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CONSTITUTIONAL INTERPRETATION AND VISIONS OF CONSTITUTIONAL JUSTICE

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ABSTRACT

The work of constitutional courts – the public "reading", interpretation of a constitution – is quite influential. Therefore, one can often hear assessments regarding the activist or self-restraint policies pursued by these courts. The aim of this paper is to understand how the views of constitutional courts follow defined logic and theory. This research is an attempt to form a systemic vision about the alternative methods and determining factors that the courts consider when interpreting constitutions. The objective is to ensure that scientific or political assessments of court judgments are not based on superficial analysis. In addition, another important issue concerning the courts is whether concrete methods and approaches of interpretation, which would minimize risks of politicization, exist and whether, against this backdrop, courts can be a healthy check on the power of the government and maintain the public trust.

INTRODUCTION

The aim of constitutional courts[1] is to implement constitutional democracy. Constitutional justice is an accelerator of the democratization of a modern state. This clearly indicates that the activ-

1 In this research, the term "constitutional court" covers all institutions that carry out constitutional justice.

ity of constitutional courts is marked with politically "high stakes".[2] Although almost every society agrees about the special importance of constitutional courts, the perception of their views is mixed; in other words, some believe that a court is an activist and others feel it pursues a policy of self-restraint. More specifically, questions are raised about the motives that determine the decisions a court makes.

This paper aims at understanding how a constitutional program is implemented, i.e. what is the nature of the decision-making process (content-related part) when carrying out constitutional justice. The objective is to show that the views of a constitutional court or equivalent institutions rest on defined logic and theory and that assessments on the part of scientific, as well as political, circles must be based on an in-depth analysis of this issue. This research is an attempt to form a systemic vision about the alternatives methods and ideological views as well as the determining factors that the courts consider. A more comprehensive study is necessary, however, to provide a detailed analysis of all these factors.

The main question in analyzing views concerning constitutional interpretation is whether there are concrete methodologies that will minimize the risks mentioned above and whether, against this backdrop, courts will be able to be a healthy opponent to the state and to maintain public trust. In the process of seeking answers, it is important to understand the presumptions of this paper: (a) A constitutional court is perceived as an actor in the country's politics (in this case it concerns the institutional views of court), although the politics of the actions of the court are not perceived as something having a role and influence. (b) Constitutional courts have a responsibility, which means a clear reading of the constitution for each member of society, each institution and participant of government system.

Thus, this paper will focus on how a constitutional court forms constitutional identity and how it applies alternatives of constitutional interpretation in this process. The research applies comparative-legal, analytical, descriptive and other methods of scientific research. To identify the boundaries of the interpretative views of constitutional justice, the research brings together and analyzes, on the one hand, methodical issues of constitutional interpretation as a technical characteristic and, on the other hand, content-related aspects of constitutional interpretation based on examples of the preamble, application of foreign law, and economic and social rights. This paper does not pursue the aim of ranking them by any trait. This research does not cover the technical aspects of reasoning – the structuring of substantiation, logic of expression; the impact of the ideological views of judges on the process of constitutional interpretation; and issues of internal and external communication as the foundation of forming institutional authority.

2 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 690 (2012).

1. CONSTITUTIONAL INTERPRETATION BY CONSTITUTIONAL COURTS – SEARCH FOR AIM

1.1. General issues of constitutional interpretation

The interpretation of constitutions by constitutional courts provides an opportunity to advance democratization while its main addressees are the people and the authority.[3] More specifically, it provides an opportunity for an individual to view the constitution as an effective, daily document and "to realize the necessity […] to unconditionally observe it",[4] and a possibility for the government to see a rationale of their existence "in ensuring freedom and not power".[5]

When discussing various methods of constitutional interpretation, this research does not attempt to demonstrate which interpretative method is better or suitable. Would it be correct, after all, to assume that it is possible to identify the sole correct method of constitutional interpretation? These issues, however, are often debated and a part of the scientific community is interested in determining the rationale of this or that constitution and "what a constitution is for".[6] Academic literature notes examples of when professional circles demanded from the Supreme Court of the United States (from the majority of its justices) that it base its decisions on a concrete method of constitutional interpretation. Such a possibility, however, may be assessed as something unintentional and even impossible.[7]

The answer to the question of which method of constitutional interpretation should be used is provided by the text of the constitution, the context of the case and the philosophy of judges. In regards to the text of a constitution, one should single out two aspects: implicit and explicit. Explicit aspect implies the constitutionalization of a method of interpretation. For example, a group of countries (Portugal, Spain, South African Republic), considering their history or existing risks, refer to the necessity to use international law when it comes to the interpretation of human rights and freedoms. Hungary decided to explicitly specify a method of interpretation when it stated that the provisions of the constitution shall be interpreted in accordance with their purposes, the preamble of the Constitution of Hungary – known as the National Avowal – and the achievements of the historic constitution.[8] In such cases, countries create the determining factors of the constitution, enabling judges to make a "moral choice"; for example, according to the Constitution of the Republic of South Africa, when interpreting human rights, relevant institutions (a court, tribunal or forum)

3 Eremadze K., Freedom within the Scope of Constitution and Freedom of Understanding Constitution Itself, Georgian Constitution after 20 years; Ed. Natsvlishvili V. and Zedelashvili D. Open Society Georgia Foundation (2016)

4 Ibid., 163.

5 Ibid.

6 *Marmor A.,* Meaning and Belief in Constitutional Interpretation, "Fordham L. Rev." 82, 577 (2013).

7 *Schauer F.,* The Occasions of Constitutional Interpretation, in Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison& Walter Sinnott Armstrong, Westview Press, Oxford, 28 (1993).

8 The Basic Law of Hungary, Article R.

"must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[9]

In implicit cases, the system of constitutional text creates various possibilities and avenues of interpretation. Proceeding from a constitution, a determining factor may also be the difficulty in formally amending a constitution. As Mark Tushnet argues, the difficulty to amend the US Constitution resulted in justices interpreting the constitution within the context of democratic and modern processes. This, in turn, proved acceptable for society.[10] When discussing examples, Kommers cites the case of Germany when "the comparative ease" of amending the constitution reinforced judicial reluctance to bring about substantial changes through interpretation.[11] But the ease of amending worked the other way in India, where judges felt compelled to interpret provisions creatively.[12]

Thus there is a correlation between the difficulty to amend a constitution and constitutional interpretation, though it is not uniform as the context plays a decisive role. Contextual, individual characteristics include political culture, experience, educational culture, et cetera. With regard to political culture, one should underline, for example, the principle of parliamentary sovereignty. One of the most significant countries pursuing the principle of parliamentary sovereignty is Great Britain where "generally, the courts cannot overrule Parliament's legislation and no Parliament can pass laws that future Parliaments cannot change".[13] Such ideological boundaries, naturally, created a fertile ground for a tendency of deference to legislative will in countries such as Canada, Australia – the countries which absorbed the British tradition of parliamentary sovereignty. Issues of context may even be called non-normative definitions. The non-normative aspect implies the doctrine as well.[14]

One important determinative factor in the process of constitutional interpretation is legal education and culture. The legal conscience and reasoning of judges is formed during the process of obtaining a legal education. An important issue is the manner of integrating concepts of sociological jurisprudence and legal realism into the legal academic culture. In Germany, constitutional law is a system of civilian-positivistic tradition, which perceives itself as a self-subsistent sphere of law – Kommers describes legal education in Germany as overly theoretical, systematized and deductive.[15]

9 The Constitution of the Republic of South Africa, article 39.1

10 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 708 (2012).

11 *Kommers D. P.,* Germany: Balancing Rights and Duties, in Interpreting Constitutions: A Comparative Study, Ed. Jeffrey Goldsworthy, Oxford University Press, 171-172 (2006).

12 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 708 (2012).

13 Parliamentary Sovereignty, available at: <http://www.parliament.uk/about/how/sovereignty/> [29.10.2017]. However, the operation of international instruments does not result in leaving the legislation outside control in relation to human rights and freedoms.

14 The mentioned is understood as a means of standardization of methods which provide non-legal lever of control of excessive discretion of judges. See, *Jakab A.,* JudicialReasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1228 (2013).

15 *Kommers D. P.,* Germany: Balancing Rights and Duties, in Interpreting Constitutions: A Comparative Study, Ed. Jeffrey Goldsworthy, Oxford University Press, 208, 207 (2006).

For its part, judges' philosophy is a non-objective criterion[16] though its consideration among other factors is that of inevitability rather than will. Otherwise, constitutional interpretation would have belonged to the realm of mathematical and logical problems, which can be substantiated in a consistent manner and can provide clear-cut answers.[17] This issue is reflected in the area of judicial appointments, which may have a decisive influence in terms of the interpretative policies of courts.[18] This is an issue which may be successfully manipulated by a country's leadership. Meaning, the members of courts can be selected by their ideological views and philosophy.[19]

1.2. Methods of constitutional interpretation

A method of constitutional interpretation may be prescriptive and descriptive. Descriptive theories merely describe a constitutional interpretation whereas prescriptive theories indicate how a judge should lead the process of interpretation.[20] According to the literature, when a judge applies this or that model of interpretation, the subject of criticism is usually based on the following four grounds: (1) the constitutional meaning of the word; (2) the intention of the authors of a constitution; (3) coincidence with a precedential interpretation (relates to the countries of common law system, see below for more information on its role in the countries of continental Europe, for example, in Germany); (4) links with so-called important, value-based interpretation.[21] For its part, the intensity of the application of one or another argument fully depends on the peculiarities of the legal jurisdiction.

Legalism tries to find answers to all questions in the constitution, in particular, to have a law that is objective, determinate and comprehensive. Scientific literature notes that the ambiguity and vagueness of provision is not an issue in the German constitution as it is believed that the Basic Law

16 For its part, differentiation is made even among such criteria by aspects of legitimacy and illegitimacy. See, *Jakab A.,* Judicial Reasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1229 (2013).

17 *Jakab A.,* Judicial Reasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1227-1228 (2013).

18 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 711 (2012).

19 The issue of ideological impact on constitutional interpretation is actively studied in the USA (liberal-conservative scale); talks about such link are also going on in cases of constitutional courts of Spain, Portugal, Germany, Taiwan. See, for example, *Hanretty C.,* Dissentin Iberia: the Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals, "Eur. J. Pol. Res." 51 (2012); *Hönnige C.,*The Electoral Connection: How the Pivotal Judge Affects Oppositional Successat European Constitutional Courts*,* "W. Eur. Politics" 32 (2009); *Pellegrina L. D., Garoupa N. & Lin S. C.,* Judicial Ideal Points in New Democracies: The Case of Taiwan,"Nat'l Taiwan U. L. Rev." 7 (2012); *Segal J. & Spaeth H.,* The Supreme Court and the Attitudinal Model Revisited, Cambridge University Press (2002);*Solum L. B.,* Judicial Selection: Ideology Versus Character,"Cardozo L. Rev."26 (2005).

20 Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison & Walter Sinnott Armstrong, Westview Press, Oxford, 2 (1993).

21 Ibid.

of Germany "contains the right answer to almost any constitutional dispute".[22] For a segment of scholars, strict legalism is the best means of maintaining public confidence in the court.[23]

However, "judicial discretion" is inevitable.[24] When assessing these directions, a distinction is made, on the one hand, between positivism and normativism, and on the other hand, between originalism and non-originalism. Positivism and normativism are considered the main conflicting directions among schools of constitutional interpretation. Positivism means the action of clearly formulated constitutional provisions; in other words, it fully depends on the interpretative text of the constitution (on the level of each provision). Normativism is guided by a holistic conception of a constitution and reasoning by the ideas that derive from the entire document is an essential part of it.[25]

Sub-directions of positivism are literalism and purposivism.[26] The former implies rules of grammar of provision (which excludes the founders' purposes) while the latter interprets provisions in light of their purposes.[27] Interpretation by applying the method of purposivism is especially topical in relation to human rights and freedoms since this field sets extraordinary obligations for a constitutional court.[28]

Normativism broadens the law and turns its focus to answers insofar as it implies guidance by "abstract norms of political morality."[29] The radicalization of such views, on the one hand, and guidance by principles of natural law, on the other, are considered identical approaches in scientific literature.[30]

In the case of originalism, a constitution is interpreted by taking into account the time of the adoption of the constitution. Originalists differ from one another by the rationale behind their decisions: the intentions and purposes of the founders of the constitution,[31] the understandings of the

22 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajo, 691 (2012); *Kommers D. P,* Germany: Balancing Rights and Duties, in Interpreting Constitutions a Comparative Study, Ed. Jeffrey Goldsworthy, Oxford University Press,161, 207-208(2006).

23 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 713 (2012).

24 Ibid, 691.

25 Positivism as textualism-originalism, also normativism as teleological-dynamic approach. See, *Rytter J. E.,* Constitutional Interpretation, "ScandinavianStudiesin Law" 52, 258 (2007).

26 The doctrine also refers to it as a teleological method. For its part, the idea of strict textualism is perceived as an unjustifiable radicalism even by prominent representatives of this method; Translation technique is considered a refined form of purposivism. See, *Lessig L.,*Fidelity in Translation, "Texas Law Review" 71 (1993); *Sunstein C. R. &Vermeule A.,* InterpretationandInstitutions, John M. OlinProgramin Law andEconomicsWorkingPaperNo. 156 (2002).

27 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 691 (2012).

28 *Rytter J. E.,* Constitutional Interpretation, "Scandinavian Studies in Law" 52, 258 (2007); cited: *MüllerJ.P.,*Zursog. Subjektiv- undobjektivrechtlicheBedeutungderGrundrechte, Derstaat, 33-48 (47) (1990).

29 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajo, 692 (2012).

30 Ibid.

31 In parallel to constitutional interpretation in countries of common law system, the modern literature about originalism established a new term of constitutional construction. For a critical analysis of the mentioned issue see, *Kay R.,* Construction, Originalist Interpretation and the Complete Constitution, University of Pennsylvania Journal of Constitutional Law Online available at:<https://works.bepress.com/richard_kay/14/> [29.10.2017]; also *Balkin J. M.*, The New Originalism and the Uses of History, "Fordham L. Rev." 82 (2013).

founding generation[32] or the meanings of the words when adopting it.[33] For originalists, constitutional interpretation means the exclusion of politics, discretion, and indeterminacy.[34] When speaking about this direction, one may pay attention to Hugo Black's phrase. For Black, reliance on the text of the constitution means considering it as the only source in the sense that, otherwise, a judge would have to determine an individual (specific) scale of justice, which might become an object of daily variation.[35] Thus, based on Black's phrase, one may conclude that the rationale behind the position of an originalist is the concept of stability and general agreement.

One cannot talk about originalists without mentioning the views of Robert Bork as he was one of most prominent defenders of originalism and active supporters of judicial self-restraint. To understand originalism, Bork describes the Madisonian dilemma, which is perceived through the lens of US reality though its content is more ideological than contextual. This dilemma implies the support of the simultaneous existence of two principles. The first is the principle of self-governance, indicating that the majority, if they wish so, have a possibility to govern insofar as "they form the majority".[36] One should also bear in mind that there are spheres where the majority cannot interfere, i.e. where the freedom of the minority does not experience interference from the majority. Such spheres, however, cannot be determined either by the majority or the minority because there is no trust towards either of them as they are inclined to tyranny.[37] In Bork's view, a judge also cannot make a classification based on this idea for the simple reason that he/she is in either of the two mentioned groups. There is a solution and it can only be written down in a constitution and be read from it.[38] It follows from here that, in Bork's view, originalism is the only philosophy of constitutional interpretation that ensures the legitimacy of constitutional justice. Bork's argument about the unavoidable connection of judges to any of the groups is perceived as inevitability by modern theories.[39]

The textualist interpreter represents originalists. Texts have linguistic and social dimensions. Critics of this philosophy are equipped with plausible arguments, according to which it is impossible to take into account the social aspect of the period when a constitution was enacted for the following reasons: on the one hand, it is unimaginable to restore the social context of that period while, on

32 *Dorsen N., Rosenfeld M., Sajo A., Baer S.,* Comparative Constitutionalism: Cases and Materials, American Casebook Series, 219 (2010).

33 Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison & Walter Sinnott Armstrong, Westview Press, Oxford, 4 (1993).

34 *Feldman S. M.,* Constitutional Interpretation and History: New Originalism or Eclecticism?, "BYU J. Pub. L." 28, 283 (2013-2014).

35 Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison & Walter Sinnott Armstrong, Westview Press, Oxford, 4 (1993).

36 *Bork R. H.,* The Original Understanding, in Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison & Walter Sinnott Armstrong, Westview Press, Oxford, 48 (1993).

37 Ibid.

38 Ibid., 48-49.

39 *Dyevre A.*, Technocracy and Distrust: Revisiting the Rationale for Constitutional Review, "Int'l J. Const. L." 13, 32 (2015). Dicey uses a similar model to substantiate the principle parliamentary sovereignty, when he does not consider parliamentary activity as a necessary expression of public desire.

the other hand, social context is not a static phenomenon.[40] Consequently, such views undermine the order of constitutional values and place it beyond the challenges facing modern society.

In case of non-originalism[41] constitutional justices may rely on modern purposes, challenges and values and not assign decisive meaning to the founders' intentions. A pressing issue for supporters of a dynamic reading of the constitution is the following: if there is, on the one hand, a concept of interpretation of law and, on the other hand, a concept of constitutional interpretation[42] but the former disregards the intention of its author [for example, by common courts when applying the law], why is the intention of the founders considered so intensely in the case of the latter?[43] This question is popular in scientific literature. However, there is also a widespread opinion that this argument is not relevant due to vagueness – or more precisely, a lack of clarity that is characteristic for constitutional provisions.[44] This issue is also explainable insofar as a constitution pursues the goal of confining political processes within legal limits while legal rules may not have claims (both in theoretical and practical terms), on the one hand, and resources, on the other hand, to fully regulate political processes.[45] Thus, notions of ordinary law and constitutional interpretation, for their part, represent a comparison of unequally important conceptions.[46]

Philosophies of constitutional interpretation are mainly oriented on a correct reading of the essence of a constitution. An opposite form of this context is the skeptical method of constitutional interpretation, according to which a constitutional interpretation may not always be linked to a reasonable result insofar as a constitution, for its part, may subject moral "flaws" to regulation.[47] This model conflicts with the approach of originalists and textualists. The concept of skepticism also contains the idea that the text of the constitution may provide a number of different interpretations which, in their turn, endanger the "stability and rationality" of the rule of law.[48]

40 *Dorsen N., Rosenfeld M., Sajo A., Baer S.,* Comparative Constitutionalism: Cases and Materials, American Casebook Series, 220-221 (2010).

41 Identical notion in the doctrine is the approach of dynamic reading of constitution.

42 For comparison of notions of interpretation of law and constitutional interpretation see, *Jakab A.,*Judicial Reasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1224-1226 (2013); *Arshakyan M.,* The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court, "Ger. Law J" 14:08, 1324-1327 (2013).

43 *Marmor A.,* Meaning and Belief in Constitutional Interpretation, "Fordham L. Rev." 82, 577 (2013).

44 *Arshakyan M.,* The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court, "Ger. Law J" 14:08, 1325 (2013); *Jakab A.,* Judicial Reasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1224 (2013).

45 However, such an understanding of constitution is viewed as a source of judiciary self-restraint. For its part, this argument can be successfully transformed to prove an opposite opinion insofar as this idea may encourage constitutional justice towards bolder actions within the limits of constitutional identity. Compare, *Arshakyan M.,* The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court, "Ger. Law J" 14:08, 1326 (2013).

46 *StarckC.,* Constitutional Interpretation, in Studies in German Constitutionalism, 50; Citation: *Arshakyan M.,* The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court, "Ger. Law J" 14:08, 1326 (2013).

47 *West R. L.,* Constitutional Scepticism, in Contemporary Perspectives on Constitutional Interpretation, Eds. Susan J. Brison& Walter Sinnott Armstrong, Westview Press, Oxford, 233 (1993).

48 Ibid., 235.

1.3. Jurisdictional tendencies of constitutional interpretation

The issue of belonging to a law system is an important issue in constitutional interpretation; for example, a precedent is assigned a different weight in the jurisdiction of the countries of common law and continental Europe. Although the principle of *staredecisis* is not mandatory in Germany, judgments by the Federal Constitutional Court always contain references to earlier interpretations of the court.[49] This might be an indication that one of the differences between these two systems is being erased. Should this mean that a decision by the constitutional court is that which influences its future reasoning? Representatives of German scientific circles note that such a tendency only shows that the German court is "stable" in interpreting its Basic Law.[50] Thus, if non-changeability and stability lies in the essence of court policy, this indicates for both systems that earlier decisions represent important determinants in interpreting the constitution. In any case, the aim of constitutional courts should be, on the one hand, to take a decision in line with a constitution and on the other hand, to reinforce trust in the court, which really makes the logic of earlier constitutional interpretation binding, to a certain degree.

In contrast to countries in the common law system, there is a tendency in Germany to apply the approach that doctrinal interpretations and opinions represent an important source of substantiation and reasoning. This means that decisions are the result of scientific consensus. This makes it more convincing that the Basic Law provides a possibility to form rational and objective views and that opinions of the court do not reflect the value order or mindset of concrete judges. These issues are so essential for a court that, one may say, academic papers are more important that precedents.[51]

Concepts of the interaction of interpretation and political processes are different in the countries of common law and continental law systems. For example, when the constitution does not or cannot reflect a social or political reality in Germany, amendments are made to the Basic Law itself in order to avert a threat to the "clarity, precision, and predictability" necessary for a constitutional state.[52]

There are also established opinions about the use of methods of constitutional interpretation. For example, it is agreed that the Australian High Court has traditionally been much more legalist than the constitutional courts of Germany or Canada.[53] However, the aim of analysis in such a direc-

49 To illustrate the above mentioned, Kommers refers to the 2003 decision of German Federal Constitutional Court, in which the court made reference to 23 of its decisions - Germany, BVerfG, Judgment of the Second Senate of 24 September 2003 - 2 BvR 1436/02, available at:
<http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html>[29.10.2017].

50 *Kommers D. P.,* Germany: Balancing Rights and Duties, in Interpreting Constitutions: A Comparative Study, Ed. Jeffrey Goldsworthy, Oxford University Press, 193 (2006).

51 Kommers underlines that there is a differentiation among doctrinal sources by their usage. *Kommers D. P.,*Germany: BalancingRightsandDuties, inInterpretingConstitutions: A ComparativeStudy, Ed. Jeffrey Goldsworthy, Oxford University Press, 193 (2006).

52 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 702 (2012).

53 Ibid., 695

tion cannot be the establishment of something constant as the dynamics of processes contains a high risk of error.[54]

My assessment of the interpretative methods of constitutional courts provides evidence of the challenges facing a legal system. This is linked to the fact that the connection between the value system of the judges and the interpretative ideology seems to imply a certain degree of stability, however, the scientific literature indicates that judges that interpret a constitution may, in order to avoid a constitutional crisis, shift from legalism to a normativist approach (change in the strategy).[55] However, the creativity of judges is not always "progressive".[56]

2. MATERIAL ISSUES OF CONSTITUTIONAL INTERPRETATION

2.1. Text of preamble to constitution

Reading a constitution means reading it from the beginning and it means that the preamble is a determinant of constitutional reasoning; however, in this case one should pay attention to what an interpreter manages to understand from the preamble of the constitution. According to popular definition, the preamble to a constitution is a text providing information to an addressee about the purposes and objectives of a basic law. There is no uniform approach with regard to its legal outcomes, legal power.[57] One should mention in this context the following: when speaking about the Weimar Constitution, Carl Schmitt notes that the constitution specified the main decisions taken as a result of a political compromise, while the preamble expressed this compromise especially clearly and emphatically.[58] Apart from expressing such a compromise, preambles also convey political decisions. For Schmitt, results of such political compromise are not legally binding elements, but, in his view, they represent a list of the prerequisites that lay the foundation of the action of the Constitution.[59]

Regarding the legal power of preambles, the legal literature indicates that a preamble itself contains information about their power and it is not suitable to establish a uniform approach.[60] In

54 For Tuschnet this is eclecticism in opinions of a judge; for Goldsworthy this is "change in the philosophy of interpretation," which is conditioned, on the one hand, by the degree of influence of judges' opinions (internal factor of court) and on the other hand, the change of judges themselves (external factor of court). See, *Goldsworthy J.,* Constitutional Interpretation, in OxfordHandbookofComparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 695 (2012).

55 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 715 (2012).

56 Ibid., 717.

57 *Hulme M. H.*, Preambles in Treaty Interpretation, „U. Pa. L. Rev." 164 , 1288 (2016).

58 *Schmitt C.,* Constitutional Theory, Trans. & Ed. Jeffrey Seitzer, Duke University Press, 77 (1928).

59 Ibid., 78-79.

60 *Orgad L.,* The Preamble in Constitutional Interpretation, "Int. J. Const. Law" Vol. 8 No. 4, 715 (2010)

functional terms, there are three categories of constitutional preambles: (1) symbolic, (2) interpretative, and (3) substantive.[61]

The characteristic of a symbolic preamble is its aim to persuade the people to obey the law – it must demonstrate the reasons why laws are "good".[62] This category may be even called a "pure formality".[63] One of the grounds of this approach is the opinion that preambles do not contain enough information to provide the possibility to form any logical and systemic reasoning. The preamble of the US constitution is also limited in practice to a ceremonial role.[64]

In case of an interpretative preamble, a preamble is the facilitator and the basis of the process of constitutional interpretation, in other words, it creates a certain framework and can be considered a sort of argument for the justification of relevant interpretation. A decision by South Africa's Constitutional Court is cited as an example of this scheme, in which the court confirmed the preamble's status as a guide and inspiration in interpreting human rights.[65] This approach is applied by countries of both common law and constitutional law. For example, in Estonia, the court confirmed the constitutionality of an act requiring adequate command of the Estonian language as a prerequisite for election to a local government council.[66] This court decision was based on the preamble of the Estonian Constitution, according to which the constitution must guarantee the preservation of the Estonian nation and its culture throughout the ages. However, it would be incorrect to consider such approach as a tendency in the case of Estonia, as in some cases the court did not use the preamble as a source for interpretation.[67] However, the latter assessment would not be accurate either as the methods of interpretation the court took as guidance are also important.

Yet another cited example of the interpretative role of the preamble is the decision by the Federal Constitution Court of Germany on the compliance of the Treaty of Lisbon with the Basic Law of Germany.[68] The constitutional court did not find a violation of the principle of sovereign statehood that is guaranteed by the German constitution. To specify the constitutional basis of the principle of sovereign statehood, the court refers to articles 23 to 25 of the Basic Law and concludes that Euro-

61 Ibid.

62 Although Plato is named as the author of this concept. For details see, *Orgad L.,* The Preamble in Constitutional Interpretation, "Int. J. Const. Law" Vol. 8 No. 4, 722 (2010).

63 *Hulme M. H.*, Preambles in Treaty Interpretation, „U. Pa. L. Rev." 164 , 1289 (2016).

64 Although it is also indicated that the preamble of US constitution has a resource to become a serious source in the matter of interpretation of determined issues. See, *Leiter B.,Handler C. E. &Handler M.,* A Reconsideration of the Relevance and Materiality of the Preamblein Constitutional Interpretation, "Cardozo L. Rev." 12, 117, 147-148 (1990); *Himmelfarb D.,*The Preamblein Constitutional Interpretation, "SetonHallConst. L.J." 2, 202-204 (1991-1992).

65 *Orgad L.,*The Preamble in Constitutional Interpretation, "Int. J. Const. Law" Vol. 8 No. 4, 724 (2010).

66 Ibid., Number of decision EST-1998-3-007.

67 A disputable norm for Estonians was an act forbidding Estonians to change their Estonian last name to a non-Estonian last name. The court declared it unconstitutional despite the provision in the preamble regarding the protection of Estonian national identity (which could be successfully used in the reasoning part, but, for its part, conception of identity requires contextualization). See, *Orgad L.,*The Preamble in Constitutional Interpretation, "Int. J. Const. Law" Vol. 8 No. 4, 725 (2010); Number of decision EST-2004-2-004.

68 Germany, BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421) available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html>[29.10.2017].

pean integration is not only permitted by the Basic Law but desired by it.[69] The latter is interpreted by the court in the following way: the Preamble of the Basic Law emphasizes not only the moral basis of responsible self-determination but also the willingness to serve world peace as an equal partner in a united Europe.[70] For the court, the preamble also creates an essential basis for this issue in terms of conformity with other provisions of the Basic Law of Germany. Thus, with this decision, the German Constitutional Court confirmed once again that the preamble "has not only political importance but also legal content".[71]

A substantive analysis of the constitution implies that it is an independent source of constitutional interpretation. In this case references are made to the experience of France, India, Nepal, and Bosnia and Herzegovina. In the case of France, pursuant to a decision taken in 1971,[72] the preamble of the constitution adopted in 1946 did not have legal power and the reference to the 1789 Declaration of the Rights of Man and of the Citizen was just "a token of respect," which thereafter became the law to be applied by the court.[73] In the case of India, the preamble of the constitution acquired essential and independent importance through a constitutional interpretation in the ruling of the court. However, in the case of Nepal, for instance, the constitution explicitly defines the exceptional role of the preamble, which indicates that it has a normative meaning.[74] The scientific literature also believes that the Basic Law of Hungary, by referring to the National Faith, includes the preamble of constitution in the list of methods of interpretation.[75]

2.2. The context of social and economic rights

2.2.1. Social and economic rights - a program or an obligation

The issue of interference of constitutional justice in decisions taken by a state authority on the grounds of social and economic rights is very sensitive and widely discussed. While there is a high degree of agreement on the necessity to consider civil or political rights, views about social and economic rights are different and controversial. The discussion around the issue grows even more interesting by such tendencies as the constitutionalization of these rights in national systems (for example, South Africa, Lithuania, Estonia, Poland, etc). However, the inclusion of these rights in a constitution was and remains a very controversial issue.[76]

69 Ibid., para. 143.

70 Ibid., para. 222.

71 Germany, BVerfGE 36, 1 2 BvF 1/73 Grundlagenvertrag - decision of 31 July 1973.

72 France, decision no. 71-44 DC of 16 July1971.

73 *Stone A.*, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective, Oxford University Press, New York, 119-140 (1992).

74 *Orgad L.,*The Preamble in Constitutional Interpretation, "Int. J. Const. Law" Vol. 8 No. 4, 727-729 (2010).

75 *Jakab A.,* Judicial Reasoning in Constitutional Courts: A European Perspective, "Ger. Law J" 14:08, 1227.

76 *Schwartz H.*, Do Economic and Social Rights Belong in a Constitution?, "Am. U. J. Int'l L. &Pol'y" 10, 1233 (1994-1995).

The most cited example in the area of the constitutionalization of social and economic rights is the case of South Africa. Some scholars even speak about the suitability of its replication in the jurisdictions of various countries.[77] For example, according to a provision in the Constitution of the Republic of South Africa, the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. Such an obligation of the state is specified, for example, with regard to the rights to health care, food, water and social security.[78] But when the constitution does not explicitly refer to social and political rights, does it include concepts such as, for example, a social state, which would put the forward social and economic rights of people? Or is it possible to consider them within the context of other rights, for example, the right to equality, life, dignity?

2.2.2. Issue of institutional platform

Among arguments concerning the exclusion of the possibility for courts to take decisions on social and economic rights, it is worth mentioning issues that are impossible to standardize, for example what constitutes adequate housing, or a fair wage? It is also noted that the realization of these rights is part of the state policy (which is its exclusive competence).[79] This is further enhanced with the argument that the government is more experienced in distributing limited resources.[80] This echoes the concept that the discussion about social and economic rights by bodies implementing control over the constitution is not covered by the constitutional mandate and institutional expertise of these institutions.[81] One should also take into account the factor of political culture, in other words, the understanding of rights and freedoms by individualist and communitarian conceptions.[82]

In contrast to these arguments, a broadly debated opinion is that it is impossible to separately consider, on the one hand, civil and political rights and on the other hand, economic and social rights, since this is a single category.[83] The role of social rights is being enhanced in modern times, encouraged by the reinforcement of the vision of the indivisibility of human rights.[84] Social rights

77 See, for example, *Christiansen E. C.,* Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons from South Africa, 13 UCLA J. of Int'l Law and Foreign Affairs369 (2008).

78 The Constitution of the Republic of South Africa, articles 26-27.

79 Key Concepts on ESCRs - Can Economic, Social and Cultural Rights be Litigated at Courts? Available at: <http://www.ohchr.org/EN/Issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx>[29.10.2017].

80 *Pillay A.*, Revisiting The Indian Experience of Economic and Social Rights Adjudication: the Need for a Principled Approach to Judicial Activism and Restraint, „I.C.L.Q" 63, 387-388 (2014).

81 Ibid., 386.

82 *Goldsworthy J.,* Constitutional Interpretation, in Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld &Andras Sajo, 714 (2012).

83 *Beetham D.,* What Future for Economic and Social Rights?, Human Rights, Ed. Robert McCorquodale, Cromwell Press, Wiltshire, 216-219 (2003). For similar ideas see, *Beetham D.,* What Future for Economic and Social Rights?, Human Rights, Ed. Robert McCorquodale, Cromwell Press, Wiltshire, 215-234 (2003)

84 *Evangelista G. F.,* Prevention, Homelessness Strategies and Housing Rights in Europe, in A report on Criminalization of Homelessness in Europe, Ed. Jones S., 163-164, Available at: <http://housingrightswatch.org/sites/default/files/11.%20Chapter%208.pdf>[29.10.2017].

have been understood in terms of their content – as court experience shows, the aims of social rights in some cases are already protected within the boundaries of civil and political rights. For example, the European Court of Human Rights (ECHR) considered the demand to be protected against industrial contamination[85] and the demand to be protected against homelessness[86] within the scope of the civil right to respect family life. To illustrate this issue, instances are cited when ECHR as well as the UN Committee against Torture considered the right to prohibit cruel and inhumane treatment[87] within the right to housing while the US court banned the detention of a homeless person for sleeping in public places.[88]

The problem of "adequate justiciability" of decisions on economic and social rights taken within the scope of constitutional justice is raised in some cases. Claims towards the Supreme Court of South Africa that judges fail to properly interpret the essence of social or economic rights also relate to the issue of justiciability of decisions.[89] The result is that while a constitutional law philosophy (justiciability) may greatly contribute to the strengthening of a relevant position, such a result becomes difficult in this context. Some scholars raise this question because there is no agreement among judges; in other words, there are no clearly formulated positions within the court. For example, in India, it is noted that judges themselves need to clearly formulate a position on what should be the boundaries of court activism or self-restraint in relation to economic and social rights.[90]

2.3. Context of the method of application of foreign law

When interpreting a constitution in the decision-making process, a constitutional court may apply the experience of a foreign country, in particular, its law or court interpretations. In such cases, the main question that arises is whether the international law of other countries is applicable[91] if a constitutional court believes that it coincides with the constitutional logic and value order of a relevant country. This issue is made pressing, on the one hand, by conceptions of "globalized legal world", "transnational legal interactions"[92] and on the other hand, the theory of positivism, which opposes the former.[93] Tripkovic discusses the possibility of consensus on the use of foreign law in

85 *López Ostra v. Spain*, App. no. 16798/90, ECtHR, 09 December 1994.

86 *Botta v. Italy*, App. no. 21439/93, ECtHR, 24 February 1998.

87 *Moldovan and others v. Romania,*App. nos. 41138/98 &64320/01, ECtHR, 12 July 2005.

88 *Langford M.,*TheJusticiability of Social Rights: From Practice to Theory, in Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Ed. Langford M., Cambridge University Press, 4 (2008).

89 *Pillay A.*, Revisiting The Indian Experience of Economic and Social Rights Adjudication: the Need for a Principled Approach to Judicial Activism and Restraint, "I.C.L.Q" 63, 387 (2014).

90 *Pillay A.*, Revisiting The Indian Experience of Economic and Social Rights Adjudication: the Need for a Principled Approach to Judicial Activism and Restraint, „I.C.L.Q" 63, 387 (2014).

91 Scientific literature considers that international law and foreign law have different contextual connotations for constitutional interpretation. See, *Perju V. F.*, The Puzzling Parameters of the Foreign Law Debate, "Utah Law Review" 20, 169-170 (2007).

92 For "transnational law," "global law" and "world law" conceptions see, *Perju V. F.*, The Puzzling Parameters of the Foreign Law Debate, "Utah Law Review" 20, 168-169 (2007).

93 *Tripkovic B.,* Judicial Comparativism and Legal Positivism, "Transnational Legal Theory" 5(2), 285-286 (2014).

the context of positivism[94] and uses Jeremy Waldron's concept as a starting point, according to which a foreign law may be understood as the law of a relevant country.[95] Goldsworthy sees the idea of "cosmopolitan constitutionalism" in constitutional courts of countries of the continental legal system going beyond geographical boundaries and "borrowing ideas" from, inter alia, countries of common law system and continental law system and vice versa.[96]

The arguments for and against the use of foreign law show that the former view is a persuasive authority while the latter attributes authoritative legal weight to it.[97] The importance of these issues is underlined by the fact that the debate about foreign law is not a debate about citation but rather a debate about "the rule of recognition or the *grundnorm*, to use Kelsen's term for a similar but not identical idea".[98] It is interesting, however, whether there is any consensus about when foreign law should be used in constitutional interpretation. For a number of scholars, this resource is especially important when foreign law and the customary international law coincide.[99] Waldron applies the same philosophical approach when he notes that when the constitutional norms and precedents of a foreign country comply with each other, it leads to the perception that it is a supranational law, i.e. *ius gentium*.[100] For some scholars, the use of this law is already acceptable in certain types of cases when it is necessary to modernize and develop law; when a problem repeats in several jurisdictions, there is a need/possibility to ensure uniform responses; when risks may be justified by considering the experience of foreign country, et cetera.[101]

As a rule, constitutions do not refer to the possibility of the use of foreign law as a source, especially in constitutional interpretation. By examining the results of a thorough study of the mentioned relations, one may distinguish three categories of countries (both by rules and approached of judges).[102] In the first category, the constitution does not explicitly refer to these issues and, consequently, leaves the choice to the judges; an example of this category is the Constitution of the South African Republic, according to which the court must consider international law and may consider foreign law when interpreting human rights.[103] Thus, the will of the founders opened the issue for judges and even established a hierarchy in applying the law by making the use of international law mandatory[104] and indicating only a possibility of the use of foreign law. The second

94 Ibid.

95 *Waldron J.,* Partly Laws Common to All Mankind: Foreign Law in American Courts, Yale University Press (2012).

96 *Goldsworthy J.,* Introduction, in Interpreting Constitutions: A Comparative Study, Ed. Jeffrey Goldsworthy, Oxford University Press,3 (2006).

97 *Tripkovic B.,* Judicial Comparativism and Legal Positivism, "Transnational Legal Theory" 5(2),288 (2014).

98 *Schauer F.*, Authority and Authorities, "Va. L. Rev." 94, 1959 (2008).

99 *Perju V. F.*, The Puzzling Parameters of the Foreign Law Debate, "Utah Law Review" 20, 169 (2007).

100 *Waldron J.,* Partly Laws Common to All Mankind: Foreign Law in American Courts, Yale University Press, 3 (2012).

101 *Markesinis B. &Fedtke J.,* Judicial Recourse to Foreign Law: A New Source of Inspiration?, Routledge, NY, 109-127 (2006).

102 Ibid.

103 The Constitution of the Republic of South Africa, article 39.

104 The use of norms of international law as an interpretation method is specified in, for example, constitutions of Portugal (article 16.2) and Spain (section 10.2). In case of Portugal, the emphasis is made on the interpretation of human rights and freedoms, which must be in line with the Universal Declaration of Human Rights while in case of Spain, additionally on those human rights protection instruments which are ratified by the country.

category includes constitutions that do not provide for such a possibility, but judicial rulings leave an impression of lawmaking on their part; in the third category, norms are similar to the second category, though judges are totally detached from the text of constitution.[105] The abovementioned categorization is intended specifically for a comparative approach though it is based on a general approach of judicial activism.

The use of foreign law has several characteristics and among them selective, facultative use is the most extraordinary.[106] Selective use means that a court uses this law individually and not in all cases.[107] Opponents of the selective use of law assert that a court cannot establish the ground of the adoption of this or that norm, i.e. it is difficult to consider the context of jurisdiction.[108] All this leads to the constantly incorrect interpretation of foreign law, and contains dangers of nominalism.[109] It is true that the use of foreign law and related interpretations may become an important source of inspiration, but one should be aware of the dangers of its incorrect use, which might be prompted by "unconstitutional" motivation on the part of courts.[110]

CONCLUSION

The right to interpret the constitution is an essential lever for constitutional courts in order to implement the policy envisaged in the constitution. Constitutional justice must pass a test in terms of separating the discovery of law and the creation of law. This, however, can be done through the interpretation of constitutions.

The objective of the constitutional court is to keep a political society within the legal dimensions provided by the constitution itself, which, in contrast to other legal acts, is more political, open and less perfect.[111] This process means taking decisions that conform to the constitution and not fully reading out a decision from the constitution. These ideological boundaries make the following points clear:

105 *Markesinis B. & Fedtke J.,* Judicial Recourse to Foreign Law: A New Source of Inspiration?, Routledge, NY, 24-25 (2006).

106 *Tripkovic B.,* Judicial Comparativism and Legal Positivism, "Transnational Legal Theory" 5(2),306-307 (2014).

107 Ibid.

108 *Perju V. F.*, The Puzzling Parameters of the Foreign Law Debate, "Utah Law Review" 20, 169-170 (2007).

109 *Tripkovic B.,* Judicial Comparativism and Legal Positivism, "Transnational Legal Theory" 5(2), 308 (2014); *Perju V. F.*, The Puzzling Parameters of the Foreign Law Debate, "Utah Law Review" 20, 170 (2007).

110 *Annus T.,* Comparative Constitutional Reasoning: the Law and Strategy of Selecting the Right Arguments, "Duke Journal of Comparative & International Law" 14:301, 321 (2004); *Lee, J. T.,* Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore, 1963-2013, "Washington International Law Journal" 24(2), 253–288 (2015).

111 *Brugger W.,* Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View, in Comparative Constitutionalism: Cases and Materials, American Casebook Series, Eds. Dorsen N., Rosenfeld M., Sajo A., Baer S., 178 (2010).

One of top concerns of constitutional interpreters is to take a position on how they will orientate themselves in terms of time. In other words, it is essential whether the philosophical approach they choose is prompted by past aims, current challenges or future prospects. Orientation on the past is, as a rule, conditioned by the issue of democratic legitimacy, which is justified by the unconditional observation of public agreement. On the other hand, the analysis of various approaches and sources of constitutional interpretation showed that each interpretative philosophy has its own rationale and consequently, it would be incorrect to speak about the advantage of this or that direction without supporting criteria. One of the essential criteria is to meet the challenges faced by a country. Thus, it would be better if a constitutional interpreter opts for a dynamic reading of the document. In other words, in terms of time, consideration of the past should be the least significant factor.

This vision shows that we should discuss which philosophical approach constitutes the basis of constitutional courts for carrying out their authority. For example, in accordance with the Trustee Model of the delegation theory of founding power, the function of constitutional control is "to improve the quality of legislation, to enhance the efficiency of public policies and, if possible, to facilitate the smooth functioning of the political system".[112] In such a case, members of the constitutional court are trustees of the political system, ensuring that the system operates in line with democratic principles. This is the theory that corresponds to the approach of the dynamic reading of the constitution – the methods of constitutional interpretation become the subject of broader discretion.

It should be taken into account what a constitutional court itself wants to demonstrate. For example, when the institution of constitutional justice is young, it is more motivated to show its necessity as a guarantor of constitutional democracy. In this case, a court is bolder and the separation of politics and law might become a greater challenge. On the other hand, it is important for a court to make use of the opportunities available.

Apart from the technical issues of constitutional interpretation, this research highlighted those material aspects that are most pressing in the modern discourse of constitutional justice. Such issues include the consideration of social and economic rights within the boundaries of constitutional control as well as the constitutional weight of preambles and the consideration of international experience by constitutional courts in the decision-making process.

The essence of the pressing issues of constitutional interpretation and modern tendencies prove that the increase of the role of constitutional courts is inevitable, which has political and social implications. Moreover, members of other branches of the government remain fearful of the trust in constitutional justice and intellectual rivalry.

112 *Dyevre A.,* Technocracy and Distrust: Revisiting the Rationale for Constitutional Review, "Int'l J. Const. L."13, 36 (2015).