understood as a broader expression having a meaning similar to those of the preceding specific words. In an enumeration like “cars, vans and other vehicles,” the word “vehicle” cannot mean ship or bicycle, only land motor vehicles. See PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 110 (1986).

<sup>79</sup> In another formulation: *exceptiones non extendendae*, see ALEKSANDER PECZENIK, *ON LAW AND REASON* 399 (1989).

<sup>80</sup> E.g. BVerfGE 19, 206 (220); 55, 274 (300) with further references. An example from Hungarian practice is the Dec. Hung. CC 48/1991. (IX. 26.) AB, ABH 1991, 217, 242.

<sup>81</sup> KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 28 (1999).

<sup>82</sup> Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v Blitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259–1310 (2001). This doctrine, however, is not yet accepted by the courts, only a scholarly opinion.

words describing the division of competences between the federal and the state level have to be interpreted according to the meaning they had in the statutes then in force, at the time they were incorporated into the text of the constitution.<sup>83</sup> Later changes of definitions in statutes, or at an even lower level, are not relevant to the interpretation.<sup>84</sup>

A special case of contextual harmonizing arguments is inferring the meaning of the constitutional provision from its place within the constitution.<sup>85</sup> E.g., we can argue that a constitutional provision looking like a fundamental right is not a fundamental right, as it is not in the chapter of the constitution on fundamental rights.

## 2. Referring to Precedents Which Interpret the Constitution

In order to establish what the text of the constitution says, one may also refer to past decisions of the constitutional court interpreting the constitution.<sup>86</sup> The question is, then, whether single decisions can be taken as conclusive arguments or whether it is only an established practice (a series of past decisions or *jurisprudence constante*) that qualifies as such.<sup>87</sup> Another question is whether in the case of contradictory jurisprudence the more recent or rather the older decisions should prevail.<sup>88</sup> In some countries precedents have a formal binding force (common law),<sup>89</sup> in others only a, sometimes very strong, persuasive value.

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<sup>83</sup> For classical formulations, see VfSlg 4349/1963, 4680/1964, 11.503/1987. It differs from references to the American *original meaning*, see *supra* sec. B.I., to the extent that here the meaning is inferred from other legal rules, while there is no such limit in the case of the *original meaning*.

<sup>84</sup> See e.g., FELIX ERMACORA, ÖSTERREICHISCHE VERFASSUNGSLEHRE 96 (1998). This kind of argument is not unknown to the BVerfG either, see BVerfGE, 7, 29 (44); BVerfGE, 33, 125 (152 f.); BVerfGE, 42, 20 (29); BVerfGE, 61, 149 (175); BVerfGE, 68, 319 (328), but it is used as a less strict and conclusive argument.

<sup>85</sup> On the problem in general, with reference to statutes, see ROLF WANK, DIE AUSLEGUNG VON GESETZEN 80–90 (2005).

<sup>86</sup> The school of American constitutional interpretation focusing on such arguments is called “doctrinalist,” see WALTER F. MURPHY, AMERICAN CONSTITUTIONAL INTERPRETATION 405–10 (2003).

<sup>87</sup> Cf. I EDGAR REINERS, DIE NORMENHIERARCHIE IN DEN MITGLIEDSTAATEN DER EUROPÄISCHEN GEMEINSCHAFTEN 275–76 (1971). Most constitutional courts consider “established practice” stronger, since if it was otherwise, they would quote the most recent decision only, however they usually quote several decisions if available.

<sup>88</sup> In the U.K., in case of contradictory precedents, the judge is free to choose amongst them. See *Young v. Bristol Aeroplane Co Ltd*, (1944) 1 K.B. 718.

<sup>89</sup> Also common law countries differ in whether a court binds itself for the future by a decision, or whether it only binds courts lower in the hierarchy. The latter is the case in the U.S., the former, with the exception of the House of Lords, today’s Supreme Court in the U.K. See PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 118–27 (1987).

The principle justifying that we follow precedents is that similar cases ought to be decided in a similar way. The question here is what “similar” means. Ordinary, not constitutional, courts usually define similar as having the same material facts. In the case of constitutional review, this means that the norm to be interpreted has the same content from the relevant constitutional perspective.<sup>90</sup> If it does not, then the previous decision does not have to be followed, so the current case can be distinguished from the earlier case. In certain cases, however, the court, while acknowledging the identity of the relevant aspects of the cases, does not follow the previous decision for reasons of social changes, which took place in the meantime, or by simply stating that it was mistaken in its earlier decision, thus creating a new precedent (overruling).<sup>91</sup>

A limit to the latter is set by legal certainty—which in our case means that citizens should be able to have trust in the stability of the legal system and that the constitutional court is going to overrule its previous decisions only if there are very strong reasons for doing so.<sup>92</sup> Moreover, as the constitutional court is the main organ protecting the constitution, or expressed in another way, the primary guardian of the constitution, it has to use higher standards than other courts when judging itself. A possibility of overruling can be reasonably considered where the social circumstances have undergone rather serious changes—i.e., new facts have emerged, which the court could not possibly take into account<sup>93</sup>—or if the previous decision was passed *per incuriam*. The latter means, in the context of constitutional review, that a relevant precedent or constitutional rule was not even considered by the constitutional court.<sup>94</sup> It does not suffice if that norm was simply misinterpreted; the legal authority has to have been completely ignored.

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<sup>90</sup> See, Dec. Hung. CC 75/2008. (V. 29.) AB, ABH 2008, 651, 656 (discussing the issue that there is *res judicata* in the Court, only if a certain statute has already been examined from the *same* constitutional aspect. The same statute can thus be examined again, if it is challenged on the basis of another constitutional provision.).

<sup>91</sup> Explicit overruling: see, e.g., BVerfGE 85, 264 (285f). Mostly overruling happens in silence, see e.g. Alfonso Ruiz-Miguel & Francisco J. Laporta, *Precedent in Spain*, in INTERPRETING PRECEDENTS. A COMPARATIVE STUDY, *supra* note 52, at 285. A special technique of *overruling* allowing for legal certainty is the so-called *prospective overruling*. See EISENBERG, *supra* note 61, at 127–32. This means that although the new rule is applied for the actual case, or not even for it, the former one will be applied for all other cases that happened before the decision. Thus, the newly declared rule is going to be valid for cases emerging after the decision. Implicit suppression without an explicit modification is called *transformation*, whereas the narrowing of the scope of the previous case is *overriding*. See EISENBERG, *supra* note 61, at 132–36. “Anticipatory overruling” in the U.S. is when a lower court does not follow the precedent by a higher court, because it expects the higher court to overturn its decision anyway.

<sup>92</sup> Cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION 139 (Amy Gutmann ed., 1997) (“The whole function of [stare decisis] is to make us say that what is *false* under proper analysis must nevertheless be held to be *true*.”).

<sup>93</sup> Cf. Practice Statement, (1966) 3 All E.R. 77 (H.L.) (discussing the proper development of the law).

<sup>94</sup> On the notion of decisions *per incuriam*, see *Morelle Ltd v. Wakeling*, (1955) 1 All E.R. 708, 2 Q.B. 379.

Yet, even if one adheres to the precedents (previous choices of interpretation), there is still some room for innovative decisions; precedents, like the texts of the norms, only define a framework, quite often without providing an unambiguous outcome for the new case. Precedents themselves have to be interpreted. This situation was described by Dworkin as writing a “chain novel,” each chapter of which is composed by a different author.<sup>95</sup> One always has to keep an eye on how the story has developed so far, and this is what has to be continued—i.e., one does not have unlimited freedom—but how the story is going to proceed is not completely bound by past decisions.

There may be different reasons for following previous decisions:<sup>96</sup> (A) Rejecting the possibility of an arbitrary innovative decision. If one keeps to his or her previous decision, (s)he also thereby shows that in the previous case the decision was made not arbitrarily, but on the basis of some legal rule (rule of law). This is not a very convincing argument, however, as following a decision does not say anything about the followed decisions. If the original decision was a bad one, the reasons to repeat it are rather weak. (B) Satisfying expectations to follow precedents. This reason is flawed as it rests on circularity; one ought to follow precedents precisely because there is a doctrine of following them. Thus the doctrine itself cannot be justified in this way. (C) Efficiency in time or intellectual efforts. It is less difficult to repeat, as one does not have to consider all of the potential choices again.<sup>97</sup> The intellectual effort, and the time spent on it, once made, makes it much easier next time to retrace the way one decided before than relaying all the steps of thinking. Normally this provides a good explanation for the nature of precedents but, alas, this is not always the case. In some cases, precedents are not time saving, but rather make the decision more cumbersome. E.g., judges can sometimes clearly and quickly see how they should decide a new case, but the relevant old precedent they are supposed to follow is a mistaken one, thus they make a huge effort to explain why they are not following the old precedent. Therefore, the problem with this kind of justification is that it cannot explain the huge efforts one sometimes puts into distinguishing. (D) The need for interstitial legislation or constitution-making.<sup>98</sup> According to this reasoning, one considers past decisions as binding because this allows for constitutional rules of behavior, the contents of which are, on the basis of their text only, uncertain, to become easier to predict in the future, and also because the respective constitution-maker may not have the time or may not be in the position to go through the cumbersome procedure for making a

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<sup>95</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 228–32 (1986).

<sup>96</sup> Following Grant Lamond, *Precedent and Analogy in Legal Reasoning*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 3 (Edward N. Zalta ed.), <http://plato.stanford.edu/entries/legal-reas-prec/>.

<sup>97</sup> See Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 597–98 (1987).

<sup>98</sup> Cf. JOSEPH RAZ, *THE AUTHORITY OF LAW* 194–201 (1979) (arguing that courts ought to have law-making competence because there are unforeseen situations).

constitutional amendment.<sup>99</sup> If we want to conceptualize this point not as a justification, but rather as an incentive mechanism, then we can say that judges, by following precedents, empower themselves to make laws, thus they enhance their own power as a social group.<sup>100</sup> (E) Formal justice—similar cases have to be decided in a similar way for reasons of justice.<sup>101</sup> This argument tacitly presupposes that the right decision was made last time—i.e., it is not a mistake that is going to be reiterated—which may, regrettably, not be the case.<sup>102</sup> It cannot be “just” to condemn someone by mistake just because it was done to someone else already.

This phenomenon—i.e., following earlier decisions—is also reflected by a notion used by the Hungarian Constitutional Court when presided by László Sólyom—that of the *invisible constitution*.<sup>103</sup> The invisible constitution comprises: (A) A coherent, non-contradictory, conceptual system derived from decisions of the constitutional court, (B) the norms inferred by such decisions from the text of the constitution, and (C) those norms added to the constitution, in such decisions—e.g., the proportionality test—which are beyond the text of the constitution. What these have in common is that their content can be understood from the decisions of the constitutional court and that they make, after all, a possible, and as it is shared by the Hungarian Constitutional Court, a binding, interpretation of the constitution. The invisible constitution is essentially the system of the court’s decisions; every new decision is another brick in the building of the invisible constitution.<sup>104</sup>

Some constitutional courts do not recognize the difference between the binding force of the *ratio decidendi* (the reason underlying the decision—i.e., the part of the reasoning that contains the arguments necessary for the given decision; without these the decision would not have been made or at least not in that way)<sup>105</sup> and the obiter dicta (other

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<sup>99</sup> Accord JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 17–20 (1983) (claiming that the judge is in fact an *interstitial legislator*).

<sup>100</sup> See Eric B. Rasmussen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63–83 (1994)

<sup>101</sup> See MARTIN P. GOLDING, LEGAL REASONING 98 (1984), following ARISTOTLE, NICOMACHEAN ETHICS V. 3, 1131a10–b15.

<sup>102</sup> CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION, *supra* note. 63, at 1, 13.

<sup>103</sup> See Dec. Hung CC 23/1990. (X. 31.) AB, ABH 1990, 88, 97–98.

<sup>104</sup> On the dangers—narrowing the room for politics, without democratic legitimacy—and advantages of this phenomenon—solving situations where politics came to a standstill, see Christian Starck, *Vefassung und Gesetz, in, RANGORDNUNG DER GESETZE* 29, 32–33 (Christian Starck ed., 1995).

<sup>105</sup> The definition stems from Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161–83 (1930); Arthur L. Goodhart, *The Ratio Decidendi of a Case*, 22 M.L.R. 117–24 (1959). For a more subtle discussion, see PECZENIK, *supra* note 79, at 334, who means by “construed *ratio decidendi*” also the arguments, which may not be mentioned in the reasoning, but were implicitly essential for passing a decision. A special difficulty arises in

considerations).<sup>106</sup> The consequence of the lack of this difference is that constitutional courts never reject an argument of one of its past decisions for the reason that it was merely *obiter dictum*.

The binding force of precedents is different in every country. In some, there is an expectation that an explanation will be provided as to why a former precedent has not been followed; in others there is no such requirement. Even if the court's own precedents do not seem to bind strictly the court itself—i.e., the precedent is only of persuasive force, only to be considered as a possible solution<sup>107</sup>—it is still possible to differentiate between the weight of different precedent arguments. If it is a judgment from a previous constitutional regime or if it is the case law of other countries' courts, then the weight is smaller. The latter, comparative law arguments, as there are special problems related to it, will be dealt with separately later.

A special case of referring to precedents is when one does not refer to what interpretation was adopted by previous decisions, but claims that the interpretation changed gradually and therefore, continuing this trend, a decision would have to follow which was never passed before. Here, one opts for a certain interpretation because it follows from past tendencies of interpretation—e.g., “the court has gradually interpreted this provision more and more broadly, so [albeit never interpreted it as broadly as suggested now] one ought to interpret it even more broadly than ever before.” This kind of argument would need the courts to admit that its own jurisprudence is subject to change, which the constitutional courts are rather unwilling to do. For the difference between precedents interpreting norms and mere practice without formal decisions, see below at pp. 1262–63.

### 3. *Interpreting the Constitution in the Light of Doctrinal Concepts and Principles*

There is another possible argument to the effect that a certain concept found in the text means “x,” because this follows from a doctrinal legal concept—e.g., that of an “organ” or its being described as such<sup>108</sup>—or a legal principle—e.g., the principle of non-arbitrary use

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cases where, because of concurring reasoning and dissenting opinions, there is no reasoning accepted by the majority, thus the *ratio* cannot be established with certainty either.

<sup>106</sup> In Germany the situation is not entirely clear: we find statements that only the *ratio decidendi* is binding, see BVerfGE 1, 14 (37); 19, 377 (392); 20, 56 (87); 40, 88 (93); but we also find judgments which say that the Federal Constitutional Court can disregard its own precedents, if the circumstances require it to do so, see BVerfGE 4, 31 (38); 20, 56 (87); 77, 84 (104). Yet another judgment states that a precedent should be followed not because it is a precedent, but because it contains sound reasoning, see BVerfGE 84, 212 (227). This unclear situation is of course favourable to the court, as it can pick the doctrine favouring its own moral preferences.

<sup>107</sup> Further on this concept, see Richard Bronaugh, *Persuasive Precedent*, in PRECEDENT IN LAW 217–47 (Laurence Goldstein ed., 1987).

<sup>108</sup> We call arguments from a name or description *argumentum a notatione*.

of rights or the principle of *nemo plus iuris*. If this doctrinal concept or principle is defined by referring to another legal rule, then it is a contextual harmonizing argument; if by referring to a precedent, then it is a reference to an interpretive precedent. “Interpreting the constitution in the light of doctrinal concepts and principles” in the strict sense means that neither of the above is used for supporting the content of the given general concept, but this content is just accepted as obvious.

Given that a conceptual definition is not usually regarded as binding in itself without a background legal rule or decision,<sup>109</sup> such interpretative references to legal concepts are questionable methodologically. A characteristic example of such arguments in Hungary is the reference to the separation of powers without linking it to any particular provision of the Constitution.<sup>110</sup> In Spanish case law, the principle of interpreting all statutes in conformity with the Constitution is said to be a general (constitutional?) principle.<sup>111</sup>

#### 4. Linguistic-Logical Formulae Based on Silence

Real lawyerly reasoning makes use of not only the text, but also the lack thereof in order to interpret the constitution. Characteristic forms of this include principles like *expressio unius exclusio alterius* (expressing the one means excluding the other), *qui de uno dicet, de altero negat* (stating the one means rejecting the other),<sup>112</sup> *argumentum a contrario* (stating something about “A” may be denying the same about “non-A”),<sup>113</sup> or *enumeratio ergo limitatio* (an enumeration is presumed to be exhaustive).

A similar way of reasoning is used by the two forms of *argumentum a fortiori*: *Argumentum a maiori ad minus* and its inverse, *argumentum a minori ad maius*. The former argument holds, e.g., that if the constitution-maker has explicitly allowed something, some other action is also allowed—although it is not mentioned explicitly. The latter holds, e.g., that if the constitution-maker has explicitly forbidden something, then another, more grave, action—although not mentioned explicitly—is also forbidden. Which of the two has to be applied can often be decided by way of teleological considerations only.<sup>114</sup>

<sup>109</sup> In the case of an argument, the lack of binding force means that it may be countered by asking “So what?”. Arguments with no binding force show the mere possibility of a solution, the acceptance of which has to be supported with arguments having binding force.

<sup>110</sup> See, e.g., Dec. Hung. CC 42/2005. (XI. 14.) AB, ABH 2005, 504, 526, with further references.

<sup>111</sup> Decision of the Spanish constitutional court Nr. 2/81 and 77/83.

<sup>112</sup> See FRANÇOIS OST & MICHEL VAN DE KERCHOVE, ENTRE LA LETTRE ET L’ESPRIT. LES DIRECTIVES D’INTERPRÉTATION EN DROIT 54 (1989).

<sup>113</sup> See, e.g., László Kiss (dissenting) Dec. Hung. CC 18/1999. (VI. 11.) AB, ABH 1999, 137, 143. Sometimes the a contrario argument is referred to as e contrario, meaning the same though.

<sup>114</sup> Cf. SZABÓ, *supra* note 22, at 208.

### III. Evaluating Arguments: Arguments from Beyond the Legal Context

These arguments are grouped together because they do not refer to the legal provision itself or its legal context, but to its subjective or objective intention or purpose, or even to admittedly non-legal—e.g., moral, sociological, or economic—considerations. These arguments contain more, or at least more apparent, evaluative elements than the two previous groups.

#### 1. Relying on the Objective Purpose of the Norm

This kind of reasoning justifies choosing a certain interpretation by claiming that it corresponds to the objective purpose of the norm in question.<sup>115</sup> The objective purpose can be inferred directly from the text—e.g., its title or preamble—or indirectly on the basis of it, like the presumable intention of an assumed abstract author.<sup>116</sup> The purpose itself is generally defined as a social purpose (*le but social*) or *ratio legis*.<sup>117</sup> The name of this method is *objektiv-teleologische Auslegung* in German,<sup>118</sup> *purposive interpretation* in Anglo-American scholarship,<sup>119</sup> while French-speaking authors call it *méthode téléologique*.<sup>120</sup> The idea is not a new one, it was also known to the Romans: *Scire leges non hoc est verba earum tenere, sed vim ac potestatem* (knowing the laws does not mean knowing their words, but their intent and purpose).<sup>121</sup>

We call this argument the ‘objective teleological’ argument or reference to the ‘objective purpose’ of the norm. This denomination does *not* mean, however, that the objective

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<sup>115</sup> BVerfGE 57, 43 (62ff), 69, 1, 57 (72). For the most thorough explanation of this method, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>116</sup> See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* xi (2005) (“Intent of any reasonable author.”).

<sup>117</sup> An interesting way of dealing with this problem is the Québec Interpretation Act, providing that “Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit. Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.” Interpretation Act (Québec) sect. 41.

<sup>118</sup> FRANZ BYDLINSKI, *JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF* 453 (1991).

<sup>119</sup> A special case of this is where the establishment of representative democracy is considered to be the purpose of the constitution, and its text is interpreted in this light. This idea leads to *judicial self-restraint*, since *judicial review* by a constitutional court is a limit to representative democracy. If, however, the purpose is understood to be the protection of fundamental rights, then it may justify activism. See MURPHY, *supra* note 86, at 419–426.

<sup>120</sup> CÔTÉ, *supra* note 68, at 353, n. 1.

<sup>121</sup> Dig. 1.3.17 (Celsus).

purpose can be established in an entirely objective way, the word ‘objective’ simply refers to the origin of the purpose: we establish it on the basis of an object, i.e. the norm (and not on the basis of a subject, i.e. the law-maker). What this purpose (in Greek: *telos*) actually is, is very much open to the partly subjective interpretations of scholars and judges.

In German works, such arguments are sometimes found under the heading *Natur der Sache* (it follows from the nature of the thing).<sup>122</sup> Also the principle *Antwortcharakter der Verfassung* (the response character of the constitution), widespread in Austrian jurisprudence, should be mentioned here.<sup>123</sup> Two particular cases of the argument are the EU law principle *effet utile* and the *implied powers doctrine* of international law, which rest on the assumption that the supposed constitution-maker would certainly have preferred a special interpretation, even if not mentioned explicitly, for a want of the norms to be effective, and therefore—e.g., competences for implementation have to be interpreted broadly. Also the common law principle *magis est ut res valeat quam pereat* (that the thing may rather have effect than be destroyed—i.e., legal provisions have to be given a meaning which enables them to be effective) follows this way of reasoning.<sup>124</sup>

There are principles of interpretation that do not seem to have an objective teleological character at first sight, but still rest on such assumptions. For example, the Austrian idea of *intrasystematische Fortentwicklung* (development within the limits of the system, according to which rules of competence can be understood in a broader sense than that according to the original *Versteinerungstheorie* (see above), and particularly in the case of new technologies—e.g., “telegraph” also means “video phone,” as the latter did not exist at that time)<sup>125</sup> and the Canadian doctrine of *living tree* (i.e., the interpretation of the text has to be adapted to changes rather than limited to a static “original meaning,” since the constitution is like a living tree, accommodating itself to the circumstances dynamically and gradually).<sup>126</sup> These presuppose that there is some inherent purpose of the text beyond what is written in it, and that this purpose can be followed even against the text.

<sup>122</sup> See RAISCH, *supra* note 75, at 176–78.

<sup>123</sup> This is a historical argument, where one refers not to what a norm says but what it *does not* (eloquent silence). This is to mean that the norm is actually silent on an issue, which seems doubtful, because it was beyond any question at the time of enacting. E.g. the B-VG does not prescribe whether the cabinet decides unanimously or by majority vote, but since this (viz. unanimous decision) was evident at the time art. 69 B-VG was enacted, one has to assume that this is implied by the B-VG even today, or else the constitution-makers would have amended it explicitly. Silence means that the purpose of the norm is to stick to the old, then obvious, solution. See Bernhard Raschauer, *Art. 69, in ÖSTERREICHISCHES BUNDESVERFASSUNGSRECHT* margin n. 28 (Karl Korinek & Michael Holoubek eds., loose-leaf ed., 2003).

<sup>124</sup> See *Attorney-General of the Gambia v. Momodou Jobe*, (1984) A.C. 689, 702 (Lord Diplock).

<sup>125</sup> VfSlg 2720/1954.

<sup>126</sup> Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY*, *supra* note 66, at 55, 85–87. The same idea has made a career in the U.S. under the name *living constitution*, see, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

In some countries the objective teleological interpretation is strongly favored—e.g., Germany—in others like in Austria or especially in Hungary, it is traditionally much weaker but is becoming stronger exactly due to German, and ECHR, influence. The weakness in Hungary can be traced back to socialism, which tried to minimize judicial creativity, as creativity seemed dangerous in the dictatorship because of its uncontrolled nature.<sup>127</sup> The Austrian anti-teleological feature is partly due to traditional, 19th century, Austrian positivism; partly it is a legacy of Hans Kelsen.<sup>128</sup>

### 1.1 Excursus on a Special Type of Objective Teleological Interpretation: Dworkin

Ronald Dworkin put forth a special kind of teleological interpretation internationally popular among constitutional lawyers. According to his view, every case has only one right solution (one right answer thesis), which has to be found by the judge applying the law by way of constructive (creative) interpretation.<sup>129</sup> This means that the right answer gives the best possible interpretation of the legal rule in question; the best interpretation, in turn, should be understood as the interpretation most compatible with the political morality of the given community—the result of the interpretation obtained in this way may be very remote from the result of a plain grammatical interpretation. Performing interpretation this way is a particularly difficult task, which demands almost superhuman skills. Dworkin calls the ideal person having these superhuman skills of a judge Hercules.<sup>130</sup> This view implies that every legal provision has the objective purpose—i.e., the actual intention of the constitution-maker may not be relevant—of supporting the moral principles of the given political community and contributing to their effectiveness. The judge has to presume that there is one single coherent moral view behind the legal system as a whole which fits to the social practices based on law, including the legal rules, and at the same time justifies that very legal order (law as integrity).<sup>131</sup> From the possible moral views behind the legal order, which “fit” to the legal order, the one with the strongest moral “appeal” should be selected.

The most important problem with this kind of theory is that it substitutes the legal debate, at least partially, with a debate on the political morality of the community, for which there are a lot less rules of discussion—i.e., constitutional lawyers are trained to follow rules of

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<sup>127</sup> For more detail and further references, see András Jakab, *Surviving Socialist Legal Concepts and Methods, in THE TRANSFORMATION OF THE HUNGARIAN LEGAL ORDER 1985-2005* 606, 606–619 (András Jakab et al. eds., 2007).

<sup>128</sup> András Jakab, *Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany*, *INT'L & COMP. L.Q.*, 933, 933-55, (2009) (with further references).

<sup>129</sup> DWORKIN, *supra* note 95, at viii–ix.

<sup>130</sup> *Id.* at 239.

<sup>131</sup> *Id.* at 225–28, 254–58.

legal methodology, but none of us are trained to follow the “rules of political philosophy debates” as there are just no such rules—and on which it is much more difficult to make compromises.<sup>132</sup> The less technical we become, the more emotional the debate will be. Therefore, if possible, one should argue with reference to the specific purposes of specific rules rather than the overall purpose of the legal system as a whole. Unfortunately, this purpose-narrowing is not always possible, as our ideas about the specific purposes of specific provisions may depend on our general views of political philosophy.<sup>133</sup> But at least, direct reference to such considerations should be minimized in constitutional interpretation as far as possible. Otherwise we lose one of the main reasons for having constitutional reasoning: Taming ideological and political conflicts by transforming them into technical-legal issues. Referring to general purposes, or general moral reasons underlying the legal system, is further complicated by the fact that if one does not want to give a long list of commonplaces, but rather something that may be relevant in deciding an actual legal case, then a range of competing narratives can be offered as the moral sense behind the legal system.<sup>134</sup> Sometimes this may be true for finding the *telos* behind the particular legal rules as well, but there one has at least slightly more of a chance of not delving into fundamental questions, so the debate is less vehement, the minority accepting the outcome more easily.<sup>135</sup> In a pluralist democratic system, such as we have in Europe, different narratives on the political and moral nature of the legal system ought to be considered as normal, so a general “moral base” of the legal system, except for a minimal notion of pragmatic common self-interest, does not exist. To rely on the general moral base of the legal system usually just masks our own moral preferences as legal necessities. True, one’s moral preferences cannot be completely eliminated from legal reasoning, yet

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<sup>132</sup> Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1637-1715 (1998) (Especially at 1695, this presents Dworkin as ‘the Taliban of Western legal thought’).

<sup>133</sup> BURTON, *supra* note 60, at 101–23.

<sup>134</sup> It is for this reason that the theory stemming from Rudolf Smend, according to which the constitution as a whole aims for “integration,” has to be rejected. Integration in the Smendian sense in pluralist societies is verging on the impossible. Smend, and the reception of Schmitt, are heavily criticized as the projection of a conservative state-centred (etatist) morality by ROBERT CHR. VAN OOYEN, DER BEGRIFF DES POLITISCHEN DES BUNDESVERFASSUNGSGERICHTS (2005). For a fitting argument possibly scaring away liberals in some European countries from Dworkin, see also the opinion of an Irish judge: “The political philosophy of our Constitution owes infinitely more to Thomas Aquinas than Thomas Paine” in High Court of Ireland [H. Ct. - Federal Court], Director of Public Prosecutions v. Best, (2000), 2 I.R. 17, 65. Dworkin would probably answer to this that his theory is geographically not universal—i.e., it has been developed solely for the U.S. or at the most for democracies of a similar liberal approach, cf. DWORKIN, *supra* note 95, at 102–03—but if he does so, then it would be simpler, more open and more honest just to leave aside the “fit” part of his argument as what he does is interpreting constitutional law in the light of his own, liberal, moral preferences. With the anti-universal approach, he basically filters out those cases where there could be a contradiction between “fit” and “appeal,” and he seems to filter the possible legal orders, thus the “fit”-side, based on his political philosophy—i.e., based on his “appeal” preferences.

<sup>135</sup> For a similar criticism on Dworkin, see NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE. JUSTICE, LAW AND RIGHTS 217 (2002).

their role ought to be severely limited for reasons of legitimacy in a pluralist society. Dworkin's theory of interpretation does not replace legal reasoning with a moral one, but it does strengthen considerably the role of moral arguments, encouraging the interpreter to use them more overtly. In light of the above considerations, his view is thus open to serious objections.<sup>136</sup>

We of course all have a more or less coherent, sometimes just unconscious, political philosophy which can help us make choices of constitutional interpretation; however, it is quite a different thing to have such a general theory in the back of our mind and to refer to it in debates on constitutional reasoning. The latter is alien from the genre and due to its emotional nature likely to waste the taming nature of constitutional reasoning. Constitutional reasoning can fulfill its function of justifying decisions in its specific way exactly because certain touchy issues remain unspoken.

### *1.2 Objections to Objective Teleological Arguments and How to Respond to Them*

The most frequent objections are (A) that the same text can have several purposes, which may lead to interpretations contradicting each other, and therefore an unclear choice among them, and (B) that even a clear *ratio legis* sometimes fails to show which interpretation could support it best as to its consequences—e.g., because this would need an empirical survey, which the interpreter cannot carry out.<sup>137</sup> These objections are relevant, but they do not mean that, in general, we cannot successfully use teleological arguments, only that these do not always bring about a suitable result.

It may also be argued that the text has no intention; only persons have intentions. Indeed, texts do not have intentions, but just as one can say that the function/purpose of a hammer is to drive in nails, rather than to sweep, also the provisions of the constitution may have functions/purposes attributed to them.

An argument against a particular form of objective teleological arguments—i.e., referring to the intention of an assumed abstract constitution-maker rather than the purpose of the text—may be that there are no “abstract authors,” only actual ones. This is true, and therefore it is preferable to refer to the purpose of the text than to the intention of an abstract author.

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<sup>136</sup> Similarly problematic is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981) who suggests that the (U.S.) Constitution should always be interpreted in a way that reinforces the nation's system of democratic representation. The supposition of such overarching purposes behind the Constitution leads to never ending political philosophical debates.

<sup>137</sup> PECZENIK, *supra* note 79, at 412, 414–15.

## 2. Relying on the Intention of the Constitution-Maker (Subjective Teleological Arguments)

Unlike in the previous section, here we deal with arguments referring not to the, more or less concrete, objective purpose of a particular provision of the constitution or the legal system as a whole, but to the actual purpose or intention of the constitution-maker.<sup>138</sup> One refers to this not because one thinks that the constitution-maker “knows better than anyone else how to interpret the provision[, b]ut simply because this is *her* interpretation.”<sup>139</sup> The reason for this is that normally the constitution-maker has stronger legitimacy, being closer to the source of sovereignty, than those interpreting or applying it. A means of investigating the constitution-maker’s intention may be consulting the *travaux préparatoires* of the constitution-making process.<sup>140</sup>

References to the subjective purpose can be divided into two groups, according to their content. (A) The first type raises the question what the constitution-maker intended at the particular historical moment.<sup>141</sup> In contemporary American literature on constitutional law this is called *original intent*. In the French literature such arguments were traditionally put forth by adherents of the so-called “exegetic school” (*École de l’Exégèse*),<sup>142</sup> but since Blackstone the method has been well-known in England.<sup>143</sup> (B) The other group of references to the subjective purpose concentrates on the question of what the constitution-maker would say today, among the altered historical circumstances. French authors call this *méthode évolutive*.<sup>144</sup>

The most plausible objection, in addition to the objection of fiction mentioned above, to the arguments of group (A) was formulated by Thomas Jefferson:

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<sup>138</sup> This may be difficult to prove—particularly in the case of a group decision where some may not be aware of what they vote for; or different persons may have different purposes—therefore some consider this concept as fiction. See CÔTÉ, *supra* note 68, at 13–14. The same problems arise to an even greater extent if one refers to the will of the “people” in the case of a statute, see, e.g., EKKEHART STEIN & GÖTZ FRANK, *STAATSRICHT 34* (2002). One may refer to the intent of the drafter(s) instead, see, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 17 (1971). This, however, raises problems in terms of legitimacy, since it is not the drafters but the constitution-maker that makes the constitution.

<sup>139</sup> JÁNOS KIS, *ALKOTMÁNYOS DEMOKRÁCIA* 134 (2000).

<sup>140</sup> A Hungarian example is Dec. Hung. CC 4/1997. (I. 22.) AB, *ABH* 1997, 41, 45–46.

<sup>141</sup> E.g. BVerfGE 88, 40 (56f.); 102, 176 (185).

<sup>142</sup> PIERRE PESCATORE, *INTRODUCTION À LA SCIENCE DU DROIT* 333–35 (1960).

<sup>143</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 59 (8th ed. 1765) (“The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made.”).

<sup>144</sup> Cf. PESCATORE, *supra* note 142, at 331 (discussing statutory interpretation in general).

Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human . . . I knew that age well . . . It was very like the present, but without the experience of the present . . . Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs.<sup>145</sup>

Moreover, the constitution-maker's intention may be manifold and in particular cases these may lead to interpretations contradicting one another.<sup>146</sup> The constitution-maker may even have intended to leave a question open. The most important problem concerning arguments of type (B) is that they are rather hypothetical and unverifiable—i.e., “in such a case the constitution-maker would say that.” A reference to the point of view of those to whom the norm is addressed is a serious argument against both types:

[I]t is simply incompatible with democratic government—or indeed, even with fair government—to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. It was said of the tyrant Nero that he used to have his edicts posted high up on the pillars, so that they would be more difficult to read, thus entrapping some into inadvertent violation. A legal system that determines the meaning of laws on the basis of what was meant rather than what was said is similarly tyrannical.<sup>147</sup>

In the jurisprudence of the Hungarian Constitutional Court, the most relevant objections to subjective teleological arguments were formulated by László Kiss:

Moreover, the concept of “the legislator's intent”—which the majority decision too makes use of—is a rather contradictory one both in terms of the constitution and the interpretation of law. Possible

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<sup>145</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE JEFFERSON* 558–59 (Merrill D. Peterson ed., 1975).

<sup>146</sup> Brison & Sinnott-Armstrong, *supra* note 63, at 11.

<sup>147</sup> Antonin Scalia, *supra* note 92, at 17.

objections are of two kinds. First, one has to answer the question of whether the “uniform” intent of a collective body (the assembly comprising 386 representatives) can be traced back at all? (A possible message of accepting the reference to the intent is that in cases allowing for deliberation those applying the law may identify the assumed intent of the legislator with their own intent, which may not be free from all arbitrariness.) . . . In defining the intent, can one construct a ranking to the effect that what was said by the person introducing the bill—who, being a minister, is not even necessarily one of the representatives—is more important than the votes of the representatives saying “yes” or “no”? Even if one cannot exclude the theoretical possibility of several hundreds of people having the same intent in a given moment: are the Official Protocols of the National Assembly a sufficient evidence of this? [On the problem of the legislator’s intent see e.g. Max Radin, *Statutory Interpretation*, 43 *Harvard Law Review* 863, 870–871; Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *Harvard Law Review* 417, 417–419 (“We do not enquire what the legislature meant; we ask only what the statute means.”).]

Another, even stronger objections may be found on the second level of objections, which I call “normative.” If there exists empirically “the legislator’s intent,” can one argue that it has any power? The legislator speaks through the written text, not her assumed intention. In a constitutional state observing the rule of law it is the rule of law that has to be effective, not the intentions of the actual legislators (“government of laws, not men”). The Constitutional Court, in turn, is bound by the text of the Constitution only, it cannot consider the assumed intent of those drafting the Constitution (in the case of constitutional interpretation), or that of the legislature (when declaring the norm in question contrary to the constitution) when seeking to find firm ground for the legitimacy of a decision. This argument resembles the concurring reasoning of László Sólyom to the decision 23/1990. (X. 31.) AB, where he opposed the freedom of the legislature, by virtue of which the

National Assembly can decide following any reason, scientific, political, or practical, to that of the Constitutional Court, which can pass decisions founded upon arguments of constitutional law only, and is therefore not even bound by the legislator's intent. (ABH 1990, 88, 97.) In a constitutional state observing the rule of law, one cannot expect those bound by law to use a concept, which is obscure and has no binding force, as the compass of their lawful/unlawful behavior.<sup>148</sup>

In order to eliminate the above problems, it may be helpful to (A) reformulate, if possible, the subjective teleological arguments into objective teleological arguments—i.e., one should speak of the *ratio* of the constitutional provision rather than some purpose of the constitution-maker—and (B) to trace this back to the text itself rather than to *travaux préparatoires* or other documents of a non-legal kind.

Alongside the positive type of subjective teleological arguments—i.e., what the constitution-maker intended—these arguments also appear in negative forms—i.e., what the constitution-maker could not have intended. Typical examples of these are cases where a certain interpretation is accepted with the rationale that the constitution-maker “might not want to contradict herself,” “might not want to infringe international law,” “might not want to codify meaningless or irrational rules,” or “might not want to proceed in an unfair way.” These arguments too, just as the positive subjective teleological arguments mentioned above, all rest on the assumption of rationality on the part of the constitution-maker,<sup>149</sup> and may justify, e.g., the interpretation of misspelled texts, without any official correction, so that they become meaningful. Also the English *Golden Rule*, or as it is called in the U.S., the *soft plain meaning rule*—i.e., the grammatical interpretation is basically accepted, yet one may depart from it if it leads to an absurd result, since this cannot be what the constitution-maker wanted<sup>150</sup>—is based on this logic; in continental European terminology we would say that the grammatical interpretation has been corrected by an *argumentum ad absurdum*.<sup>151</sup> There are no general methodological objections to these negative subjective teleological arguments. Still, negative subjective

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<sup>148</sup> In one of his dissenting opinions, Dec. Hung. CC 675/B/2001, ABH 2002, 1320, 1344-1345.

<sup>149</sup> For a more detailed discussion of these arguments, see François Ost, *L'interprétation logique et systématique et le postulat de rationalité du législateur*, in *L'INTERPRÉTATION EN DROIT: APPROCHE PLURIDISCIPLINAIRE* 97, 159-77 (Michel van de Kerchove ed., 1978).

<sup>150</sup> Cf. JAMES HOLLAND & JULIAN WEBB, *LEARNING LEGAL RULES* 234-36 (2006) (discussing statutory interpretation in general).

<sup>151</sup> See SZABÓ, *supra* note 22, at 210 (discussing the *argumentum ad absurdum*).

teleological arguments are sometimes so abstract—i.e., not linked to the actual constitution-maker—that they seem to be, in fact, objective teleological arguments.

### 3. Substantive (Non-Legal: Moral, Sociological, Economic) Arguments

Arguments of a substantive, or prudential, character are seldom used in most European constitutional courts. Examples can be found in cases where no other arguments can help, or other arguments lead to interpretations contradicting one another and one has to choose. Such arguments may also appear in cases involving rather abstract general clauses or abstract and value-laden legal provisions. In an Anglo-Saxon context, such arguments are linked to the *Law and Economics* movement,<sup>152</sup> also the so-called *Brandeis Briefs*<sup>153</sup> may be considered the manifestation of this kind of arguments; in French-speaking cultures, following François Génay, to the slogan *Libre Recherche Scientifique*; while in German-speaking jurisprudence to the *Freirechtsschule*.<sup>154</sup> Adherents of substantive arguments are split on whether you can use both economic-sociological<sup>155</sup> and moral arguments<sup>156</sup> or just one of them.<sup>157</sup> Using moral arguments has to be distinguished from the Dworkinian theory of interpretation discussed above, which does not refer to moral arguments as such, but to moral arguments which can be found within the legal order in force and which serve to justify that very legal order. Thus, the Dworkinian reason for a particular interpretation cannot be that the meaning of a constitutional provision is a “moral” one, but that the given interpretation fits best to the best reading of the principles

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<sup>152</sup> See William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (discussing its impact on legal interpretation). For a consequence-based theory of interpretation under the heading “pragmatism,” see Richard A. Posner, *Interpretation Revisited*, in CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION, *supra* note 63, at 102–17.

<sup>153</sup> Louis Brandeis, Justice of the Supreme Court between 1916 and 1939, argued as an attorney in the case *Muller v. Oregon*, 208 U.S. 412 (1908) by delivering a detailed sociological presentation of the social effects of long working hours on women.

<sup>154</sup> On these German and French schools, see JEAN-LOUIS BERGEL, *MÉTHODOLOGIE JURIDIQUE* 249–53 (2001); JEAN-CASSIEN BILLIER & AGLAÉ MARYOLI, *HISTOIRE DE LA PHILOSOPHIE DU DROIT* 189–94 (2001).

<sup>155</sup> See Richard A. Posner, *The Costs of Enforcing Legal Rights*, 3 E. EUR. CONST. REV. 71 (1995) (discussing the “right” interpretation of fundamental rights based on a cost-benefit analysis, with examples from U.S. constitutional interpretation). For a critique of Posner on moral grounds, see Kis János, *From Costs and Benefits to Fairness: Comments on Richard Posner*, 3 E. EUR. CONST. REV. 84 (1995).

<sup>156</sup> E.g. BVerfGE 84, 212 (221). Within moral arguments one may further distinguish between references to critical morality (“the” right approach of morality) and references to the moral views of the majority of the society (social morality), see, e.g., Rainer Arnold, *Réflexions sur l’argumentation juridique en droit constitutionnel allemande*, in RAISONNEMENT JURIDIQUE ET INTERPRÉTATION, *supra* note 10, at 61. The latter emerges very rarely in Hungarian constitutional case law: 154/2008. (XII. 17.) AB, ABH 2008, 1203, 1235.

<sup>157</sup> For a combined example, see Dec. Hung. CC 23/1990. (X. 31.) AB, ABH 1990, 88, 93, with references to values on the one hand, and the lack of effectiveness, on the other.

morally justifying the legal order. Here, however, one finds a reference less subtle and more direct than that of Dworkin.

In Germany, these arguments arise under the heading *Wertordnung der Verfassung*. An even more direct form of the moral argument is to refer to natural law.<sup>158</sup> In Hungary, however, this concept was explicitly rejected by the constitutional court with reference to legal certainty.<sup>159</sup> The then president of the court termed this approach as constitutional positivism (*Verfassungspositivismus*).<sup>160</sup>

Constitutional positivism is indeed a plausible approach, as almost any argument can be “translated” into objective teleological arguments, thus giving them a legal form. Once introduced, legal arguments are exposed to criticism through other legal arguments, which opens the way for a rational legal discourse.<sup>161</sup>

#### IV. Further Arguments

The last group of methods is unified by the mere fact that these can serve merely as sources of inspiration or a toolkit of ideas, i.e., they can only show the theoretical possibility of a certain interpretation or give a persuasive authority, without being a binding reason for choosing that very interpretation.

##### 1. Referring to Scholarly Works

A certain interpretation can be supported by the fact that it appears in scholarly literature, preferably in the works of a jurist of high reputation (*argumentum ab auctoritate*), or as

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<sup>158</sup> See the commentary to the decision BVerfGE 95, 96 in VERFASSUNGSRECHTSSPRECHUNG 605–611 (Jörg Menzel ed., 2000). On German references to natural law, see BVerfGE 3, 88; 6, 132; 23, 98. On the arguments for and against the references to values in the jurisprudence of the German constitutional court, see Ernst-Wolfgang Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in RECHTSPOSITIVISMUS UND WERTBEZUG DES RECHTS 33, 45 (Ralf Dreier ed., 1990); Christian Starck, *Zur Notwendigkeit der Wertbegründung des Rechts*, in *id.* at 59–61.

<sup>159</sup> Dec. Hung. CC 11/1992. (III. 5.) AB, ABH 1992, 77, 82, 84–85. Unlike e.g. the USA, where such arguments do play a major role, see Mark Tushnet, *supra* note 66, at 38–40.

<sup>160</sup> LÁSZLÓ SÓLYOM, AUFBAU UND DOGMATISCHE FUNDIERUNG DER UNGARISCHEN VERFASSUNGSGERICHTSBARKEIT, OSTEUROPA-RECHT 235 (2000).

<sup>161</sup> Further objections to moral arguments: (1) Giving them a legal form (i.e. forbidding direct references to morality) serves the taming and easing of ideological oppositions, see ERNST FORSTHOFF, ZUR PROBLEMATIK DER VERFASSUNGS-AUSLEGUNG 22–25 (1961); (2) References to morality are not representative of the whole of society, as they reflect the morality of (upper middle-class) lawyers and are therefore anti-democratic, see ELY, *supra* note 136, at 59.

the commonly accepted view (*herrschende Meinung*). In some legal cultures it has a heavy persuasive weight (e.g. Germany where as a consequence of the prestige of legal scholarship, constitutional law professors are often appointed as judges at the Federal Constitutional Court), in others the situation is rather the opposite (U.K.).<sup>162</sup> In the U.S., reference to academic writing mostly serves only to point to factual information, or to decorate the conclusion already defended by other interpretive techniques.<sup>163</sup>

## 2. Arguments from Comparative Law

Last but not least, arguments from comparative law have to be mentioned.<sup>164</sup> It is interesting to note that Section 35.1 of the South African Interim Constitution,<sup>165</sup> as well as Section 39.1 of the now valid Constitution of the Republic of South Africa,<sup>166</sup> explicitly encourage the study of foreign cases in constitutional review.<sup>167</sup> Like scholarly works, such arguments have no binding force,<sup>168</sup> yet they may help to give the impression that a decision was arrived at after careful consideration.

Reasoning with arguments of comparative law in constitutional interpretation is a global phenomenon or trend.<sup>169</sup> One may or may not like this trend,<sup>170</sup> but its existence is beyond

<sup>162</sup> For a discussion on the historical reasons of the differences in use of legal scholarship, see András Jakab, *Seven Role Models of Legal Scholars*, 2 GERMAN L.J. 757 (2011). For an example of deference of the German Federal Constitutional Court to academic critique, see BVerfGE 84, 212 (227).

<sup>163</sup> Tushnet, *supra* note 66, at 44 n. 109.

<sup>164</sup> E.g., BVerfGE 84, 239 (269); 89, 155 (189); 95, 408 (423f.). Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als “fünfter” Auslegungsmethode*, 44 JURISTEN-ZEITUNG 913 (1989) (mentioning comparative law as the fifth method of interpretation in addition to the traditional four (grammatical, logical, systematic and historical) of Savigny).

<sup>165</sup> S. AFR. (INTERIM) CONST., 1993 (“In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”).

<sup>166</sup> S. AFR. CONST., 1996. (“When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”).

<sup>167</sup> For a discussion on this topic, see D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience*, 1 INT’L J. CONST. L. 181, 189–91 (2003).

<sup>168</sup> This is called ‘soft use’ by Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Argument*, 14 DUKE J. COMP. & INT’L L. 301 (2004). According to an even more radical description, such references have a merely ‘ornamental function.’ See Ulrich Drobnig, *The Use of Comparative Law by Courts*, in THE USE OF COMPARATIVE LAW BY COURTS 3, 18. (Ulrich Drobnig & Sjef van Erp eds., 1999).

<sup>169</sup> Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversation on Constitutional Rights*, 20 O.J.L.S. 499, 506 (2000).

doubt.<sup>171</sup> The main causes of the trend are: The general trend of globalization, and, as a consequence, the overall weakening of national isolation; the emergence of inter- or supranational courts<sup>172</sup> as meeting points of different legal cultures, where the practice of legal comparison spreads the culture of comparative law even beyond its own institutional limits;<sup>173</sup> and the similar role-perception of judges (i.e. that of guarding the basic values of constitutionalism which are considered as being some kind of modern or postmodern natural law or as a modern *ius gentium*)<sup>174</sup> in liberal democracies. This common identity then serves as the ground for a feeling of global community, which in turn leads to a dialogue,<sup>175</sup> which manifests itself in references made in decisions to each other's works.<sup>176</sup> Beyond these reasons for the use of comparative law arguments, the explicit reference to foreign case law might be especially relevant for new constitutional courts of transitional countries which try to show themselves in a prestigious society of well-established foreign constitutional, or supreme courts in order to collect more credibility in their respective domestic discourses. And finally, considering a foreign interpretation might be helpful even if, for some reason, we eventually reject that specific interpretation: It can still be used for purposes of contrast, by showing what we do *not* want to adopt. In this negative way, it can help us to understand and to crystallize the reasons behind our own interpretation better, for others and for ourselves too.

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<sup>170</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 61 (Vicki C. Jackson & Mark Tushnet eds., 2002); Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *id.* at 3.

<sup>171</sup> This is characteristic not only of *small* countries, but may also be observed e.g. in the U.S., see, e.g., Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37, 39 (2006). An interesting figure is that 60% of the cases referred to by Québecois courts are of foreign law (e.g. French or common law). See H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 294 (1987).

<sup>172</sup> In the context of the ECJ, see T. Koopmans, *Comparative Law and the Courts*, 45 INT'L & COMP. L.Q. 545, 546 (1996).

<sup>173</sup> For a discussion on the clarification of vague principles through comparison in international law, see SIGRID JACOBY, ALLGEMEINE RECHTSGRUNDSÄTZE: BEGRIFFSENTWICKLUNG UND FUNKTION IN DER EUROPÄISCHEN RECHTSGESCHICHTE 184–90 (1997). From EU law, Sigrid Jacoby discusses the example of Art. 288. 2 [ex Art. 215.2] of the EC Treaty, *id.* at 210–15.

<sup>174</sup> See Gábor Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1331–32 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>175</sup> For a discussion on the dialogue model of this phenomenon, see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 855–65 (1999); *SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES* (Filippo Fontanelli et al. eds., 2010).

<sup>176</sup> For a discussion on this phenomenon as part of the international communication between courts, see Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 129–32 (1994).

Arguments against this approach form three groups: Objections (A) based on legitimacy,<sup>177</sup> or (B) on methodology;<sup>178</sup> and (C) criticizing the mindless borrowing of foreign ideas.<sup>179</sup> The first objection can be dealt with by clarifying that the argument from comparative law is not a conclusive one (i.e. only an idea for further consideration). As for the second objection, the comparison ought to be as broad as possible and the arguments considered as sources of inspiration, not necessarily as solutions, given the difference of contexts. The usual trick of choosing only those countries that apply the same solutions as we prefer, should thus be avoided. These two answers also give a response to the third objection: by considering comparative law only as an idea, and by bearing in mind the contextuality of constitutional solutions, we make it clear that we have to think through the particular foreign solutions and find out whether they can be applied to us or not.

The most important argument for the comparative method is the common-sense principle of “two heads are better than one,” or “wise men learn by other men’s mistakes.”<sup>180</sup> Such theoretical arguments, however, are usually only of secondary importance for undertaking or not undertaking legal comparison: Whether one goes for an international overview, or not, basically depends on whether one has sufficient time and knowledge of the relevant languages.

#### V. *The Relationship Between the Methods*

In our survey we discussed four major types of arguments: (A) Linguistic, grammatical, or textualist, methods; (B) systemic arguments; (C) evaluative arguments; and (D) arguments from scholarship and comparative law, which only have persuasive force. When inquiring about the relationship between them, we have to make general theoretical statements

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<sup>177</sup> The defense of authentic national identity against the *new imperialism*, see Carlos F Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269 (2003). General concerns of legitimacy, see Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305 (2004).

<sup>178</sup> The choice of foreign material is not only arbitrary (or, more properly, one looks for support for an already given conclusion) and uncontrollable, it is also dangerous for stability, delivering arguments for departing from the already established case law, see Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985); George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998). Borrowing is always problematic because of the different cultural and political contexts, see Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT’L J. CONST. L. 244 (2003); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, Aug. 2004, at 41, 41–42. Every country has a different argumentative culture, so legal reasoning cannot be borrowed, see PIERRE LEGRAND, LE DROIT COMPARÉ 81–99 (1999). The tacit presupposition that constitutional laws converge, is not true, see Ruti Teitel, *Comparative Constitutionalism in a Global Age*, 117 HARV. L. REV. 2570, 2584 (2004).

<sup>179</sup> Christian Walter, *Dezentrale Konstitutionalisierung durch nationale und internationale Gerichte: Überlegungen zur Rechtsvergleichung als Methode im öffentlichen Recht*, in NICHT-NORMATIVE STEUERUNG IN DEZENTRALEN SYSTEMEN 205, 224 (Janbernd Oebbecke ed., 2005).

<sup>180</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999).

knowing that constitutional courts in practice sometimes do not follow any theoretical pattern in weighing the arguments, or they sometimes give lip service to old and outdated theories of interpretation (e.g. that of Montesquieu's famous saying that judges are simply "mouthpieces of the law"). Thus any *description* of the weighing of methods of interpretation necessarily becomes also a *prescription*. The following passages are to be read in the light of this disclaimer.

When interpreting constitutions, the first step is usually the examination of the arguments of the type (A), even without explicitly mentioning them, just as an implied starting point. This is followed by the use of more or less subtle, according to the country specific sophistication of *Verfassungsdogmatik*, systemic arguments. Arguments of the types (A) and (B) are basically accepted everywhere as general lawyerly methods, though with different weight. Evaluative arguments of type (C) or rather their explicit use, are, however, deliberately rejected or limited by some constitutional cultures, mostly due to their arbitrariness.<sup>181</sup> Arguments of type (D), which lack binding power in European constitutional cultures, are used occasionally and as their inventory is almost infinite, and are deployed primarily depending on the time and/or the languages one knows.

Choices between different arguments or types of arguments are often determined by the concerns of legitimacy mentioned above.<sup>182</sup> Arguments of type (A) pose the least problem from this aspect, and those of type (C) are the most problematic. Those of type (D) do not count in this regard, as they admittedly serve only as sources of inspiration with no binding force. This situation has led to the formulation of principles like *interpretatio cessat in claris*,<sup>183</sup> *quand la loi est claire, il faut la suivre* (if the statute is clear, it has to be observed), or *l'esprit l'emporte sur la lettre* (the spirit [of a statute] is expressed by its letter).<sup>184</sup> It is hard, however, to keep to these less legitimacy-demanding methods, if the interpretation thus obtained would remain too obscure, or too vague, or even absurd.<sup>185</sup> In such cases, one cannot help but move on towards more legitimacy-demanding grounds: *Quand elle est*

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<sup>181</sup> The attitude towards the creative arguments of type (C) also depends on which institutions one trusts. If one thinks that the legislature is short-sighted, populist, and incompetent, then constitutional courts are likely to prefer creative, interpretatory techniques, while if the prestige of judges is low (because they are considered to be anti-democratic, elitist, corrupt, or maybe adherents of the *ancien régime*), then one opts for a text-based interpretation. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 169 (1996).

<sup>182</sup> There are also tacit political philosophies, (conceptions of democracy) underlying the preferences in terms of methods of legal interpretation, but we shall not discuss these here. For a detailed analysis, see MARTIN KRIELE, *THEORIE DER RECHTSGEWINNUNG ENTWICKELT AM PROBLEM DER VERFASSUNGSINTERPRETATION* 27-31 (1976).

<sup>183</sup> It is described as an argument used in Belgian jurisprudence, see François Ost & Michel van de Kerchove, *Les directives d'interprétation en théorie du droit et en droit positif belge. La lettre et l'esprit*, in *LES RÈGLES D'INTERPRÉTATION* 25, 25-27 (Jean-François Perrin ed., 1989).

<sup>184</sup> It is formulated (also) somewhat differently, see CÔTÉ, *supra* note 68, at 265-285.

<sup>185</sup> Cf. the British *Golden Rule*, see *supra* p. 206.

*obscure, il faut en approfondir les dispositions* (if [the statute] is obscure, its provisions have to be examined more closely).<sup>186</sup>

Methods of type (A) provide, firstly, a field which is certainly within the scope of the expression interpreted, a black core, secondly, one which is definitely outside of it, a white environment, and thirdly, a blurred grey penumbra.<sup>187</sup> Through the methods of type (B), (C), and (D), the cases in the grey penumbra will then be classified as either white or black. Sometimes even clear cases of black will be classified as white, or the other way around, but in such cases very strong arguments from (B), (C), or (D) are needed to make this result acceptable. Besides the legitimacy concerns mentioned above, legal certainty may also be a reason to prefer type (A), or perhaps type (B), over type (C) and type (D) arguments. Focusing on the constitution, Goldsworthy puts this as follows:

A constitution laid down by a founding generation empowers as well as restricts subsequent generations, by providing them with the incalculable benefits of an established and accepted set of procedures for making collective decisions binding on all their members . . . . If some attempt to evade the restrictions, others may be tempted to follow suit, leading eventually to the collapse of the constitution and the loss of the empowerment it provided.<sup>188</sup>

In the case of constitutional interpretation, however, there are strong arguments for attributing evaluative arguments of type (C) a greater weight than usual. The reason for this is that constitutions are generally rather abstract,<sup>189</sup> difficult to amend (i.e., one cannot always adapt to a new social situation simply by amending the text),<sup>190</sup> and sometimes ancient as well.<sup>191</sup> Therefore, sometimes the constitution can be made to fit the

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<sup>186</sup> For a discussion on debates concerning this problem in Austrian scholarship, see Jakab, *supra* note 128, at 943–45.

<sup>187</sup> HERBERT HART, *THE CONCEPT OF LAW* 120–131 (1961) uses the metaphor of “the open texture of law.” For Hart’s thesis being applied to constitutional interpretation, see JOSÉ JUAN MORESO, *LEGAL INDETERMINACY AND CONSTITUTIONAL INTERPRETATION* 131–71 (1997).

<sup>188</sup> Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1 (1997).

<sup>189</sup> Moreover, constitutional ideas, and therefore the abstract provisions implementing them, partly contradict one another, see EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 58–60 (1949).

<sup>190</sup> BENJAMIN L. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (1921).

<sup>191</sup> Jeffrey Goldsworthy, *Introduction, in* *INTERPRETING CONSTITUTIONS. A COMPARATIVE STUDY*, *supra* note 66, at 5. This argument does not apply, though, to most European countries where constitutions are usually younger than civil or criminal codes.

altered circumstances by modifying the interpretation.<sup>192</sup> The concerns of legitimacy and legal certainty can be answered, in turn, by always tracing the arguments back to the text of the constitution and referring to the methods of type (C) moderately, as opposed to complete abstinence. Moreover, most, but not all, of type (C) arguments can be substituted by a skillful use of the systemic arguments of type (B). There is no general standard as to the proportions of use; one must rely on the country specific expectations of the professional community of constitutional lawyers.

#### VI. Summary of Part B

If we had to formulate the most essential thesis of the present paper as regards to methods of constitutional interpretation, it might be the following: The constitution has to be interpreted (A) always according to its text, (B) yet adapting to the changing circumstances. Among the several methods of interpretation discussed above, which all aim to resolve this apparent tension in constitutional interpretation, the most important one is the objective teleological method, even though some European legal cultures do not really use it to its full potential. The teleological method can reduce, if the objective *telos* is determined on the basis of actual passages of the constitution, the danger of arbitrariness and legal uncertainty while allowing for flexibility. In determining the *telos* of the text, one ought to be as exact as possible, not speaking of general purposes of the legal order or of the constitution, as these may well lead to quasi-religious debates of political philosophy, which are, in practice, regrettably difficult to carry out in a reasonable way.

The objective teleological method can be used not only as a particular method of interpretation, but also as a meta-argument for choosing between the different possible interpretations obtained by the other methods. If, however, the interpretation obtained by an objective teleological argument can also be constructed by systemic arguments (i.e., those of type (B)), then arguments of type (B) have to be preferred, as they may raise fewer legitimacy concerns. The objective teleological line of thought serves in such cases as an unspoken control, (i.e., we do it quietly, internally, but it is unnecessary to mention it in the reasoning, and it does not need to be referred to explicitly, as one has the desirable outcome anyway. One has to see, however, that in the case of fundamental rights one almost always relies on the teleological arguments, as the systemic arguments cannot in themselves help in this area.

#### C. The Conceptual System of Constitutional Law (*Verfassungsdogmatik*)

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<sup>192</sup> A change in the Constitution without a formal amendment to the text (i.e. modification through interpretation) is called *Verfassungswandlung* by Jellinek. GEORG JELLINEK, VERFASSUNGSÄNDERUNG UND VERFASSUNGSWANDLUNG 9, 21, 26-27 (1906).

The aim of constitutional reasoning is to find the solution for a case in the constitution. Yet with the help of the above techniques, and based on the text of the constitution, an abstract—i.e., separate from actual cases, generally valid—conceptual system (*Rechtsdogmatik*) or constitutional conceptual system (*Verfassungsdogmatik*) can be constructed,<sup>193</sup> which may help to decide future cases, by eliminating contingencies and apparent contradictions of the text.<sup>194</sup> This conceptual system is, however, not always based on the text of the constitution. It goes beyond that and stems from beyond the text of the constitution; it can partly be the result of a text-independent abstract speculation. *Verfassungsdogmatik* is a necessary and normal phenomenon in constitutional courts and in constitutional scholarship in every area of constitutional law. Its most obvious area of influence is that of fundamental rights, by building tests for fundamental rights restrictions, as their usually short and vague formulation alone would not be sufficient for solving cases.<sup>195</sup>

*Verfassungsdogmatik* is built partly by the constitutional courts, partly by legal scholars. A conceptual system is, then, like a semi-prepared product, which one may complete (i.e., find a solution for the case) at any time. Like the good host, who—thinking of the future—fills her fridge with semi-prepared meals (frozen pizzas) that can easily and quickly be used when needed, the good jurist builds a conceptual system in preparation for future situations where law has to be applied.<sup>196</sup>

### I. Coherence

The building of such a conceptual system is largely neglected in dictatorships, as debates of constitutional law were not decided by constitutional courts, but on the basis of *ad hoc*

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<sup>193</sup> A broader conception of *Rechtsdogmatik* (i.e. including not only the conceptual system, but the job of building it up) is used e.g. by Ulfrid Neumann, *Wissenschaftstheorie der Rechtswissenschaft*, in *EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE DER GEGENWART* 394, 394-96 (Arthur Kaufmann et al. eds., 2004). We use the concept here in a more narrow sense, which likewise allows for a thorough explanation of methodological problems, while making the explanation clearer and easier to understand.

<sup>194</sup> Contradictions have to be eliminated by way of interpretation otherwise one cannot contribute to the solution of future problems. If contradictions are merely highlighted, those applying the law will stare puzzled at the two passages, then decide which passage to follow by tossing a coin, as it were. Our task is to help to avoid this arbitrary decision-making process, thus making a calculable functioning of the system possible. See Eike von Savigny, *Die Rolle der Dogmatik – wissenschaftstheoretisch gesehen*, in *JURISTISCHE DOGMATIK UND WISSENSCHAFTSTHEORIE*, *supra* note 4, at 104.

<sup>195</sup> See, e.g., in Austria: Karl Spielbüchler, *Grundrecht und Grundrechtsformel*, in *ARBEITSRECHT UND SOZIALE GRUNDRECHTE: Festschrift Hans Floretta* 289-307 (Oswin Martinek et al eds., 1983).

<sup>196</sup> If one introduces a legal concept only for understanding and describing (heuristics), but does not intend to use it when deciding legal cases, then one has no doctrinal ambitions with it.

political reasons.<sup>197</sup> There is normally no formalized procedure for settling debates among state organs.<sup>198</sup> Similar problems can be seen in the U.K. and France, where judicial review of legislation (*Verfassungsgerichtsbarkeit*) is, or was until recently, very limited. In dictatorships, a further obstacle to building a *Verfassungsdogmatik* is that it necessarily also means judicial or scholarly rule-making, thus a certain self-empowerment by judges and scholars which is not welcomed in any centralized system.

The requirement of building a coherent conceptual system consists of several elements. The first and most obvious one is non-contradiction. However, this in itself is not sufficient. On the one hand, the system, which cannot be built up in a value-neutral way, should be compatible with the fundamental values of the political community.<sup>199</sup> On the other hand, some internal structural criteria have to be met, like the presence of conceptual cross-references, or the pyramidal and logical nature of the system of used concepts.<sup>200</sup> The latter requirement can be fulfilled only to a certain extent (unlike e.g., the idea of non-contradiction).

## II. In Defense of *Begriffsjurisprudenz*

Elaboration of legal concepts as a goal of jurisprudence may be easily—and pejoratively—tagged as *Begriffsjurisprudenz*,<sup>201</sup> which used to imply that this approach cannot live up to the challenges of the present, being some sort of an outdated, and “out of touch with reality,” project. In order to dispel any misunderstanding, this problem must be briefly addressed.

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<sup>197</sup> This is similar to the conceptual system of administrative law: It becomes sophisticated only if there is judicial review of administrative acts. See András Jakab, *Wissenschaft vom Verwaltungsrecht: Ungarn*, in IUS PUBLICUM EUROPAEUM IV, marginal nos. 5 and 16 (Armin von Bogdandy et al. eds., 2011). Constitutional courts are a necessary, but on their own, not a sufficient precondition of a sophisticated *Verfassungsdogmatik*.

<sup>198</sup> As explained *infra* pp. 35–38, in the absence of judicial review of statutes, the elaboration of a detailed constitutional *Rechtsdogmatik* would really be just a “useless lawyerly pursuit.”

<sup>199</sup> Neil D. MacCormick, *Coherence in Legal Justification*, in THEORY OF LEGAL SCIENCE 235–51 (Aleksander Peczenik et al eds., 1984).

<sup>200</sup> Following Robert Alexy & Aleksander Peczenik, *The Concept of Coherence and Its Significance for Discursive Rationality*, 3 RATIO JURIS 130 (1990) (with some simplification and modification).

<sup>201</sup> The concept comes from RUDOLPH VON JHERING, SCHERZ UND ERNST IN DER JURISPRUDENZ 337 (1884), who used it primarily for Puchta. An excellent overview of Puchta’s scholarship is HANS-PETER HAFERKAMP, GEORG FRIEDRICH PUCHTA UND DIE “BEGRIFFSJURISPRUDENZ” (2004).

First, let us address the problem of unrealism. In legal arguments (i.e., those of legal practice), one cannot use arguments commonly accepted in everyday life like *effective*, *immoral*, or *unprofitable*. Such arguments have to be translated somehow into legal arguments (e.g., the conduct was *unlawful*).<sup>202</sup> Arguments of effectiveness, etc., are not necessarily irrelevant to law, but they cannot be deployed directly (*naked* use): It must be explained why they are relevant and through which gate they were introduced into legal reasoning (e.g., constitutional principles).<sup>203</sup> Legal scholarship in a traditional, narrow sense, which does not cover topics of policy, sociology, history, political philosophy, or legal philosophy, also stays within these limits.

The basic problem of the original nineteenth century form of *Begriffsjurisprudenz* was something else. It was out of touch with everyday life not only in the sense just described above, because this is true essentially for all traditional kinds of legal conceptual analysis, but also because in many cases it did not even try to translate the extra-legal arguments into legal ones and neglected them *tout court*.<sup>204</sup> Criticism on *Begriffsjurisprudenz*<sup>205</sup> can therefore be justified only to the extent that it addresses actual logical mistakes committed by classical authors of *Begriffsjurisprudenz*;<sup>206</sup> but we cannot criticize *Begriffsjurisprudenz* in general as a conceptual game which is out of touch with everyday life, since lawyers necessarily work with concepts.<sup>207</sup>

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<sup>202</sup> Interests and benefits have to be formulated as rights and duties. See PHILIPPE A. MASTRONARDI, JURISTISCHES DENKEN 264–76 (2001). Moral arguments have to be translated likewise. As it is formulated in a decision by the ICJ, see *South West Africa (Eth. v. S. Afr.)*, 1966 I.C.J. 6 (July 18) (“It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.”).

<sup>203</sup> It is for this reason that journalists and proper constitutional lawyers argue in an apparently different way on the same problem. Cf. *supra* note 56 (discussing the canon of acceptable arguments).

<sup>204</sup> Eugen Bucher, *Was ist “Begriffsjurisprudenz”?*, in THEORIE UND TECHNIK DER BEGRIFFSJURISPRUDENZ 372 (Werner Krawietz ed., 1976). It is also worth noting that the *Interessenjurisprudenz*, frequently referred to as the opposite of *Begriffsjurisprudenz*, was not in fact its counterpart but rather complementary to it. This is well shown by the fact that the four traditional methods of Savigny (grammatical, logical, systemic and historical) are not replaced by the teleological interpretation (of which Jhering is thought to be the inventor): It is added to them as a fifth method, cf. GÉZA KISS, A JOGALKALMAZÁS MÓDSZERÉRŐL 53–58 (1909). The opposite of *Begriffsjurisprudenz* is rather the “School of Free Law” (*Freirechtsschule*). See Bucher, *supra* note 204, at 372–73.

<sup>205</sup> See especially Philipp Heck, *Was ist die Begriffsjurisprudenz, die wir bekämpfen?*, 14 DEUTSCHE JURISTENZEITUNG 1456 (1909).

<sup>206</sup> Bucher, *supra* note 204, at 388; Horst-Eberhard Henke, *Wie tot ist die Begriffsjurisprudenz?*, in THEORIE UND TECHNIK DER BEGRIFFSJURISPRUDENZ, *supra* note 204, at 415.

<sup>207</sup> Bucher, *supra* note 204, at 389.

Second, as for the elaboration of the conceptual system, one may state the following: It is not some kind of self-indulgent worship of the systematic nature as such, but a requirement of legal certainty, because a detailed and thoroughly built system of legal concepts makes the application of law more predictable. Moreover, one may add that legal certainty itself is far from being a goal in itself, but serves the effective functioning of the society, or the economy, through predictability. This elaboration of concepts, however, is not to be made in a vacuum, but always with an eye on legal practice. *Rechtsdogmatik* and its specific constitutional form, *Verfassungsdogmatik*, are therefore aids to the legal practice, having the task of building up an accurate conceptual system for the sake of legal certainty (i.e., the predictability of future practice).<sup>208</sup> A complete separation of the conceptual system from legal practice would result in the inability of those applying the law to make use of the insights delivered by legal scholarship due to the absence of links (i.e., scholarly works could by no means contribute to the increase of legal certainty). Therefore, our starting point has to be the content of concepts, even if this may not always be very elegant, as perceived by the relevant legal actors, in the case of a constitution, the constitutional court.<sup>209</sup> If all the relevant actors *falsely* think “x” to be the content of a given concept, while it is in fact “y”, then the content of that concept becomes “x” (*communis error facit ius*). This, however, does not mean that the common opinion (*herrschende Meinung*) could not be put to question. If an implicit—and previously undiscovered—consequence of a commonly held opinion “a” contradicts the likewise commonly accepted opinion “b,” one of these views may be challenged, the one that is more important according to the commonly held opinion “c”). What the relevant actors think the content of a given legal text, and its concepts, is becomes manifest through their interpretational practice.<sup>210</sup>

A mere collection of the commonly held views on individual legal issues does not suffice, however, as such a collection does not cover all the possible problems<sup>211</sup> without gaps<sup>212</sup> or

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<sup>208</sup> Some of the concepts of legal theory do not directly contribute to legal certainty, but only as a building block of the system. This means that they are generally not directly used in the application of law, yet they are necessary for building a coherent system. In this way they help the predictable introduction of new elements (of positive law and *Rechtsdogmatik*) into the system, thereby improving the predictability of the application of law indirectly.

<sup>209</sup> Compare the constitutional-law proverb, “The Constitution is what the judges say it is,” Charles Evans Hughes, Speech at Elmira (May 3, 1907), cited by BERNARD SCHWARTZ, CONSTITUTIONAL LAW VII (1972). For a similar view, see Rudolf Smend, *Festvortrag zur Feier des zehnjährigen Bestehens des Bundesverfassungsgerichts am 26. Januar 1962*, in DAS BUNDESVERFASSUNGSGERICHT 24 (1963) (“The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court.”).

<sup>210</sup> Cf. the dictum Hung. CC Dec. CC 57/1991. (XI. 8.) AB (ABH 1991, 236, 239.): “the content and meaning of a legal rule is what is attributed to it by the permanent and uniform practice of courts.” For a detailed discussion of this concept of Italian origin (*diritto vivente* or living law), see e.g., ANTONIO RUGGERI & ANTONINO SPADARO, LINEAMENTI DE GIUSTIZIA COSTITUZIONALE 134 (2004).

<sup>211</sup> Building a conceptual system instead of mere reproductivity is also advocated by Henke, *supra* note 206, at 414.

contradictions.<sup>213</sup> Such completeness can only be achieved by building up a system, and being aware that this goal (i.e., covering all the possible future legal problems without any gaps) can never be achieved, but also that one may come closer to this goal by building a *Rechtsdogmatik* rather than by merely reproducing all the past views. This part of the legacy of the *Begriffsjurisprudenz* can also be accepted today.<sup>214</sup>

### III. Typical Mistakes in *Verfassungsdogmatik*

One common mistake is to believe that the meaning of a constitutional provision is defined by implementing or detailing statutes. To accept this proposition would lead to the absurdity that the ordinary legislator would have the power to modify the meaning of the constitution.<sup>215</sup> In a constitutional democracy, however, it is actually the constitution that ought to be used as a tool for interpreting the statutes (*verfassungskonforme Auslegung*), rather than the statutes for interpreting the constitution. Norms of lower rank can be used to interpret the constitution only within a historical interpretation.

Another error is mistaking the constitution (*Sollen*) for the political practice based upon it (*Sein*). There is a view according to which a given interpretation of a constitutional provision can be argued for on the basis of how its addressees (e.g., the government or the parliament) interpret it.<sup>216</sup> This view must be rejected, because the constitution is a norm by which the political practice is to be measured. Any factual practice or custom of the addressees is only a sign of how they understand the respective provision, and this can be of interest, particularly if we think that it contradicts the constitution, but has nothing to

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<sup>212</sup> The ideal of gaplessness is characteristic not only of *Begriffsjurisprudenz*, but also of the rationalist natural law tradition. See GUSTAV BOEHMER, GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG 2.1, DOGMENGESCHICHTLICHE GRUNDLAGEN DES BÜRGERLICHEN RECHTES 63 (1951); with reference to Christian Wolff, see Werner Krawietz, *Begriffsjurisprudenz*, in THEORIE UND TECHNIK DER BEGRIFFSJURISPRUDENZ, *supra* note 204, at 436. The beginnings of conceptual system-building in law are traced back to the scholastics, or its reflections in the works of the glossators and commentators, by Harold J. Berman, *The Origins of Western Legal Science*, in THE WESTERN IDEA OF LAW 399, 401, 405 (J. C. Smith & David N. Weisstub eds., 1983).

<sup>213</sup> Even authors outside of the *Begriffsjurisprudenz* tradition often assume non-contradiction in the case of a legal system, see, e.g., J. W. HARRIS, LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS *LEGAL RULE* AND *LEGAL SYSTEM* 11, 81–83 (1979).

<sup>214</sup> Views of the end of *Begriffsjurisprudenz* are clearly refuted by e.g. ROBERT ALEXY, THEORIE DER GRUNDRECHTE 38 (2001). While rejecting mere logical inference, he still thinks that the elaboration of the conceptual system is the primary goal of legal scholarship, and on this point he explicitly sides with the tradition of *Begriffsjurisprudenz*.

<sup>215</sup> See Francis Delpérée, *La Constitution et son interprétation*, in L'INTERPRÉTATION EN DROIT: APPROCHE PLURIDISCIPLINAIRE, *supra* note 149, at 193.

<sup>216</sup> E.g., ANTIEAU, *supra* note 74, at 44–45. In French works, such arguments are referred to as *coutume constituante* or *coutume constitutionnelle* (“constitutional custom”). See, e.g., MARCEL PRÉLOT & JEAN BOULOIS, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL 207–16 (1990). On the German debate, see CHRISTIAN TOMUSCHAT, VERFASSUNGSGEWOHNHEITSRECHT (1972).

say about the right interpretation of the constitution. Among the state organs it is only the constitutional court that can give an interpretation of the constitution that is final and binding for all.<sup>217</sup> Political practice may be mentioned in an analysis of *Verfassungsdogmatik*, if this contributes to the exploration of the meaning of the constitution, as the document providing the framework rules of politics. But, such issues—i.e., which particular solution the practice opts for between the limits imposed by the constitution—are remote from the genre of traditional legal scholarship; they belong rather to the field of political science.

A thorough legal argument also must answer possible counter-arguments and it must be able to be generalized to future cases. This is to say, we do not only want to give a systematic description of constitutional provisions and cases that have occurred so far, but we also want to help and provide direction for future interpretations.<sup>218</sup> The fact that a problem has not yet occurred does not mean that one cannot tell, on the basis of similar, past cases and indirectly applicable rules (e.g., principles), which solution would be more *constitutional* than the other.<sup>219</sup>

#### D. The Style of Constitutional Reasoning in Different Constitutional Courts

The style of constitutional reasoning differs from country to country.<sup>220</sup> Style can be characterized by: (A) Whether creativity or dilemmas are admitted; (B) how technical the language is; (C) how elaborate the reasoning is (i.e., whether possible counter-arguments are answered in advance); (D) the degree of generalization; (E) whether style is discursive or rather magisterial (hierarchical); (F) the degree of rhetoric (i.e., how grandiose the

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<sup>217</sup> The same claim is made, focusing on the U.S. Supreme Court in a more detailed form by Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). Contrary to this, and to our view, is the pluralist (viz. involving the whole of society: *die offene Gesellschaft der Verfassungsinterpretation*) approach of constitutional interpretation put forth by Peter Häberle, see PETER HÄBERLE, VERFASSUNG ALS ÖFFENTLICHER PROZESS 150–152 (1996) (ignoring the place of constitutional courts within constitutional law). For criticism on Häberle in the same vein (and emphasizing the obscurity of his theory), see Christian Starck, *Die Verfassungsauslegung*, in VII HANDBUCH DES STRAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, *supra* note 2, at 205–06.

<sup>218</sup> For a discussion on this task of the commentaries, see Helmuth Schulze-Fielitz, *Was macht die Qualität öffentlich-rechtlicher Forschung aus?*, JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART VOL. VII 1, 20 (Peter Häberle ed., 2002).

<sup>219</sup> For a discussion on the nature of principles, see Andrés Jakab, *Re-Defining Principles as 'Important Rules': A Critique of Robert Alexy*, in ON THE NATURE OF LEGAL PRINCIPLES 145 (Martin Borowski ed., 2009).

<sup>220</sup> The organic statutes often contain the requirement that constitutional/supreme court decisions must be somehow justified, e.g. VfGG [Constitutional Court Act 1953] No. 85/1953 § 26(2) (Austria) (“mit den wesentlichen Entscheidungsgründen [...] zu verkünden”), but on how exactly it should be done, explicit legal rules, except regarding dissenting or parallel opinions, are usually silent. Internal standing orders often refer to certain necessary parts of the judgment (e.g., statement of facts, submissions, applied law, whether to separate these under different headings, decision on costs), but they also do not say much about the style of the reasoning.

reasoning is); (G) the specific methods usually preferred in the respective constitutional cultures; and (H) the typical length, layout, and internal structure of judgments, including the possibility of dissenting opinions. The features (B), (C), and (D) are defined by the *Verfassungsdogmatik* of the country: The more sophisticated it is, the more technical, the more elaborate and the more generalized the reasoning becomes.

We might be tempted to assume that the features of argumentative style could be divided into two main groups: External (form, layout, rhetorical and linguistic style, etc.) and internal (actual legal content). But this assumption is wrong. External and internal features are interconnected. Form and content in legal reasoning are difficult to separate from each other, or if we do separate them then our results would be painfully incomplete. It would be unsatisfactory to say that we only analyze the number of references to case law, but not whether they are actually followed as to their content or rather just mentioned for ornamenting the text. Or, it would be unfulfilling to say that the actual number of references to precedents is unimportant, and we are interested only in the *real* influence of precedents as to the outcome of new disputes. One is normally indicative of the other, and if not, then exactly this lack of connection would be an important result of the analysis. Until now, there has been no overarching, in-depth comparative analysis of *European* styles of constitutional reasoning, so we can only present a tentative sketch on the issue with the hope of further development in the future.<sup>221</sup>

#### *I. Austria and Germany: Focusing on Verfassungsdogmatik*

Both Germany and Austria have a very sophisticated *Verfassungsdogmatik*, the elaboration of which is considered to be the main task of constitutional scholarship, and the constitutional courts of these countries do make use of this scholarship. In Germany, the Federal Constitutional Court explicitly refers to it in judgments, and in Austria the Constitutional Court uses it mostly without reference.<sup>222</sup> Consequently, constitutional

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<sup>221</sup> Cf. Goldsworthy, *supra* note 66, (including from Europe only Germany and, from outside Europe, the US, India, Canada, South Africa and Australia); MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS. A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004) (comparing the U.S. Supreme Court, the ECJ, and the French *Cour de cassation*, thus not treating any national constitutional court in Europe). For some European reports, with serious contributions only from Germany, Austria, and France though, but without an actual comparison, see VERFASSUNGSINTERPRETATION IN EUROPA (Georg Lienbacher ed., 2011). For general studies in judicial style, see Basil Markesinis, *Conceptualism, Pragmatism and Courage*, 34 AM. J. COMP. L. 349 (1986); Basil Markesinis, *A Matter of Style*, 110 L.Q. REV. 607 (1994); Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain, and the USA*, 24 AM. J. COMP. L. 43 (1976); Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TUL. L. REV. 1010 (1974); MacCormick & Summers, *supra* note 57; MacCormick & Summers, *supra* note 52. In September 2011, a research group began to work at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg in the frame of a five years project on "Comparative Constitutional Reasoning" to fill in this research gap, see CONREASON PROJECT, <http://www.conreasonproject.com/>.

<sup>222</sup> The relevance of scholarship for constitutional reasoning might be the consequence of the fact that, most of the time, the majority of these constitutional courts consists of law professors or former university assistants.

reasoning in these countries is technical, elaborate, and open for generalization. Solutions for constitutional problems are mostly depicted as necessary consequences of the conceptual system, and not as dilemmas to be decided by judges. There are, however, important differences between these two countries.

In Austrian *Verfassungsdogmatik*, legal issues are more often conceptualized in the language of theory of norms. E.g., competence conflicts between the federal government and the governments of the *Länder* are conceptualized as conflicts between the federal constitution, federal statutes and *Länder* constitutions, without any reference to the concept of sovereignty.<sup>223</sup> Argumentation tends to be simpler and more readily comprehensible than in Germany. Austrians consider their own argumentation style to be more elegant and more modest, applying less rhetoric, also trying to be shorter<sup>224</sup> than the German style. Austrian argumentation seldom includes the reinforcing, secondary, or *backup* arguments typical in Germany. Kelsen's theoretical legacy is used frequently (*Stufenbaulehre*, three circle theory of the federal state). All in all, Kelsen's influence is enormous, as arguments based on natural law and sociology are generally not highly regarded.

German *Verfassungsdogmatik* still employs many basic terms from the period of constitutional monarchy.<sup>225</sup> In Hans Kelsen's stead, the key figures are Rudolf Smend and Konrad Hesse, and Carl Schmitt, whose lines of argumentation often appear in the Federal Constitutional Court's jurisprudence.<sup>226</sup> These arguments often make use of terms that do admittedly have an intuitive, descriptive value but cannot be strictly legally defined (e.g., community, integration, or *Gesamtheiten*<sup>227</sup>). This argumentation tendency brings with it an inclination towards compound nouns and somewhat mysterious, one could say pretentious, rhetorical figures: "The law as an ordering factor,"<sup>228</sup> or "the federal order is a

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<sup>223</sup> Jakab, *supra* note 128, at 935-40.

<sup>224</sup> The short style has the advantage of being able to hand down faster decisions, thus contributing to a faster enforcement of constitutional claims. Peter Perenthaler & Peter Pallwein-Prettner, *Die Entscheidungsbegründung des österreichischen Verfassungsgerichtshofs*, in *DIE ENTSCHEIDUNGSBEGRÜNDUNG IN EUROPÄISCHEN VERFAHRENSRECHTEN UND IM VERFAHREN VOR INTERNATIONALEN GERICHTEN*, *supra* note 45, at 210.

<sup>225</sup> Cf. STERN, *supra* note 33, at 584-86. Reference is frequently made to such traditional platitudes as, for example, the equating of executive power with the application of the law without any mention of government decrees or regulations. See, e.g., KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 88 (20<sup>th</sup> ed. 1995).

<sup>226</sup> ROBERT CHR. VAN OOYEN, *DER BEGRIFF DES POLITISCHEN DES BUNDESVERFASSUNGSGERICHTS* (2005).

<sup>227</sup> HESSE, *supra* note 225, at 97.

<sup>228</sup> *Id.* at 86 (in German, *Recht als Ordnungsfaktor*).

form of federative structure.”<sup>229</sup> One often comes across reasoning based on political science and also occasionally on natural law.<sup>230</sup> This style of thinking has the advantage of facilitating argumentation (fruitful lack of clarity); in exchange, the disadvantage lies in the unpredictability of the results of such argumentation. In general, one argues from a greater number of premises, and attempts to find more alternative arguments for the desired result. Thus, argumentation follows more than one line, and these lines are more complicated and less pointed. Germans argue more often from broad, general principles (democracy, human dignity, etc.) to concrete problems. In Austria, such activist tendencies are more seldom, albeit not unheard of. Opinions of the Federal Constitutional Court are often lengthy, written almost in scholarly monographic style,<sup>231</sup> and their Austrian counterparts are usually much shorter.

Also the political context has influence on the style of reasoning: In Austria, the almost permanent constitution-making majority of the government since the Second World War (“grand coalition”) made the Constitutional Court less likely to venture into creative interpretation against the legislator.<sup>232</sup> In Germany, however, the FCC considered itself right from the beginning as the missionary of liberal and democratic values after the downfall of Nazism. Also, on those rare occasions where grand coalition existed with a constitution-making majority, a conflict with the FCC would have been a taboo in German political culture.

In Austria, dissenting opinions are not allowed at all at the Constitutional Court because the authority of law is perceived to be better protected by a unified voice. In Germany, dissenting opinions are used rather rarely for the very same reason. This practice also results in hiding contentious general, non-legal issues, and concentrating on strictly legal approaches. The German references to supra-positive norms or an *objective* value order are unknown. Dissenting opinions or references to scholarly opinions are also avoided in Austria.<sup>233</sup> Otherwise, the structure of constitutional court judgments is very similar:

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<sup>229</sup> *Id.* at 97 (in German, *Bundesstaatliche Ordnung ist Form föderativer Gestaltung*). One can only guess as to its meaning.

<sup>230</sup> Or etatistic (state-centered) combinations of both, such as the figure of a state’s recognition of a right. See STERN, *supra* note 33, at 588.

<sup>231</sup> Matthias Jestaedt, *Phänomen Bundesverfassungsgericht*, in *DAS ENTGRENZTE GERICHT* 125 (Christoph Schönberger ed., 2011).

<sup>232</sup> For a different explanation referring to the dismissal of the judges of the Constitutional Court in 1929, see Ewald Wiederin, *Verfassungsinterpretation in Österreich*, in *VERFASSUNGSINTERPRETATION IN EUROPA*, *supra* note 221, at 105.

<sup>233</sup> Pernthaler & Pallwein-Prettner, *supra* note 224, at 207–208 (referring to VfSlg 2455/1952 where the Austrian Constitutional Court explicitly refused to discuss scholarly opinions. But in fact, scholarly opinions, often contained in the submissions, hugely influence the decisions.)

Doctrinal elaboration dominates the approach to constitutional argument and legal writing generally. The FCC's full senate opinions tend to be heavily oriented toward normative theorizing and definitional refinement. In contrast to the breathtaking brevity of and incisiveness of French Constitutional Council decisions, the typical German opinion is an exercise in encyclopedic scholarship. The typical case reads like a sophisticated—and often turgid—American law student research note . . . . It seems rather clear that these opinions, which reflect a thorough survey of the literature pertaining to a particular set of constitutional issues, are written less for the general public than for the academic legal profession. Opinion writing on the FCC is designed largely to persuade the academic legal community—and other informed readers—of the rightness, neutrality, and integrity of decisional outcomes. The typical case begins with *Leitzsätze* (leading sentences) or “headnotes” summarizing its essential holding. The opinion then proceeds systematically (1) to describe the case's factual, legal, and procedural background, (2) to recapitulate—usually in great detail—arguments advanced by petitioners and respondents, (3) to rule on the admissibility of the complaint or the legitimacy of the issue referred to the Court, and (4) to pass upon the merits of the case in an extended judgment that seeks to resolve all relevant constitutional issues.<sup>234</sup>

As a final remark, one can say that both German and Austrian legal scholars depict each other as proponents of an outdated methodology. As described above, from a traditional Austrian vantage point, German constitutional scholarship appears to be stuck at a (pre-)Jellinekian methodological level, that is, the mixing of legal and sociological arguments; the presentation of personal views on legal policy as theoretically compulsory legal conclusions. From the other side of the border, in contrast, the Kelsenian style in Austria is

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<sup>234</sup> Donald P. Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 66, at 210. For a discussion on the distinctively scholarly style of BVerfG decisions, see Peter Lerche, *Stil und Methode verfassungsgerichtlicher Entscheidungspraxis*, in FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT VOL. I, 333 (Peter Badura & Horts Dreier eds., 2001). The abstract style serves also as a means of self-empowerment as the FCC creates in this way long-term detailed, and seemingly objective, standards for politics, see Oliver Lepsius, *Die maßstabsetzende Gewalt*, in DAS ENTGRENZTE GERICHT, *supra* note 231, at 171-81.

viewed as an absurd and unproductive caricature of an outmoded, formalistic nineteenth century *Begriffsjurisprudenz*.<sup>235</sup> But from a French or British perspective, these two Germanic styles can look very similar indeed.

*II. France and the U.K.: Limited Judicial Review Resulting in Limited Conceptual Sophistication*

Both in France and the U.K., we find a lot less references to scholarly works in judgments. In the U.K., it is because of the generally low prestige of legal scholarship; in France, references to scholarly works are rare because of legitimacy concerns, legal scholars have not been elected democratically. The German-Austrian style of *Verfassungsdogmatik* is considered to be rather quixotic, which can be explained partly by the lack, or at least the late birth, of an overarching, constitutional review of statutes in these countries.

In France, until very recently there was only *a priori* constitutional review,<sup>236</sup> and consequently only a very few cases came to the Constitutional Council.<sup>237</sup> Most constitutional conflicts were not enforceable in courts, thus building any sophisticated conceptual system of constitutional law would have been futile, as the conflicts were decided by politicians according to the rules of politics. Also the commentary literature explaining the meaning of each constitutional provision in the form of individual scholarly contributions containing references to academic literature and case law, so popular in Germany and Austria, is almost entirely missing in France.<sup>238</sup> We can predict that with the recent introduction of the *a posteriori* constitutional review, the situation is likely to change. The need for a more sophisticated *Verfassungsdogmatik* will be more eminent, the literature of constitutional commentary will become stronger, even references to scholarly works in judgments might become more usual.

The language and the form of the decisions of the Constitutional Council are extremely technical, being one very long sentence. The elaboration of the reasoning is sometimes

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<sup>235</sup> See, e.g., NORBERT ACHTERBERG, DIE ÖFFENTLICHE VERWALTUNG 445-54 (1974) (Hans Kelsen's Bedeutung in der gegenwärtigen deutschen Staatslehre) (citing, inter alia, HERMANN KLENNER, RECHTSLEHRE: DIE VERURTEILUNG DER REINEN RECHTSLEHRE (1972)). See also HORST DREIER ET AL., REZEPTION UND ROLLE DER REINEN RECHTSLEHRE 25, 29 (2001) (citing, inter alia, Larenz, Heller, Schmitt, and Smend); HORST DREIER, RECHTSLEHRE, STAATSSOZIOLOGIE UND DEMOKRATIETHEORIE BEI HANS KELSEN 19–25 (1986).

<sup>236</sup> Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation*, 9 GERMAN L.J. 1297 (2008).

<sup>237</sup> The original 1958 French Constitutional Council was classified as an example of the "political [i.e. non-judicial] control of constitutionality," see MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 2–6 (1971).

<sup>238</sup> For a notable exception, but as a noticeably shorter and less sophisticated version of its German counterparts, see CODE CONSTITUTIONNEL (Michel de Villiers & Thierry Renoux eds., 2011).

questionable; decisions are mostly a few lines long, rarely longer than two printed pages, thus much shorter than German or Austrian decisions, even if lately they have been slightly increasing in length. Dilemmas are practically never shown; which is strengthened by the fact that there are no dissenting or concurring opinions. Solutions are presented as stemming from the text of the Constitution, or from the 1789 Declaration, without any trick of interpretation.<sup>239</sup> This can be explained by a certain traditional shyness of the French judges who feel they lack the legitimacy to decide cases, thus pointing simply at the Constitution as if they were just its mouthpiece.<sup>240</sup> Academic *doctrine* does have a high standing in France, as opposed to the U.K.,<sup>241</sup> but it is not quoted in judgments; it has influence on future decisions and it is widely read by judges, again, as opposed to the U.K. Moral or policy perspectives are not mentioned explicitly in the judgments themselves (which, of course, does not mean that they are not considered behind the scenes).<sup>242</sup>

The structure of the decisions of the Constitutional Council is always strictly the same.<sup>243</sup>  
(A) At the beginning of the decision there is an introductory head note about the

<sup>239</sup> For a discussion on French constitutional reasoning, see Luc Heuschling, *Verfassungsinterpretation in Frankreich*, in VERFASSUNGSINTERPRETATION IN EUROPA, *supra* note 221, at 37–68.

<sup>240</sup> This still lasting judicial shyness can be depicted as the legacy of the French Revolution of 1789. At that time, judges were considered as corrupt and, as far as it was possible within the limits of corruption, as royalist, both for good reasons. Thus the revolutionaries and their imperial successors during Napoleon did everything to limit the power of the judges ranging from the explicit prohibition of the binding power of judgments on future cases in the *Code civil* to placing the judicial review of administrative actions into the hands of the State Council (a traditional advisory institution, filled up with high profile bureaucrats and reliable politicians) instead of ordinary courts. See Goutal, *supra* note 221; Rudden, *supra* note 221. They even introduced the institution of *référé législatif*, which basically meant that judges had to ask the legislator if they were uncertain about the correct interpretation of a statute, see Loi du 27 novembre 1790 instituant un tribunal de cassation et réglant sa composition, son organisation et ses attributions [Law of November 27, 1790 Establishing a Court of Appeals and Regulating its Composition, Organization and Responsibilities], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 20, 1944, p. 65; Loi n°1790-12-01 du 1 décembre 1790 portant institution d'un tribunal de cassation et réglant sa composition, son organisation et ses attributions [Law No. 1790-12-01 of December 1, 1790 on the Establishment of a Court of Cassation and Adjusting its Composition, Organization and Functions] (repealed 2007) that resulted in slowing down trials and in the legislator's constantly rewriting of the statutes which it was asked about. The institution is now only legal history which, however, was widely used also in German territories during the 19<sup>th</sup> century, see MATTHIAS MIERSCH, DER SOGENANNTÉ RÉFÉRÉ LÉGISLATIF (2000).

<sup>241</sup> For the situation in England in general, see FH Lawson, *Doctrinal Writing: A Foreign Element in English Law*, in IUS PRIVATUM GENTIUM: FESTSCHRIFT FÜR MAX RHEINSTEIN VOL. I. 191–210 (1969).

<sup>242</sup> Proven on the example of the *Cour de cassation* by LASSER, *supra* note 221, at 27–61.

<sup>243</sup> The obsessively strict French requirements on forms and style can be seen also in constitutional (or in general, legal) scholarship: doctoral theses have to consist of two parts (A and B), each of them consisting of two sub-parts (*le plan*). Any alteration of this structure has to be thoroughly justified. This seemingly logical structure results in the violation of the internal logic of topics and occasionally results in more effort being put into the structure than into the intellectual content. For foreigners, this structure makes it very difficult to make use of French constitutional literature, and it therefore contributes to the isolation of French constitutional scholarship.

constitutional empowerment of the Constitutional Council and the short history of the procedure—initiators, submission date. (B) Then under the heading *Le Conseil constitutionnel*, we find a list of the titles of the relevant statutes, and submissions. Each entry is a new paragraph which finishes with a semicolon, resulting in one long sentence consisting of paragraphs beginning with *Vu* (having seen); the list ends with the entry *Le rapporteur ayant été entendu* (the reporter having been heard). (C) The considered legal arguments, sometimes structured with subtitles, sometimes not, are listed again as part of a long sentence ending with *Décide* (decides). The arguments are always introduced in a new line beginning with *Considérant que* (considering that or whereas). (D) The actual decision is then to be found under the heading *Décide*. (E) At the end of the decision, the date and the judges taking part in the decision are listed.<sup>244</sup>

In the U.K., judgments are generally longer than in any other country in the world, with no predefined structure except for a usual beginning fact description, the procedural steps, the submissions of the parties, the legal reasoning, and the final verdict, as the case load of judges is very low.<sup>245</sup> Traditionally, judges also perceived as one of their tasks the lecturing of young lawyers sitting in court hearings. Thus they explained everything in detail, and showed all the dilemmas to the future generation of judges sitting eagerly in the audience. The language is therefore a lot less technical than in France or even in Austria or Germany; the style is rather discursive.<sup>246</sup> Cases are rather just *ad hoc* solutions, no general conceptual system is meant to be built from them. Purposive interpretation was in general not particularly popular, as Parliament could easily change any law, so in case of a socially unacceptable legal solution Parliament was meant to change it, not the courts. A purposive interpretation is becoming more and more popular though, partly due to the influence of EU law and ECHR law, the latter of which is the most similar to a constitution of the U.K. as

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<sup>244</sup> This style and structure of judgments is very similar to the ordinary court judgments. For a detailed analysis and a historical explanation with further references on the judgments of ordinary courts, see LASSER, *supra* note 221, at 30–38; HEIN KÖTZ, *Über den Stil höchstrichterlicher Entscheidungen*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1973, 245, 247–252 (1973); PIERRE MIMIN, *LE STYLE DES JUGEMENTS: VOCABULAIRE, CONSTRUCTION, DIALECTIQUE, FORMES JURIDIQUES* (1978).

<sup>245</sup> Goutal, *supra* note 221, at 61–65.

<sup>246</sup> The style of constitutional scholarship literature is similar to the style of judgments: lengthy, essayistic style (sometimes rather an unstructured textflow or collection of legal and non-legal information), building inductively on a series of examples explained in detail with an impressive eloquence, often with numerous proverbs and metaphors, but in a conceptually and methodologically rather undisciplined and unstructured manner. It reminds one rather of the speeches of barristers or judges in courts, than of continental *Verfassungsdogmatik*. Large amounts of non-legal, factual political, or political philosophical, information are also contained in the works (besides legal history, never or just not yet enacted draft statutes, or policy papers) which might be explained by the sporadic and unsystematic nature of British constitutional law itself (corrected in practice by non-legal constitutional conventions as a *modus vivendi*). On the latter point in general see GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* (1984). Consequently, the context of law seems to have sometimes even more emphasis than law itself, also in mainstream legal scholarship.

you can get. In the U.K., dissenting or parallel opinions are not simply a rarely used possibility, like in Germany, but are the default position.

Interestingly, both in France and the U.K., some of the most recent developments in constitutional theory are heavily relying on German, and to a lesser extent Austrian, background literature.<sup>247</sup> It is unlikely that the style of constitutional reasoning will become fully Germanized, but the influence is apparent and one-sided as there is no similar French or U.K. influence in Germany.<sup>248</sup>

### *III. Hungary and Spain: Copying the German Model After the End of the Dictatorship*

After the end of dictatorships, both Spain and Hungary opted for the German constitutional model and its accessories in constitutional reasoning, like dissenting opinions. The U.K. model with no formal constitutional guarantees seemed to be a dangerous option. The decentralized American constitutional review looked chaotic, and ordinary judges were servants of the *ancien régime* who could not be trusted to be guardians of the new democratic constitution. In lack of strong democratic traditions, a very strong president looked too much like a to-be dictator, so basically the choice was between a semi-parliamentary French system and the parliamentary German system; the unstable Italian parliamentary system looked less attractive, and there were no further major western democracies to look at. Some European post-dictatorial countries opted for the French model, but most chose the German model.<sup>249</sup> The German constitutional system had been built up exactly as an intellectually sophisticated response to a former dictatorship. So, especially with its strong constitutional court, it seemed to fit such situations much more aptly than the French model, which originally was an answer to the incapacity of the executive branch to govern. The choice was partly motivated by the generous German scholarship policy, which meant that some of the talented constitutional lawyers from the new democracies had already spent several months or years at a German university or at the Max Planck Institute for Comparative Public Law and International Law

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<sup>247</sup> OLIVIER BEAUD, *LA PUISSANCE DE L'ÉTAT* (1994); MICHEL TROPER, *POUR UNE THÉORIE JURIDIQUE DE L'ÉTAT* (1994); MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010).

<sup>248</sup> It is not the first time that European continental, more specifically, German, legal methodology has influenced its English counterpart. For a discussion on Samuel Pufendorf's influence on Blackstone, see Jan Schröder, *Zur gesamteuropäischen Tradition der juristischen Methodenlehre*, 2/2002 *AKADEMIE-JOURNAL* 37, 40. For a discussion on Savigny's influence on John Austin, see HERBERT HART, *Introduction, in THE PROVINCE OF JURISPRUDENCE DETERMINED: AND THE USES OF THE STUDY OF JURISPRUDENCE* vii, vii (1971).

<sup>249</sup> The Portuguese and the Spanish constitutional courts as *daughters* of the German Federal Constitutional Court (originally by Roman Herzog), the Hungarian and the Polish as his 'grandchildren', see László Sólyom, *Anmerkungen zur Rezeption auf dem Gebiet der wirtschaftlichen und sozialen Rechte aus ungarischer Sicht, in GRUNDFRAGEN DER VERFASSUNGSGERICHTSBARKEIT IN MITTEL- UND OSTEUROPA* 83 (Jochen Abr. Frowein and Thilo Marauhn eds., 1998).

in Heidelberg. Accordingly, they all had learned the democratic style of constitutional law from German literature. Once they had a position at the constitutional court of their home country, either as a judge or as an advisor of a judge, they implemented what they had experienced in Germany.

The style of constitutional reasoning in these relatively new democracies depended on how the legacy of the dictatorial past, and the few local innovations, merged with the new German transplants. During the dictatorship there were no constitutional courts in the dictatorships in socialist Eastern Europe (except for a very few façade constitutional courts with practically no activity whatsoever), so we cannot look for socialist case law in order to identify the socialist elements in today's constitutional thought. We cannot use constitutional texts either, as the text of the constitutions has been almost entirely changed. Consequently, for the legacy of dictatorships we have to check rather the old constitutional scholarship and how it still influences today's constitutional reasoning both in the constitutional courts and in the literature.

In Hungary, socialist constitutional law literature basically contained four elements: (A) Explanations of how true the teachings of Marx and Lenin were; (B) descriptions of the factual political situation; (C) repetition of constitutional or, constitutionally relevant, statutory texts; (D) proposals for new laws. The traditional task of legal scholarship, i.e., proposing a new interpretation of an old law, was almost entirely missing. The first element died out naturally after the end of socialism, so the three others remained. The second element, the description of the factual political situation, resulted in textbooks, where political science merged with constitutional law.<sup>250</sup> As to the third element, the repetitive and intellectually shy style of analyzing constitutional provisions and relevant statutes reflects itself not only in the literature, but to some extent also in the constitutional court. The court's reliance on literal methods of interpretation and the refusal of teleological, sometimes even systemic, arguments is typical.<sup>251</sup>

As to the final element, a typical mistake of today's Hungarian *Verfassungsdogmatik* is to deliver meditations *de lege constitutione*, instead of conceptual analysis.<sup>252</sup> Legal scholars

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<sup>250</sup> Some even proudly criticize from this confused methodological point of view the attempts at building a *Verfassungsdogmatik*. See György Müller, Kormányzati viszonyainkról az új alkotmánykommentár "A Kormány" című fejezete kapcsán, 1 JOGELMÉLETI SZEMLE (2010), <http://jesz.ajk.elte.hu/muller41.html>. For a response, see Vilmos Térey, *Csodaváróknak*, 2 JOGELMÉLETI SZEMLE (2010), <http://jesz.ajk.elte.hu/terey42.html>.

<sup>251</sup> The school of Hungarian textualists, as analyzed in András Jakab, *Wissenschaft und Lehre des Verfassungsrechts in Ungarn*, in IUS PUBLICUM EUROPAEUM VOL. II, marginal numbers 23-30 (Armin von Bogdandy et al. eds., 2007), represent this symptom.

<sup>252</sup> This is particularly dangerous in the field of constitutional law, as it may lead the scholarly debate into one of political confessions. Arguments of constitutional law are (sometimes rightly) subject to 'ideological insinuation' anyway. See Hans Peter Ipsen, *Die deutsche Staatsrechtswissenschaft im Spiegel der Lehrbücher*, 106 ARCHIV DES ÖFFENTLICHEN RECHTS 161, 198 (1981).

doing so do not help constitutional courts. They just dream about a better constitutional text, and substitute real lawyerly conceptual analysis with useless future plans. This type of legal scholarship dominated the landscape in socialist countries, where according to the official doctrine of *socialist normativism* attempts were made to turn judges into law-applying machines, using literal interpretation and law-making power lay with the Parliament. The Parliament followed the *scientific* and modern socialist views in order to transform society into socialism and later into communism. For the big reform plan they needed advisors on how to use law as an instrument of social transformation. The advisors were legal scholars presenting *de lege ferenda* works to the legislator for further use.<sup>253</sup> If the legislator is legally omnipotent (i.e., there are no constitutional constraints, even the constitution can easily be amended),<sup>254</sup> then we do not have to deal with intricate doctrinal questions at all, and we can concentrate on the instrumental character of law. Law was a means to change society, and lawyers were needed only to wield this instrument. This socialist legacy is getting weaker, newer generations are influenced primarily by German,<sup>255</sup> secondarily by American patterns, but probably for several decades its traces will remain strong in Hungary.

In Franco's Spain, the binding force of the constitution (Fundamental Laws of the Kingdom) was institutionally weak as a constitutional court did not exist. Consequently, also *Verfassungsdogmatik* remained unsophisticated as most constitutional lawyers understandably did not bother to work on it. The university subject and the title of textbooks was *derecho político*, merging historical and ideological descriptions with the repetition of statutory provisions—very similar to Hungary.<sup>256</sup> In the new democratic system, very often whole full constructions of *Verfassungsdogmatik* have been borrowed from Germany, sometimes even original German words (e.g., *Drittwirkung*) are used in Spanish texts. This doctrinal import is mostly well understood, but sometimes it is imprecise or it does not accommodate the Spanish constitutional text.<sup>257</sup> Thus, surprisingly, comparative law arguments sometimes prevail over all other methods of interpretation, breaching our normative methodological considerations above.

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<sup>253</sup> See Jakab, *supra* note 127, at 607–08.

<sup>254</sup> At this point, the Westminster system and the socialist countries were very similar.

<sup>255</sup> See CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS. THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY 65–86 (2003); SÓLYOM, *supra* note 160, at 230–41.

<sup>256</sup> For an exception, see MANUEL GARCÍA-PELAYO, DERECHO CONSTITUCIONAL COMPARADO (1950), not a strictly doctrinal analysis, but rather an institutional and historical comparison. García-Pelayo left the country during Franco because of his political ideas and first returned after the regime change.

<sup>257</sup> Leonardo Álvarez, *Die spanische Dogmatik der Verfassungstreue. Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 433 (2010). For similar problems in Hungary concerning human dignity, see Jakab, *supra* note 251, at n. 71.

*IV. Is There a European Style of Constitutional Reasoning?*

To be able to talk about a *European* style of constitutional reasoning we should be able to name some features which are common to European constitutional cultures, but which do not characterize non-European (e.g., U.S.) constitutional reasoning. Unfortunately, or fortunately, there are no such features. The most we can get are different emphases. The average U.S. Supreme Court judgment uses more substantive moral, sociological, or economic reasons, than their European counterparts, as the general judicial style is more substantive in the U.S.<sup>258</sup> Also, the conscious rejection of the use of comparative law arguments based on legitimacy concerns is rather a U.S. feature than a European one.<sup>259</sup> Radical originalism is also rather an American phenomenon, explained by the sacred and identity-building nature of the U.S. Constitution,<sup>260</sup> even though questioned in the U.S. too.<sup>261</sup>

In Europe, neither the European Court of Justice (ECJ), nor the ECtHR, has unified the style of constitutional reasoning; only a stronger presence of teleological arguments can be attributed to them, at least in countries where formerly it was less common.<sup>262</sup> Also, the

<sup>258</sup> Judges in the U.S. often behave like politicians (state judges are sometimes directly elected by the local population for a limited term, federal judges are appointed mostly exactly because of party membership and loyalty, so their audience is much less the legal profession than the electing people or the appointing politicians), so non-legal (political, social, policy, moral) arguments are much more acceptable for them than in other countries. ATIYAH & SUMMERS, *supra* note 89, at 342, 344, 350–51, 379.

<sup>259</sup> According to Jeffrey Goldsworthy, *Conclusions, in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY, *supra* note 66, at 342, the real reason for the low popularity of comparative law arguments in the U.S. is that the Constitution is old, thus there is a bigger pool of precedents to rely on for the solution of new cases. Comparative law is therefore rather used where guidance is needed because the Constitution is new. In Europe, the integration rather results in a growing use of comparative constitutional law in constitutional reasoning. See Ingolf Pernice, *Europarechtswissenschaft oder Staatslehre?*, in STAATSLHRE ALS WISSENSCHAFT 239 (Helmuth Schulze-Fielitz ed., 2007).

<sup>260</sup> Robert C. Post, *Constitutional Scholarship in the United States*, 7 INT'L J. CONST. L. 418 (2009).

<sup>261</sup> Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in EUROPEAN AND US CONSTITUTIONALISM 187–94 (Georg Nolte ed., 2005).

<sup>262</sup> For a discussion on the teleological practices of the ECJ, see JOXERAMMON BENGOTXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE 181–270 (1993); ANNA BREDIMAS, METHODS OF INTERPRETATION AND COMMUNITY LAW 70–105 (1978) (calling it the 'functional method'). For a discussion on the 'dynamic interpretation' of the ECtHR, see Hans-Joachim Cremer, *Regeln der Konventionsinterpretation*, in EMRK/GG. KONKORDANZKOMMENTAR ZUM EUROPÄISCHEN UND DEUTSCHEN GRUNDRECHTSSCHUTZ 155–230 (Rainer Grote & Thilo Marauhn eds., 2006). For a discussion on the influence of the EC (EU) on the British judicial style, see Jonathan E. Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347 (1994). For recent normative accounts of how the ECJ and the ECHR *should* reason, see GERARD CONWAY, THE LIMITS OF LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE (2012); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN COURT OF HUMAN RIGHTS (2007).

German style of constitutional reasoning is nearer to the U.S., than to the French, even though Germany does have a strong influence on some European countries. It is clearly the most influential European constitutional culture, both intellectually in content and financially (especially via scholarship programs in Germany for foreign constitutional scholars) promoting its own ideas. While until now it has been unable to significantly alter the style of constitutional reasoning in France or the U.K., Germany has been able to partially indirectly influence the U.S., as evidenced by the import of the proportionality test.<sup>263</sup>

The differences in constitutional reasoning in European countries are partly based on historical and institutional coincidences, partly on implied theoretical presuppositions of a legal community, and on general mentalities,<sup>264</sup> the latter of which are unlikely to converge in the near future. So, to put it shortly, currently there is no such thing as a *European* style of constitutional reasoning. The question is rather whether we should have, and whether one day we will have, such a common style in Europe.

For the combined purposes of constitutionalism and legal certainty, this style should converge and it should be based on a sophisticated *Verfassungsdogmatik*. Whether it will happen, and what exactly this style will look like, especially how strong the German influence will be, is still open.

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<sup>263</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

<sup>264</sup> Jakab, *supra* note 128, at 953–55.