2 The art of constitutional interpretation

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2.1 Defining constitutional interpretation

The concept of legal interpretation has several meanings. It is usually understood as determining the meaning of a legal norm; that is, this definition treats the process as a rational activity by which a meaning is derived from a linguistic formula.[1] This general definition can also be applied to the interpretation of the constitution: on the basis of this, constitutional interpretation is the process of giving concrete meaning to the particular provisions of the constitution.[2]

Beyond this definition, there are already differing views on the conceptualization of legal interpretation. Some argue that this category should be used in a narrower sense, claiming that interpretation is needed only if the meaning of the text is not clear[3] and there is a difference between the comprehension and interpretation on the one hand, and the application of a legal text on the other,[4] while others argue that interpretation is essential to reveal the meaning of a legal norm in all cases.[5] The narrower concept of interpretation follows the principle of *in claris non fit interpretatio* (the clear rule does not require interpretation), while the rival approach claims that this statement – namely that a rule is not clear – is itself a result of interpretation. For a text to be able to behave as a rule, it must have a rational meaning, that is, an identifiable content that can be justified to some level of certainty for all participants in the constitutional discourse.

According to another view, the fundamental question of legal interpretation is how the legal norm as a general rule is applied to a specific case, i.e. the

1 Jerzy Wróblewski, 'Legal Language and Legal Interpretation' (1985) 4 Law and Philosophy 243; Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press 1992) 13; Aharon Barak, *Purposive Interpretation of Law* (Princeton University Press 2005) 3, 18.

2 Donald P. Kommers, John E. Finn and Gary J. Jacobsohn, *American Constitutional Law. Essays, Cases and Comparative Notes. Vol. 1: Governmental Powers and Democracy* (Rowman & Littlefield Publishers 2009) 34.

3 Wróblewski (n 1) 243.

4 Marmor (n 1) 12–13, 31, 122.

5 Barak (n 1) xv. Barak argues that it is not possible to determine in advance whether a text has a clear or unclear meaning: this can be determined only by interpretation. Ibid. 273.

interpretation of each norm comes to the fore during its execution,[6] while other scholars conceptually separate this process of legal thinking – as subsumption – from interpretation. Nevertheless, in the value-based conception of constitutional interpretation, the function of interpretation is basically to ensure that state actions remain within the framework of the provisions and principles of the constitution.[7]

As to the circumscription of interpretation, there is a broad consensus that the linguistic limitations of a text are also limitations of interpretation, and the latter is an activity that attributes a meaning to the norm which is consistent with the grammatical meaning of the text. However, this does not provide sufficient guidance to distinguish between interpretation and other forms of legal thinking, as language is not a completely precise form of expression and, moreover, its meaning can be explicit or implicit. It is therefore clear, empirically, that the same text may be understood differently even by speakers of the same language, whereas the expectation is that the law, as a set of general and enforceable rules of conduct, will form a system of norms that is comprehensible and predictable in advance. This is the reason why legal interpretation is such a fashionable and frequent subject in legal discourse, and why so many attempts have been made and will continue to be made to describe and explain it (to justify the best method of interpretation).

In fact, constitutions often use ambiguous, uncertain and contradictory terms, or remain silent on issues that need to be resolved in constitutional disputes. In such cases, an interpretation is needed because the constitutional text does not provide full guidance on how to answer the question involved in the particular constitutional controversy.[8] There may be several reasons why the constitution is not clear. First, this is the case for all legal norms, as they are *per se* normative in nature, i.e. general rules that contain binding provisions for a large number of individual cases. Second, the subjects of the constitutions are also very complex social relations. Their text is often the result of political compromises, and it is also possible that the original ideas of the constitution makers were not clear either, or even that they deliberately used terms with abstract, vague meanings.[9]

The uncertainty or multiple meanings of the text make certain legal disputes 'hard cases' that can be resolved only by interpretation. Although the problem of hard cases leads us back to debates about the necessity of interpretation,[10] it is certain that resolving such cases requires legal interpretation,

6 Hans Kelsen, 'On the Theory of Interpretation' (1990) 10 Legal Studies 127.

7 Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007) 13.

8 Kommers, Finn and Jacobsohn (n 2) 34.

9 Walter F. Murphy, James E. Fleming, and William F. Harris II, *American Constitutional Interpretation* (The Foundation Press 1986) 5.

10 Whereas Ronald Dworkin, for example, says that resolving both 'easy' and 'hard cases' presupposes interpretation, others claim that easy cases are those in which the rule (and the way it is implemented), even without interpretation, is known. See Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 266, 353–354, and Timothy A. O. Endicott, 'Putting Interpretation in Its Place' (1994) 13 Law and Philosophy 466.

as these cases are usually difficult precisely because it is not clear what rule applies to them, or because the rule applicable to them is fuzzy and vague. Besides that, especially in the case of old constitutions, the original constitutional principles no longer meet the requirements of the modern age, and due to the inflexibility of the constitution, interpretation remains the only reasonable way to adjust its content to social change.[11] Moreover, certain otherwise important provisions (empowerments, restrictions) are missing from the constitutional text, or at least there is no directly and clearly applicable rule. One of the most famous such shortcomings in constitutional history is that the judicial review of federal legislation is not explicitly recognized by the US Constitution, although it is a fundamental institution of US constitutional law. Missing provisions often cause problems in fundamental rights matters, not only if the text does not include an explicit entrenchment of a universally accepted freedom, but also when the constitution does not provide guidance on how to restrict fundamental rights or to reconcile them when they come into conflict with each other. Creating institutions, guarantees and procedures, or constructing unenumerated rights absent from the constitutional text by way of judicial decisions is always controversial, because it is difficult to justify that courts merely realize the will of constitution makers, rather than replace it with their own convictions. In any case, it does not seem to be a compelling argument that what is not included in the constitutional text could surely not be the intention of the constituent power, as social, economic, technical, etc., developments from time to time create new needs and situations that the constituent power could not even imagine. When drafting constitutions decades ago, for example, constitution makers clearly could not have known of the future existence of antibiotics, space research, organ transplantation, human cloning, microchips or the Internet – that is, so many things that can cause urgent constitutional problems that must be resolved even if the constitution cannot be properly amended for any reason.

2.2 Classifying interpretive theories

2.2.1 Monist and pluralistic theories

Clearly, whatever concept of constitutional interpretation is accepted, the definition of which interpretive method should be followed does not include a judgement on which one is the most authentic or the best. The authority of the constitutional text alone does not imply the primacy of any particular modality of interpretation.[12] This is because the concept of interpretation is quite abstract and flexible, so any choice of how a judge should interpret

11 Jeffrey Goldsworthy, 'Introduction' in Jeffrey Goldsworthy (ed.), *Interpreting Constitutions. A Comparative Study* (Oxford University Press 2007) 1.

12 Frederick Schauer, 'An Essay on Constitutional Language' (1982) 29 UCLA Law Review 812, 817, 828.

a legal text can be based on several different factors, from the purpose of interpretation to legal culture.[13] The possible interpretive methods are, in fact, '*axiomes fondés sur l'expérience*' (axioms based on experience), and they themselves are not legal norms. The choice between them in a particular case is, however, important, because it does not follow from the fact that the text has a multifarious or multilayered meaning which has to be interpreted in several different ways.

Although some constitutions contain provisions as to how their own texts should be interpreted,[14] most of them do not provide any guidance in this regard. But even where such provisions can be found in the constitution itself, their validity is not general, and especially not exclusive, as in modern constitutional democracies, constitutional and legal interpretation falls within the scope of the authority of courts.

The theories of constitutional interpretation are normative approaches about how the constitution should be interpreted in general. In order to be able to choose from among different interpretive theories, or simply from among the various methods of interpretation, it is necessary to determine what their function is and what requirements a consistent theory should meet. For this aim, several different aspects are defined, such as that interpretive theories should properly describe the practice of constitutional interpretation, provide strong normative justification for their preferred methods, produce satisfactory results resolving constitutional disputes, and limit the scope for judicial discretion; in brief, they should provide, as far as possible, objective methods. The problem is, however, that different interpretive philosophies adjust the expectations of 'proper' interpretive methods to their own conceptions. Thus, for example, the originalists like to postulate a fundamental requirement for theories of interpretation that they ensure the realization of the original intentions of the constitution-makers, which is clearly an unacceptable criterion for the adherents of a dynamic approach to the constitution. Among the possible options, perhaps the most common is the sceptical perception that there is no 'true' or 'genuine' method of interpretation – the only option available is to determine the most plausible method for a given case.

The interpretive rules must ensure the reasonableness of the whole process of discovering the meaning of the text and justify the preferred method(s). Obviously, they have the important function of safeguarding constitutionalism and the rule of law, because if everyone were to be free to interpret the constitution in the way they wanted, the supremacy of the constitution and legal certainty in general could not be maintained.

Some interpretive theories claim that their preferred method is suitable for interpreting any or every type of legal text. Those that are based on the primacy of a particular method we call monistic theories. Of course, there may also be significant differences between them in terms of their ambitions and

13 Endicott (n 10) 451.

14 See Gamper, Chapter 3 in this volume.

scope, and depending on whether their preferred method takes precedence in all cases,[15] or only in the so-called hard cases,[16] that is in deciding problems that cannot be solved by grammatical or traditional means of interpretation in general.[17] The possibilities of language are limited, so the use of an interpretive theory is needed to determine how the meaning of a legal text should be revealed, if it is not clear.

The other group of interpretive theories can be called pluralistic approaches, which deny the prominent role of a particular method, except for the textualism or grammatical-logical interpretation, which in most perceptions is an indispensable part of the process of interpretation. Instead, they suppose that deciding which method leads to the best result depends on the particular text or constitutional provision (or, possibly, on the specificity of the concrete dispute). While this view seems to be pessimistic as regards objectivity – a celebrated value of law (and legal interpretation) – it seems to be much closer to the day-by-day practice of constitutional interpretation.

At the same time, some take a sceptical position against such theories, disputing their justifiability or usefulness. This is not surprising from those who argue that interpretation should enforce pragmatic considerations rather than follow the prescriptions of a normative theory. The usefulness of interpretive theories is also questioned by some because judges in a significant number of cases achieve the same result regardless of the preferred method of interpretation, and even similar interpretive results would be produced in many other cases that do not go to court precisely because of the broad consensus.[18] However, neither is the need for theorization reinforced by the fact that most well-known normative conceptions do not lead to a definite result in a number of cases, or in their pure form often reach unacceptable conclusions.[19] Finally, such theories are often invented by law professors, who present them to other scholars without their having any significant impact on legal practitioners.[20]

As I have already pointed out, there is a broad consensus between monistic and pluralist interpretive theories that the correct interpretation should be based on, or at least traceable to, the constitutional text.[21] Beyond that, however, practice shows that courts rarely commit themselves to a particular

15 See, for example, Aharon Barak's theory of purposive interpretation. Barak (n 1) 2005.

16 For example, Dworkin's moral interpretive theory. Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1991) 81–130; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1999).

17 In contrast, those cases are considered 'easy cases' in which there is agreement in the constitutional scholarship on the content of the relevant constitutional provisions and the method of interpretation to be applied. Robert Justin Lipkin, 'Indeterminacy, Justification and Truth in Constitutional Theory' (1992) 60 Fordham Law Review 609.

18 Adam M. Samaha, 'Low Stakes and Constitutional Interpretation' (2010) 13 Journal of Constitutional Law 312–313.

19 Ibid. 313–315.

20 Richard A. Posner, 'Against Constitutional Theory' (1998) 73 New York University Law Review 4.

21 Kommers, Finn, and Jacobsohn (n 2) 36.

method of interpretation; instead, they usually represent an eclectic, pragmatic approach. Yet this is not only a practical consideration, but also a theoretically defensible position, because it can be strongly argued that in a hermeneutical sense it is the best output of interpretation to which most interpretive methods lead. This is why some constitutional thinkers suppose that it is a hermeneutical requirement for the interpreter to consider all canons of interpretation. However, for those who think that some methods are better than others, this is hardly a convincing view, especially if the case before the court can be easily resolved in the preferred way.

2.2.2 Other classifications of interpretive theories

Experience shows that the debates over the principles of constitutional interpretation have nowhere led to any generally accepted or exclusive method.[22] In contrast, there are a number of more or less well-accepted ways of interpretation in constitutional law.

In general, a number of tools of legal interpretation are identified,[23] and there is a broad consensus that judicial practice is characterized by the pluralism of applied methods, and by the combined and variable use of interpretive modalities.[24]

In Europe, the most classic categorization of the methods of legal interpretation is linked to the German jurist Carl Friedrich von Savigny, who distinguished between grammatical, logical, historical (referring to the original intent of the lawmaker) and systematic ways of interpretation.[25] Laws were

22 Dieter Grimm, 'Constitutional Adjudication and Interpretation' (2011) NUJS Law Review 23.

23 Fritz Ossenbühl, 'Grundsätze und Grundrechtsinterpretation' in Detlef Mertem and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa. Band I. Entwicklung und Grundlagen* (C.F. Müller 2004) 600; Klaus Stern, 'Die Auslegung des Verfassungsrechts' in Klaus Stern (ed.), *Das Staatsrecht der Bundesrepublik Deutschland. Band I. Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung* (C. H. Bech'sche Verlagsbuchhandlung 1984) § 4, III. 1.

24 The U.S. Supreme Court, for example, in *Griswold v. Connecticut*, 381 U.S. 497 (1965), used at least six different methods of interpretation. Kommers, Finn, and Jacobsohn (n 2) 47.

25 Friedrich Carl von Savigny, *Vorlesungen über juristische Methodologie, 1802–1842* (Vittorio Klostermann 2004) 91–95, 215–246; Friedrich Carl von Savigny, *Das System des heutigen Römischen Rechts. Erster Band* (Veit und Camp 1840) 213–214. Although Savigny applied these methods of interpretation to private law, his classification is generally considered valid also in constitutional law, supplemented, possibly, by a method of comparative law, encouraged by the practical benefits of comparing EU law, the case law of the European Court of Human Rights and national constitutions. See 11 BVerfGE 126, 129 (1960); Michael Sachs 'Einführung' in Michael Sachs (ed.) *Grundgesetz. Kommentar* (Verlag C. H. Beck 2011) 15–16; Winfried Brugger, 'Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View' (1994) 42 The American Journal of Comparative Law 397; Christian Starck, 'Die Verfassungsauslegung' in Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts dr Bundesrepublik Deutschland. Band VII. Normativität und Schutz der Verfassung – Internationale Beziehungen* (C. F. Müller 1992) 200.

obviously interpreted from the very beginnings (in Hungary, for example, István Werbőczy's *Tripartitum*, a collection of medieval customary law published in 1517, already contained references to the methods of legal interpretation). Savigny's significance lies primarily in systematizing and theorizing the possible interpretive methods. According to conventional wisdom, judges must interpret the law using these methods and choose between them according to which leads to the best solution.

In the United States, the American lawyer Joseph Story had already dealt with the issue of correct constitutional interpretation before Savigny, when, in his voluminous commentary on the American Constitution, the first edition of which was published in 1833, he wrote: '[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties',[26] while a scientific systematization of interpretive methods appeared in American legal literature as early as 1837.[27]

Constitutional interpretation theories can be descriptive or normative. While the former instantiate, explain and systematize the practice of interpretation, the latter also claim that there are correct and incorrect interpretive methods and include the principles of choosing between them.[28]

These theories can also be labelled according to whether or not a hierarchy is defined between different interpretation methods. As we have seen, monistic theories favour the primacy of a particular method, but pluralistic interpretive philosophies do not reject this claim, either. So it is broadly accepted that the exercise of interpretation should start with the exploration of the grammatical-logical meaning of the text, and any other methods may be used only if an appropriate interpretive result cannot be established, or an absurd conclusion would be reached in this way. Theories other than textualism therefore do not dispute the grammatical interpretation itself or its legitimacy, but only its exclusive or primary nature.[29] The alternative methods generally do not replace but merely supplement the grammatical interpretation.[30] But even in the absence of a strict and permanent hierarchy of interpretive methods, some scholars argue that although multiple methods can be legitimately used in the course of constitutional interpretation, some of them are better than others, and the recognition of the multiplicity of interpretive principles does not exclude the fact that in

26 Joseph Story, *Commentaries on the Constitution of the United States, Vol. I* (Hilliard, Gray, and Company 1833) 383.

27 Francis Lieber, *Legal and Political Hermeneutics* (F. H. Thomas 1837). On Lieber's legal and political hermeneutics see also the special issue of *Cardozo Law Review*, Vol. 16, No. 6, April 1995.

28 Susan J. Brison and Walter Sinnott-Armstrong, *Contemporary Perspectives on Constitutional Interpretation* (Westview Press 1993); Richard Fallon Jr., 'How to Choose a Constitutional Theory' (1999) 87 California Law Review 537.

29 Sachs (n 25) 15; Frank B. Cross, 'The Significance of Statutory Interpretive Methodologies' (2006–2007) 82 Notre Dame Law Review 1973.

30 Cross (n 29) 1974.

individual cases some can be more effective than others, and, therefore, it may be preferred to move from the more concrete to the more abstract in the process of interpretation.[31] In Germany, for example, it is a widespread perception that, although traditional principles of interpretation are equally applicable, the plain meaning of the text must be respected in the course of interpretation.[32]

In the American legal literature, the distinction between interpretivism and non-interpretivism has been widespread since the mid-1970s.[33] In this classification, the methods based on the semantic meaning as well as the originalist approach were classified in the first group, while the second group includes those – mainly natural and moral – schools which legitimize or prefer the use of non-textual sources for interpretation. So-called 'interpretivism' is the approach that 'it is the Constitution alone which is authoritative, whereas noninterpretivism is the view that in at least certain classes of cases some set of supplementary, extra-constitutional norms are authoritative as well'.[34] Interpretivism is based on legal positivism according to which, in the absence of a consensus on the exact content and requirements of natural rights or moral principles, the social consensus necessary for the constitution to prevail can be grounded only on positive, consensual agreements between the people. By contrast, 'non-interpretive' theories state that the constitution includes, in addition to the written text, unwritten, more general moral or political principles which must also be taken into account in the course of interpretation.[35]

Some distinguish 'substantive' theories that see the representation of certain moral or political values as the main task of constitutional interpretation, while 'formalist' theories are those that determine what kinds of considerations judges should follow when they adjudicate.[36]

In principle, a further distinction can also be made between 'static' and dynamic (or evolutive) schools of interpretation on the basis that while the

31 Thus, for example, in statutory interpretation through the examination of the legal text, the original legislative process, the legal purpose, the history of the development of the law, and the current aspirations. William N. Eskridge Jr. and Philip P. Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 Stanford Law Review 353.

32 Brugger (n 25) 400. It is to be noted that Savigny, who is still considered a classic of interpretation theory throughout Europe, did not establish any hierarchy between the various principles. 'So there are not four kinds of interpretation from which one could choose according to taste or preference, but there are different activities that must be combined, when interpretation is to be done'. Savigny, *Das System des heutigen Römischen Rechts* (n 191) 215.

33 Michael Perry, *Morality, Politics and Law* (Oxford University Press 1988) 10–11.

34 Dennis J. Goldford, 'The Political Character of Constitutional Interpretation' (1990) 23 Polity 262.

35 Ibid. 264–265.

36 Fallon (n 28) 562–563. Notably, the substantive–formalist division is not the same as the interpretivism–non-interpretivism dichotomy. In this respect, for example, both moral and pragmatic interpretation are formalistic because they refer to the need to strive for the morally best decision, or for the most effective solution. Ibid. 563–564.

former claims that constitutional interpretations are framed by the original intentions (or objectives) of the constitution-makers, the latter emphasizes that interpretation develops through constant changes, because the constitution does not have eternal meaning, but should be accommodated to continuously changing circumstances and values.[37]

Notwithstanding, practical experience shows not only that there is no authentic method or exact ranking among competing interpretive theories or principles,[38] but also that none of them play a decisive role in building consensus among judges. According to some surveys, consensus can be reached at most around the results of pragmatic interpretation,[39] which is not very surprising based on the great variety of interpretive modalities. The variety and pluralism of these methods provide the greatest leeway for judges in constitutional interpretation. The possibility to choose between different methods, on the basis of the particularities of the given case, allows judges to 'borrow' the opportunity to find and justify the best solution. Empirical research usually proves that in practice, judicial interpretation is characterized by the varied, combined and mixed application of interpretive methods. There may be differences in the frequency, emphasis or scope of the use of each method, but this does not change the fact that a wide variety of methods are used in many different forms.[40] The only exception to this is textualist interpretation, because it is considered everywhere to be the starting point of the whole process, and only exceptionally is it permissible to deviate from the plain meaning rule.

2.3 Main interpretive theories

2.3.1 Interpretive modalities

As we have seen, there are several possible classifications of the methods of constitutional interpretation which often distinguish between different interpretive principles and theories.[41] The identification of each specific method

37 Terrance Sandalow, 'Constitutional Interpretation' (1981) 79 Michigan Law Review 1033–1034.

38 Christian Starck, 'Constitutional Review and the Theory of Interpretation' in Thomas Ellwein, Dieter Grimm, Joachim-Jens Hesse, and Gunnar Folke Schuppert (eds.), *Jahrbuch zur Staats- und Verwaltungswissenschaft. Band 7.* (Nomos 1994) 51; Starck (n 25) 203.

39 Cross (n 29).

40 See, for example, Vicki C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Tim Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011) 604–605; Stephen M. Griffin, 'Pluralism in Constitutional Interpretation' (1994) 72 Texas Law Review 1757, 1760–1761.

41 On the major explanatory factors of the differences in constitutional interpretation in the various constitutional polities, see Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michael Rosenfeld and András Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) 706–717.

depends on the chosen normative theory and the conceptualization of the constitutional interpretation. Nevertheless, the most commonly identified interpretation theories (which themselves are generic concepts) are:

- textualism (grammatical-logical interpretation),
- originalism (intentionalism, interpretivism),
- contextual (systematic, structural) interpretation,
- purposive interpretation (teleology),
- moral and natural law interpretation,
- pragmatic interpretation, and
- common law interpretation.

In line with textualism, the meaning of a legal text is given by the ordinary or technical meaning of the words or phrases it uses. The interpretation is thus based on the conventional rules and the internal logic of the language. The primary and even almost exclusive source of grammatical-logical interpretation is, of course, the text itself, because the constitutional text itself is what the constituent power adopted as such.

Pursuant to originalism, the main purpose of constitutional interpretation is to execute the original intention of the constituent power. Consequently, that meaning must be attributed to the text which the constitution-makers intended to give to it when the constitution was adopted. The basic conception of this idea is that the constitution-makers have the exclusive power to adopt or amend the constitution. So the execution of the will of those who were empowered to lay down constitutional rules is an absolute requirement arising from the authority of the constituent power, which cannot be replaced by any other intention or consideration.

The essence of the structural or contextual interpretation is that the words, expressions and even provisions of the constitutional text should not be interpreted in isolation, but instead in accordance with other rules and principles of the constitution as a whole. This is based on the fact that the constitution is not a set of logically separate rules, but a coherent group of norms aimed at establishing the whole legal system.

Purposive (theological) interpretation in constitutional law attaches meaning to the text in accordance with the purpose of the constitutional provisions or the whole constitution (*telos*, *ratio legis*, *ratio iuris*). The theoretical basis of this sort of interpretation is the consideration that a piece of legislation always has a purpose; that is, it is designed to have a specific effect.

Although moral and natural law interpretations are not the same, their common feature is that they attach decisive importance to extra-constitutional values and principles, and thereby often endorse interpretive solutions that do not follow compellingly from the constitution. In fact, the adherents of these theories see the constitutional text as only a starting point and reach interpretive results derived from some philosophical conviction. Natural law theories claim that the authority of the constitution does not stem from the mandate of the constitution makers or the special authority granted to them;

in contrast, the needs for the limitation of power and for human rights are of natural origin, so their enforcement cannot be entrusted to the political majority of the day. The moral reading of the constitution puts fundamental moral values at the centre of legal reasoning. According to this conception, constitutions consist not only of individual rules, but also of moral principles, the interpretation of which must seek the best moral solution, that is, the solution that best enforces the basic values of the constitution.

It is not clear whether the conception of legal pragmatism can be considered an independent philosophy of interpretation. In a sense, it can be described as a 'theory without a theory', as one of its central ideas is that in the course of interpretation, the court should find the best solution for the given situation, not a meaning arising from a special interpretive principle. In this view, courts must always take into account the social consequences of their possible decisions.

The common law constitutional interpretation can be seen as a separate type of interpretive theory, not only because it is used in most Anglo-Saxon countries, but also because of its specific logic supposing that the meaning of the constitution must be determined on the basis of the principle of *stare decisis*; that is, following previous judicial decisions in similar cases. Although this respect for precedents is unique to Anglo-Saxon legal systems, many constitutional courts have developed (or at least sought to establish) a kind of constitutional case law over the years; thus, this method has gained some importance in civil law systems as well. In practice, this means that the previous decisions of the constitutional court, which build on each other to produce a unified doctrinal system, can play a prominent role in their constitutional polities.

2.3.2 Substantive interpretation

Another group of theories of constitutional interpretation can be classified as conceptions based on specific value choices, which are either aimed at defining the purpose of interpretation or enforcing certain constitutional values.

There are a large number of examples of 'substantive interpretation' conceived in this sense, such as John Hart Ely's theory claiming that the constitution primarily provides for procedural democracy, and judicial review should also support this goal. The constitution and the courts are otherwise value-neutral; the importance of the constitution is to provide an open forum for discussing all competing values until the majority decides. It is not the job of the courts to override specific value choices, but to ensure that all values have an equal chance in the decision-making process.[42] Another American thinker, Michael Perry, proposes the consensus theory, according to which judicial review should be aimed at preserving values in which there is a high degree of social consensus, as opposed to

42 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

matters that deeply and ultimately divide society. In the latter, the courts should be reluctant to decide, and rather leave the decision to the democratic legislatures.[43] The theory of 'popular constitutionalism' has been present in the literature since a famous 1957 article by Robert Dahl. He claimed that experience shows that the Supreme Court, which is inevitably a policy-making body itself, cannot for an extended period successfully prevent the will of a strong legislative majority from prevailing, or it can act only against a weak legislative majority.[44] A more recent version of this approach supposes that, in the long run, the interpretive practice of the US Supreme Court follows the evolution of public opinion.[45]

Substantive interpretation often focuses on certain constitutional values, such as the notion of human dignity or 'general freedom of action' in the practice of the German Federal Constitutional Court,[46] and the interpretive practices that define the protection of the basic structure of the constitution as a main function of judicial review can also be listed here.[47]

However, while the formal modalities of constitutional interpretation are primarily aimed at standardizing the process of interpretation, and constitutional changes in this way can be achieved mainly by alternating different methods, in this form of interpretation the same results can be reached only by reinterpreting the content of substantive constitutional values.[48]

2.3.3 Other interpretive aids: judicial doctrines, constructions, standards, tests and legal maxims

Beyond interpretive theories, there are a number of other special tools and technics of interpretation, such as constitutional doctrines (constructions) standards (tests) and interpretive sub-principles and guidelines (canons, maxims). They help the interpretation process in different ways, and the techniques and tools of their various groups have certain common features. However, the differentiation between these methods is only relative, so they can often not be precisely separated from each other. Consequently, their existence and specification have usually no statutory basis but primarily serve as an analytical framework.

Constitutional doctrines are judicial constructions that set out certain general rules or criteria for interpretation in order to decide certain types

43 Perry (n 33).

44 Robert Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 Journal of Public Law 286.

45 Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004).

46 Donald P. Kommers, 'Germany: Balancing Rights and Duties' in Jeffrey Goldsworthy (ed.) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 323.

47 See e.g. this doctrine in Indian constitutional law: Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: a Study of the Basic Structure Doctrine* (Oxford University Press 2009).

48 See e.g. Gárdos-Orosz, Chapter 9 in this volume.

of cases. There is usually some important constitutional value behind them that the court must uphold in its proceedings. The doctrines are mostly formulated by the constitutional and other high courts; that is, they are not included in the constitutional text. Nevertheless, they adopt special legal approaches and conceptions that are useful instruments for judges to determine the content of constitutional principles or build a coherent analytical framework.[49] The doctrine of the so-called 'living constitution',[50] the 'unity of the constitution',[51] the 'interpretation conforming the constitution'[52] or the 'autonomous concepts'[53] can be included, among others, in this group.

The standards and tests used in constitutional interpretation are also judicial constructions, aiming to make judicial review predictable and transparent and thus, in a sense, controllable. Basically, these are technical requirements for the interpretive process, which determine what aspects (and how) the court will scrutinize in its proceeding. This includes fundamental rights tests such as the necessity-proportionality test,[54] constitutional balancing,[55] or such specific methods as the strict scrutiny test in the United States[56] or the so-called Wednesbury reasonableness in the UK.[57]

The legal nature of some other interpretive rules, canons, maxims and guidelines is vague, and their legal status is uncertain; at least, they are much weaker than those of principles, doctrines, or tests of interpretation in constitutional law, even though in some cases they may play a decisive role in finding the right solution to the case. These interpretive aids merely assist the judge but do not in themselves have legal force; usually, they are based solely on the consensus of a legal community. Consequently, there is no authoritative list of interpretive canons, and their use varies in case law, as do their generality and scope: some maxims are specific, applicable only in some cases; others are more similar to general principles of law. Among them, there are primarily interpretive canons such as 'the rule against surplusage' or '*ejusdem generis*' ('of the same kind'), maxims of legal logics such as '*argumentum a maiore ad minus*' ('from the larger scale to the smaller one'), '*argumentum a contrario*' ('argument from the contrary'), or '*idem per idem*' ('the same through the same'), conflict resolution rules, as '*lex superior derogat legi inferiori*' ('the higher law repeals the lower one'), '*lex specialis derogat legi generali*' ('the special law repeals the general law') '*lex posterior*

49 Craig R. Ducat, *Constitutional Interpretation* (Wadsworth 2009) 80; Kommers, Finn, and Jacobsohn (n 2) 40.
50 Sandalow (n 37) 1053.
51 Kommers (n 46) 178; Stern (n 23) § 4, III. 8.
52 Sachs (n 25), 18–19; Starck (n 25) 210.
53 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2010) 41–43.
54 Alec Stone Sweet and Jud Mathews, 'Proportionality, Judicial Review, and Global Constitutionalism' in Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (eds.) *Reasonableness and Law* (Springer 2009) 173.
55 Louis Henkin, 'Infallibility under Law: Constitutional Balancing' (1978) 78 Columbia Law Review 1029.
56 Richard H. Fallon Jr., 'Strict Judicial Scrutiny' (2007) 54 UCLA Law Review 1273.
57 Stone Sweet and Mathews (n 54) 175.

derogat legi priori' ('the later law repeals the prior one') and value-laden interpretive aids such as '*nullum crimen sine lege*' ('no crime without law' and 'no punishment without law') '*contra bono mores*' ('against good morals').

2.4 Conclusion

In sum, it can be concluded that a number of theories and methods of constitutional interpretation have been developed both in scholarship and jurisprudence. By reason of the vagueness and indeterminacy of the constitutional text, however, choosing between them is unavoidable, as in many cases the plain meaning does not provide sufficient guidance to resolve the dispute.

Beyond the exigency of interpretation, the next question is who should be the ultimate interpreter of the constitution. Without engaging here in the never-ending dispute around the counter-majoritarian difficulty, but assuming that constitutional interpretation, at least in the countries examined in this volume (perhaps with the sole exception of the UK) is essentially a judicial function, the art of interpretation lies primarily in deciding which interpretive methods lead to the best outcome in various constitutional debates. The real difficulty is how to justify the application of the chosen interpretive methods or principles. As a matter of fact, there is no natural hierarchy between the various theories of constitutional interpretation and the modalities and substantive concepts attached to them (as we will see in reality, even if the constitution itself prefers certain methods); that is, one can choose between them only on the basis of a certain (political, moral, etc.) value judgement.

Whatever choice is made between competing interpretive methods, now it is sufficient for us to conclude that the courts undeniably encounter constitutional disputes generated by the contemporary wave of populism and therefore are forced to decide whether or not to change their previous interpretive practices, and if so, how they do this. This is what this book is about.