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Justification of the methods of constitutional interpretation

Abstract of the Doctoral Dissertation

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I. Research objectives

The research topic of the methods of constitutional interpretation has received great attention in the last years in Hungary. There has been a number of attempts to present comprehensive reviews on the competing theories and to present a systematic description of the different methods and their rules of applicability. Even the new constitution laid emphasis on the methods of constitutional interpretation, as some of its rules are explicitly about how the new Basic Law should be interpreted and generally how courts should read legal texts. In fact, the adoption of a new constitution usually brings up basic questions about the right methods of constitutional interpretation, and the adoption of the new constitution in Hungary was not the exception. During the constitutional debates, we saw that the question of the legitimacy of certain interpretive methods emerged together with the question about the grounds that could justify the use of such methods.

Moreover, the interpretive methods of the constitution have always been surrounded by the suspicion that they serve to disguise political ideology. Perhaps such reservations are grounded if we look at the experience of the United States, where, textualists and originalist confront the opposing political ideologies of living constitutionalism and the moral interpretation of the constitution. Nevertheless, such experience of embedded political ideology in constitutional interpretation might only be due to an approach to the constitution and constitutional arguments that finds the only possibility of justification in the constitution itself. If this were true, the decisions of the constitutional court are nothing else than a continuous struggle for ruling the political landscape that is doomed to fail.

If the will of the interpreter is enough to justify the choices between different constitutional decisions, then the only point of reference to evaluate the legality or constitutionality of an act is sheer power. On the contrary, in this dissertation I argue that constitutional interpretation and the justification of interpretative choices are regulated by rules that can be known and justified independently from political opinions. Therefore, the application of the interpretive methods of the constitution is not arbitrary, or at least it does not have to be.

The primary goal of this dissertation is to show how the most important constitutional interpretive methods could be justified. While looking for such justifications, I also sought to verify the idea that each form of constitutional interpretation are rules themselves too, that can be

known by anyone, and therefore must be observed and their breach shall be subject to accountability.

In order to fulfil the first goal of this dissertation on the availability of justifications for the main methods of constitution interpretation, I incorporated three different areas of knowledge that offer relevant insights on this regard.

In the first place, I considered that the question of justification has strong ties with that of legal normativity, and with the evaluation of legal validity. Together with the survey on the different theoretical approaches to the problem of legal normativity, I offered my own views on this subject in order to elaborate on the idea that by interpreting the constitution, we attach normative force to the meaning in question.

The second area I incorporated to this dissertation is the concept of constitution. My starting point was that constitutional interpretation as such has a distinctive goal, that is, to promote those ideals of the concept of constitution. Therefore, the methods of constitutional interpretation must neither be considered arbitrary nor they serve the only goal of persuasiveness. By reflecting on the theoretical features of the concept of constitution, I intended to point at those essential features without which we might not call a document a proper constitution. In turn, such essential features of the concept of constitution will have direct consequences on the study of what amounts to a sound justification.

In the last place, I introduced in a separate chapter the philosophical research on language and the legal texts. In this chapter I aimed at showing how the use of legal language is different from the use of natural language, and thus to build a solid ground for the justification of the textual interpretation of the constitution.

II. Methodology

The methodology of this dissertation has been laid down in the first chapter about the theoretical approaches to legal normativity, as well as in the last one that deals with the duty of justification from the point of view of practical reasons. The goals of the dissertation that were set out in the previous part are grounded on the theory of practical reasonableness, and the most important consequences of this methodological approach are explained in the following paragraphs.

I laid emphasis on the notions of science in general and the legal science in particular in order to locate the discipline of constitutional law in the third order of sciences as presented by Saint Thomas Aquinas. The third order of science is called moral philosophy in the broad sense, and includes law, political philosophy and ethics. All the disciplines that fall into this category can be known and ordered by applying practical reasoning – which is different than theoretical reasoning, as I explain in the last chapter of this dissertation.

By defining and separating legal sciences (and constitutional law) from political sciences and political philosophy, I aimed at giving an even more refined picture about the nature of legal sciences and law. Although I did delve on the relevance of philosophy, political sciences, philosophy of language and epistemology in the sphere of legal normativity, I sought to make a distinction on the legal nature of justification. By never giving up the fundamental aspects of the positivity of law, namely that legal validity requires a certain body with suitable authorization to adopt legal rules within a fair procedure, I expected to strike the right balance. I think this does not rule out the possibility to apply the theory of practical reasons to the problem of legal normativity (i.e. the authority of the positive law and the coordinative task that the legal system has to perform, in itself represents an instrumental value, that is fully protected by practical reasons).

A further consequence of my approach was the key role that I assigned to the person of the judges. According to the first principle of practical reasonableness, by understanding that it is possible to know the truth, one also understands that knowledge is good. This is of fundamental importance for the role that judges have to perform when striving for knowledge and a good decision. Practical reasons are neither revealed by an abstract system of political philosophical system, nor by simple intuition, but by the personal, responsible, and self-reflective insight of the judge with which she makes a good decision in the end. This procedure cannot even start without the first principles of practical reasons, according to which knowledge is *possible*, and it is *good*, *therefore* one *ought to* have it. The good of knowledge –in this case– cannot be deducted from any

higher principle or abstract order of values, which means knowledge is not a moral principle. In a separate sub chapter, I present the most important steps of the cognitive process in decision making, where I sought to grasp and apply the relevant tenants of philosophical hermeneutics and epistemology to the issue of constitutional interpretation.

In the final chapter about the justification of the interpretive methods of the constitution, I integrated all the findings of the previous chapters and at the same time I tried to show where all these details fit in the larger question on interpretive methods. Additionally, I made a crucial differentiation in the sphere of justification. I hold that when the courts are exercising their constitutional review power, the justification for the interpretation of a constitutional norm is different from the justification of other norms and acts. During the justification of the interpretation of a constitutional norm, the constitutional court does not only decide about the meaning of the constitution, but it decides also about the normativity of that constitutional norm. This means that the justification of a decision like this, has to deal with the practical reasons that are behind the question of *why* that norm is good (what are the reasons behind the constitution), and which interpretive method serves the task to protect the normativity of the constitution.

III. The results of the research

1. The starting point of the dissertation was the idea that behind the interpretive methods of the constitution we find the basic concepts about law and constitution. In each choice between the theories of interpretation or argumentative methods we also make a choice about what we think about the object and fundamental idea of the law.

2. I rejected the "demarcational problem" in legal sciences (and in sciences in general) according to which one has to define the differentiation between what is law and what is not, what is scientific and what is not. Instead, I urged to face the role of the *subjectum*, the person in a realistic way, and sought to find a methodological framework that enables to use her legitimate viewpoints.

3. I hold that during interpreting the constitution one does not simply give meaning to the words of the text, but one also gives normative force to a certain meaning of the supreme law of the land. Therefore, the interpretation of the constitution and the question of legal normativity is closely connected. In order to get to know which interpretive method can be justified on what reasons, we also have to answer the question of how the normativity of law can be justified.

4. After presenting the most influential theoretical approaches to the explanation of the normativity of the law, I arrived to the conclusion that the theory of practical reasonableness is the one that best suits the research objectives that I set myself to. The reasons why I support this theory are, on the one hand its honesty and thoughtfulness in undertaking to discern the task and nature of the legal system and legal sciences in general, including the goods that they must serve. On the other hand, its aim to preserve the positive nature of law as well. Basically, I rely on the theory of John Finnis, but I make some important reservations, for example, I lay significant emphasis on the text and its philosophical roots, just as on constitutional reasoning and interpretation, which I hold crucial in order to be effective in legal argumentation. Finally, perhaps based on the previous two reasons, I consider the tasks of the judges and their decision making as something more active and direct, than what Finnis would support.

5. I started the chapter on the constitution with an analysis about the relationship between legal sciences and political philosophy. My conclusion is that in spite of the clash between the claim of systematicity of the law and the nature of political will, at their roots law and political philosophy share common goals. The law is committed to understand and solve human and social problems, and as such shares important features with philosophy. The true difference between law and

political philosophy is not in their goals, but in the different justification they have to provide for the decisions.

6. In contrast with those theories that lay great emphasis on the constitution-making power, I suggest that this notion should be ruled out from the possible justifications of the normativity of the constitution. The professional literature characterizes these theories as the "paradox of authorship".[1] It is a paradox because it attributes authority to the constitution in regard to its authors, but it does not say why these authors should be treated as having legitimacy or authority. The same logic is behind those theories that rely on the acceptance of the constitution in order to justify its normative force.

7. I sought to reject this theory on the basis of the following arguments: 1) it is a naturalistic fallacy to infer a normative statement from a plain fact. Therefore, the acceptance of the constitution or the identification of the authors of the constitution could not in itself justify why the constitution should be considered normative. 2) It is also a fallacious (self-justificatory) argument to justify the constitution-making power on the basis of its own power. 3) Finally, historical experience shows that overemphasising the constitution-making power favours populism and practices of abusive constitutionalism.

8. At the end of the second chapter I listed the fundamental elements that characterize the concept of a constitution, which are as follows: 1) a full community, 2) an authentic relationship with the community's past, 3) coherence and unity, 4) legal validity, and 5) the rule of law as the quality of the legal system. By defining these elements, I sought to emphasize not only the formal, but also the substantial elements of what we mean on a constitution, i.e. what are the reasons to have a constitution.

9. I dedicated a separate section to deal with the concept of constitutional identity. The concept of constitutional identity is dominated by a great number of sometimes contradictory features, like stability and constitutional change, or the inner, infinite essence of a constitution and those parts that are open to adapt to the changing circumstances. I argue that we cannot coherently separate these competing parts of the concept and that the constitutional identity could be found both in the constitutional text and in the social, political, and historical circumstances.

I concluded that the concept of constitutional identity can be useful to understand the diversity and depth of the different forces that are working under the text of the constitution. At the same

[1] Dyzenhaus 2012.

time, this concept should only be applied with judicial self-constraint and continuous self-reflection, because the conceptual framework of constitutional identity is very fluid and undetermined. Therefore, it is of crucial importance to provide suitable justification for the meaning that is attributed to constitutional identity.

10. Before the topic of the constitutional interpretive methods, it was necessary to deal with the philosophical foundations of the text and the legal language. This was necessary on the one hand, because the justification that relies on the text of the constitution has always been regarded as persuasive. However, the philosophical and theoretical foundations of the textual interpretation are often missing, which means that those reasons that would support the arguments about why a certain meaning can be traced back to the text –or not– are also missing. On the other hand, what usually happens is that scholars approach the text with some political-philosophical biases that they would like to find written in the constitution. Yet, they often lose sight of the actual text.

11. First, I present the most important theoretical approaches to the philosophy of language in order to introduce the relevant context for the different topics I planned to research. After the criticism of legal formalism, I gave a detailed description about what we mean on legal indeterminacy and what are the relevant categories of the concept. I argue that language indeterminacy is not only unavoidable, but necessary. Even more, many times it is particularly useful. In the remaining of this section I approach different topics of the semantics and pragmatics of language focusing on whether the legal language is significantly different from natural language and if yes, why.

12. On the basis of these research and analysis, I conclude that legal language shows relevant differences from natural language in the following ways: 1) the context of the legal language is much poorer; 2) because of this, neither the conversational implicatures, nor the conversational maxims work the same way than in natural language; 3) finally, the legal language requires active interpretation from the very moment of its birth, because the legislative procedure is the typical case of strategic speech, while natural communication is considered as cooperative speech, therefore the latter does not require that much creativity.

13. In order to secure the better understanding of the arguments on both sides, I made a chart with all the relevant points of view in the debate. However, as I said, my aim was to overcome these controversies. Thus, I did not take any sides in the debate, but rather tried to offer another approach that focused on the question of method. I focus on searching for what kind of method

would be used by constitutional interpretation taking into account the above-mentioned features of legal language. I summarize the main conclusions of the chapter in 11 points that include, among other ideas, that the meaning and the interpretation of the text cannot be separated; that the nature of the interpreted text has a relevant role to play in interpretation; that the meanings of the single words of the constitutional text cannot be torn apart from the meaning of the whole text; and that the intention of the constitution-making power cannot be inferred from the constitutional text.

14. In the last chapter about the interpretive methods of the constitution, I return to one of the topic of the first chapter, which is the theory of practical reasons and practical reasoning. In order to present my conclusions as clear as possible, I made another chart about the main differences between theoretical and practical reasoning.

15. I also return to the role of the person that was explained throughout the four chapters in the dissertation. One of the most important conclusions here is that the normativity of the law is connected to the recognition and understanding of the value of the person. I hold this view because the theoretical reason alone is not able to understand the worth, the pain and happiness of the human existence. In order to achieve that, one needs practical reason. Only through personal experiences can one fully realize how precious human dignity is, for instance.

The first step is to realize that knowledge is *possible*. This type of realization happens when we do not only realize that knowledge is possible, but that it is also *good*. When we see that something is good, we also recognize that it is worth doing it, i.e. this good *ought to* be done. Furthermore, when I recognize that something is good for me, I also understand that the same good can be good for others. Under this framework, our will is only an intelligent answer to the goal that our reason has already understood; therefore, the will in itself is not good or bad, because it does not have any content. All these realizations do not happen by using either deductive inference (from some abstract principle or system of values), or plain intuitions. Therefore, the first principles of practical reason are not moral principles.

16. My explanation about the epistemological part of the last chapter relied upon the theory of Bernard Lonergan. In his book on the human understanding and insight, he argued that during the processes of human cognition, we all use certain data of consciousness that makes it possible for everyone to reach well-founded, traceable conclusions that can be justified based on the same data. However, his theory was accused of being empiricist, there are many useful considerations about the processes of human understanding.

17. I deal with the role of the judge as the subject of the judicial decision making procedure to whom central importance. This is because only the judge is in such a situation in the course of constitutional adjudication that makes a personal, responsible, open and self-reflective decision possible.

18. I differentiate between the formal and normative obligation of justification, and furthermore, inside the normative obligation of justification I differentiate between the justification of a norm and the justification of an argument. From the point of view of my objective, the justification of a norm carries great relevance. The constitutional court uses the justification of a norm when it has to decide about the constitutionality of a norm. In this case, the constitutional court does not only make a decision about the meaning of the norm, but it also makes a decision about the normativity of the constitutional norm in question. This implies that the constitutional court has to justify not only the meaning that it gives to the text, but also the normativity of that certain constitutional rule. I also argue that in these cases of constitutional adjudication, the constitutional norm that is in question cannot function as an exclusionary reason (following Raz), which would mean that the normative force of that norm is not questionable.

Based on these considerations, I arrive to the following conclusions: 1) constitutional adjudication necessarily requires substantive reasons as well as any process of practical reasoning, 2) the constitutional interpretive methods that are applied during the constitutional adjudication require the court to give justifications of the norms in question, 3) this also means that the justification of the constitutional interpretive methods needs to include considerations about the normativity of the constitution.

19. I raise the question of whether there is significant theoretical difference between the interpretive method of the constitution and simple legal interpretation. I conclude that the methods of constitutional interpretation do not seem to have any specific differences compared to the methods of legal interpretation. The relevant question however is not this. I argue that the difference is not in the methods, but in the justification of the interpretive methods of the constitution. The justification of the interpretive methods of the constitution is different, because in this case the constitutional court has to use substantial reasons about why the given constitutional norm is *good*, which implies that during the justification, the court has to pay attention to the protection of the normativity of the constitution, and also to the substantive elements of the constitution.

In order to analyse these ideas in practice, I chose some recent cases of the Hungarian Constitutional Court. Among others, I present the case about the possible usage of those constitutional court decisions that were delivered on the basis of the previous constitution.

20. Finally, I applied the above-mentioned methodology to the most relevant constitutional interpretive methods. I found, that the textual interpretation, the structural interpretation based on the principle of the unity of the constitution and the objective teleological interpretation are those that are the most suitable to endorse the above-mentioned factors of the justification both in theory and in practice. Contrary to this, I found that the constitutional interpretation that relies on the intention of the constitution-maker and the moral interpretation of the constitution are less suitable methods. Although, I have good reasons to favour the above-mentioned methods, I do not imply that there should be any hierarchical order or even less, one single interpretive method that solves all our problems about constitutional interpretation because any method can be misused.

The results of my research can be useful in both the theory and practice of the constitutional decision making. The methodology of the justification and also the concrete justifications of the most important methods give ammunition to the academic discourse for the ongoing debate about the new interpretive methods that can be found in Art. R) and Art. 28. of the Basic Law, and can be also useful in the constitutional interpretive debates in everyday practice.

VI. Publications

Book:

Lóránt Csink – Johanna Fröhlich, To the Margin of a Constitution. Theoretical and Interpretive Questions about the new Fundamental Law. Budapest, Gondolat, 2012.

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