(*Working paper***)**

The status and nature of an argumentative approach to constitutional interpretation

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Abstract

Is constitutional interpretation different from legal interpretation or is it only a mere application of it without any particular distinguishing feature? And if constitutional interpretation is different from legal interpretation, what are the necessary elements which define a theory of constitutional interpretation? These are the questions on the status and nature of constitutional interpretation. Regarding the question about the status, the argumentative approach to constitutional interpretation advanced in this paper contends that constitutional interpretation is a qualified form of legal interpretation, sharing with it the basic requirements of correctness derived from the theory of legal interpretation, but in need to be supplemented by further correctness criteria. On the other hand, the question about the nature revolves around the necessary elements which make up a theory of constitutional interpretation. Due to the hierarchical position of constitutional provisions as the highest institutionalized moral reasons and the highest institutionalizing authoritative reasons (*the here so called special character thesis*), a theory of constitutional interpretation has to take position on three aspects, namely, the question of the role of moral arguments in the interpretation process, the question of the semantic content of constitutional provisions and the question of the correctness criteria which render the interpretation outcome as rational as possible. The in this paper presented argumentative approach to constitutional interpretation puts forward that moral arguments have to be considered when interpreting the constitution, that there is a semantic limit for interpreting the wording of the constitution, and that the correctness of interpretation is connected with the claims of the theory of legal argumentation.

I. Constitutional interpretation as public interpretation

In a broad sense, interpreting amounts to confer meaning to a certain interpreted object.[1] Every interpretation starts as a subjective process, since the cognitive capacities belongs to the interpreting subjects. From this general approach, every interpretation is correct to its author, for it responds to his expectations, capabilities and interests. The outcome of such a subjective process could even be shared by other interpreters which might consider the original interpreter as an expert or authority on the interpreted issues.

However, a pressing problem arises when the outcome of the interpretation has to be addressed to other potential interpreters who may not regard the original interpreter as a reliable expert or may not necessarily share the same expectations, capabilities or interests. Thus, public interpretation requires that the participants of the interpretative process have a shared understanding about the object of interpretation in order to be able to come up for a judgement about it and to engage in an argumentative exchange of reasons. The necessity to externalize the interpretative process and to justify its outcome in order to engage in a public deliberation makes up the starting point of any theory of public interpretation.

As an interpretative process aimed to ascribe meaning to constitutional provisions and which outcomes have effects beyond the primary participants, constitutional interpretation is a kind of public interpretation. In this sense, constitutional interpretation requires to externalize its interpretative process and justify its outcomes in order to obtain legitimation from the deliberative exchange of reasons. However, constitutional interpretation, to this point, cannot be distinguished from what is expected from any kind of legal interpretation. Certainly, the interpretation of legal norms is seized by the requirements of externalization and justification. The issue about the relationship between constitutional interpretation and legal interpretation will be address later as the question on the status of constitutional interpretation.

2. Constitutional interpretation and the rule of law

A further aspect to be considered in order to contextualize constitutional interpretation, revolves on the question on what is a constitution? and what are its goals? A general characterization of constitution could run as follows: a constitution is the highest – written or unwritten – set of rules, principles and binding practices in a legal system, which

[1]Andrei Marmor, Interpretation and legal theory, 2nd ed., (Oxford: Hart Publishing, 2005), p. 9.

embodies a particular ethical-political commitment, and which acts as the blue-print not only for the organization, distribution and limitation of the decision-making powers of the branches of government, but also for the relationship between the branches of government and the individuals.[2] The trait of being written or unwritten is a contingent feature which derives from historical development,[3] and, although being important to contextualize the interpretative process, do not play a central role in the reasoning process.

The goals ascribed to the constitution are what really have direct consequences on its interpretation. The goals of a constitutional order oscillates between purporting the highest amount of legal certainty (the so called formal account of the rule of law) and ensuring the fulfilment of some additional requirements of substantial justice (the so called substantial account of rule of law).[4] Depending how the relationship between legal certainty[5] and the substantial requirements of justice[6] is settled, it would be possible to identify if the constitution to be interpreted is based only on a formal account of the rule of law or if it also embraces a substantial account of it. There are four possibilities to settle this relationship, first, an exclusionary priory of legal certainty, second, a prima facie priority of legal certainty, third, a *prima facie* priority of the substantial requirements of justice, and fourth, an exclusionary priority of the substantial requirements of justice.

If a constitution confers an exclusionary priority to legal certainty, it will be meant to be based on a formal account of rule of law. Therefore, its interpretation will be oriented only to provide a higher level of legal certainty and to assure that the law has to be applied

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[2] See for instance, John McEldowney, Public Law, (London: Sweet & Maxwell, 2016), p. 20; Neil Parpworth, Constitutional & Administrative Law, 9th ed., (Oxford: Oxford University Press, 2016), p. 3.

[3] See, Albert Venn Dicey, General Characteristics of English Constitutionalism, (Oxford: Peter Lang, 2009, p. 60 ff.

[4] On this I resort to Gustav Radbruch´s claim that the idea of law is make up of three elements, namely, legal certainty, expediency or suitability for a purpose, and justice. See Gustav Radbruch, Legal Philosophy, in The Legal Philosophies of Lask, Radbruch, and Dabin, E. W. Patterson (ed.), (Cambridge, Mass.: Harvard University Press, 1950), pp. 47-224,107-108.

[5] By legal certainty I mean the well-grounded expectation that what is prescribed in the law will be effectively enforced by the legal officials. See, Aulis Aarnio, The Rational as Reasonable, (Dordrecht: Reidel, 1987), p. 3. The effective enforcement of what is prescribed in the law has been called by Radbruch as the "*Sicherheit des Rechts selbst*" (the certainty of the law by itself, *trad. alt.*) Gustav Radbruch, "Vorschule der Rechtsphilosophie", in Gustav Radbruch Gesamtausgabe, Arthur Kaufmann (ed.), Vol. 3, (Heidelberg: C.F. Müller, 1990), p. 147.

[6] By substantial requirements of justice I mean considerations on what can be rationally justified as being fair and correct. See, John Rawls, Justice as Fairness, (Cambridge Mass.: Harvard University Press, 2001), pp. 42 f. "[J]ustice counts as a special case of correctness, for justice is nothing other than the correctness of distribution and compensation", see Robert Alexy, The Ideal Dimension of Law, in The Cambridge Companion to Natural Law Jurisprudence, George Duke and Robert P. George (eds.), (Cambridge: Cambridge University Press, 2017), pp. 314-341, 315.

equally to all individuals in the society in order to keep a wide frame of liberty for them. If a constitution confers a *prima facie* priority to the legal certainty over the substantial requirements of justice, assuring that the equal application of the law has to be prioritized before any other consideration, and at the same time guarantying the fulfilment of certain substantial requirements of justice – such as equal opportunities to develop capacities in the society, procedural due process, equal participation in the political decision making process and equal dignity upon every individual in the society – then the constitution to be interpreted is not only restricted to a formal approach to the rule of law but also embraces a substantial account of it. Finally, the possibility of conferring either *prima facie* or exclusionary priority to the substantial requirements of justice has to be leave out of consideration, since the constitution, as part of the legal order, is meant to rule and organize the society as a binding prescription, and not as a moral commitment. As a result, constitutional interpretation can either be oriented to a formal conception of the rule of law, or to a material conception of the rule of law; the prevalence of one of these approaches depends on the wording of the constitution and the overarching political morality underlying the legal order.

3. Constitutional interpretation and constitutional reasoning

Every process of interpretation relies on a reasoning process which guides the ascription of meaning to the interpreted object and the exchange of reasons in favour or against an interpretative outcome. In this sense, it is valid to assert that interpretation is a special case of reasoning, for *interpretation* is a reasoning process set out to ascribe meaning to an interpreted object from a linguistic point of view[7], whereas *reasoning* is the general process of understanding and explaining an object. From this basis it is possible to claim that what is called *constitutional interpretation* is based on a *constitutional reasoning*. While constitutional interpretation is oriented to ascribe meaning to the provisions gathered in the constitution, constitutional reasoning amounts to the reasoning process on which the interpretation of the constitution runs. Taking into account that reasoning (*Vernünft*) is the faculty of the mind which allows to discern facts and experiences obtained from the real and the intelligible word in order to formulate rules and principles to act accordingly with, then a constitutional reasoning will underlie both: the process of

[7] "Solving a legal problem as well as legal reasoning can also be seen from a linguistic point of view. Then one speaks of legal interpretation". See, Aulis Aarnio, One right answer and the majority principle, in Legal System and Practical Reason, ARSP Beiheft 53 (1994), pp. 36-48, 36.

applying the interpreted meaning of constitutional provisions through subsumption or balancing, as well as the construction of the normative upper-premise of an application process. Thus, constitutional reasoning turns on the question about what ought I do according to the constitutional provisions, whereas constitutional interpretation revolves on the question about how ought I ascribe meaning to the constitutional provision. Therefore, the scope of the question on constitutional reasoning is wider than the scope of the question on constitutional interpretation.

II. The question about the status

1. Constitutional provisions and legal norms

Is constitutional interpretation different from legal interpretation or it is only a mere application area without any particular distinguishing feature? To come up with an answer to this question, it is necessary to address the issue of the relationship between constitutional provisions and legal norms. There are three possible scenarios to do this: first, constitutional provisions are legal norms without any further qualification and therefore their interpretation follows the rules, principles and forms of the legal interpretation (*the equivalence thesis*)[8]; second, constitutional provisions are completely different from legal norms since they have a different deontic structure which requires a different and specific model of legal interpretation (*the independence thesis*); and third, constitutional provisions are a qualified set of legal norms whose interpretation do follows the rules, principles and forms of legal interpretation but also need to be supplemented with some special considerations able to address the ideological and moral burdens contained into them (*the special character thesis*).

The thesis of equivalence renders no place for a proper theory of constitutional interpretation. In this sense, constitutional interpretation is seen as legal interpretation applied to the constitution, therefore there is no use in pleading for the existence of something like a theory of constitutional interpretation. On the other hand, the thesis of independence claims that there is a clear difference between constitutional provisions and

[8] This claim has been raised by Forsthoff, who considers that the only valid method of interpretation for the constitution is the classical interpretation theory of laws (*Auslegungsmethodenlehre*), see. Ernst Forsthoff, Die Umbildung des Verfassungsgesetzes, in Probleme der Verfassungsinterpretation. Dokumentation einer Kontroverse, Ralf Dreier and Friedrich Schwegmann (eds.), (Baden-baden, Nomos, 1976), pp. 67 ff. This approach is also shared by Riccardo Guastini, L'interpretazione dei documenti normativi, (Milano: Guiffrè, 2004), pp. 277–278.

the other kinds of norms within the legal system. This difference had to relay necessarily on some objective features in the deontic structure of the constitutional provisions which cannot be found in the other legal norms. If this thesis were sound, then it would be possible and necessary to develop an autonomous theory of constitutional interpretation. However, this claim is hard to justify, since there is no difference, at least from the deontic structure of constitutional provisions, between constitutional norms and other legal norms within the legal system.

2. The special character thesis

This thesis contends that constitutional provisions, although sharing the same deontic structure with the other legal norms, have a special character or *ethos* derived from their *hierarchical* place in the legal system. Certainly, constitutional provisions – the set of rules, principles, binding practices which make up the constitutional body in a legal system – are norms which assert that something is commanded, prohibited, permitted or empowered, and therefore cannot be distinguished from other rules, principles and binding practices within the legal system. However, constitutional provisions have a particular feature which makes them the defining point of reference according to which the rest of legal provisions have to be consistent, namely *their double status as the higher institutionalized substantial reasons and as the higher institutionalizing authoritative reasons within a legal system*.[9] In fact, constitutional provisions enshrine moral values, cultural views, political expectations, ideological commitments, economic interests and social practices which work as the blue print for the distribution of competences, functions and rights in the entire legal system.

From this thesis it is possible to infer that the theory of constitutional interpretation, since its object is made up of constitutional provisions, is a qualified form of the theory of legal interpretation.[10] Constitutional interpretation shares with legal interpretation the rules, principles and forms of the methodology of legal interpretation, but needs further methodological standards to give account of the specific problems of interpreting constitutional provisions. To deal with these problems, it is necessary to complement

[9] The special character of constitutional norms deriving from their hierarchical position in the legal system has been pointed out by Dieter Grimm, Constitutionalism. Past, Present and Future, (Oxford: Oxford University Press, 2016), pp. 11 f; and, Rainer Wahl, "Der Vorrang der Verfassung", in Der Staat 20 (1981), p. 485.

[10] The status of Constitutional interpretation as a special case of legal interpretation has been also mentioned by András Jakab, European constitutional Language, (Cambridge: Cambridge University Press, 2016), p. 20.

legal interpretation with further methodological and *extra legem* considerations. In this sense, the function of the special character thesis is to justify the necessity of complementing the theory of legal interpretation with additional interpretative standards such as hermeneutics, moral reasoning, semantical reasoning and topical reasoning.

III. The question about the nature

The question about the nature addresses the issue of the necessary elements which make up an approach to constitutional interpretation. Whether it is a skeptical or a normative approach, either of these has to address directly or indirectly at least three issues when explaining or predicting the outcomes of an interpretative process, namely, the question of the role of moral arguments in the interpretation process, the question of the semantic content of constitutional provisions and the question of the correctness criteria which render the interpretation outcome as rational as possible.

First, the question about the role of moral arguments in the interpretation process deals with the relevance of the so called universal or critical morality as a justificatory reason when interpreting the constitution. Since constitutional provisions represent the concretization of the values, costumes, and commitments of a given community, their interpretation will often face problems related to the moral background on which the constitution is based. Moral reasons such as prudential moral reasons or ethical-political (positive morality), do not represent a major problem for their interpretation since they can be identified and assessed objectively resorting to their utility or their incorporation as normative standards in the constitution. Therefore, reasons such as pragmatic evaluation of the suitability of efficient measures to solve certain problems in the community or reasons such as the customary political or cultural commitments of the community can actually play a central role in solving conflicts between the branches of the government, between them and the citizens, or even between the citizens themselves. However, major problem is posed by the introduction of universal moral reasons (critical morality) in the interpretation process. It is valid to resort to ideas such as human dignity, human rights or social equality in our reasoning on the constitution? It is valid to restraint the competences or interest of the law-giver resorting not only to prudential and ethical-political moral reasons but also to universal moral reasons which are not explicitly institutionalized in the constitution? A theory committed to explain or predict the

outcomes of constitutional interpretation and assess their correctness, has to incorporate necessarily an element in their structure which address directly or indirectly this issue.

Second, the question about the semantic content of constitutional provisions turns on the possibility of ascribing meaning to the words contained in the constitution and on to the extent to which the meaning of those words can be object of diverging interpretations. These two aspects of the semantic content of the constitution reflects what are known in the analytical philosophy as the "problem of reference" and the "problem of the semantic limit". On one hand, the problem of reference in constitutional interpretation turns on the question if the speech signs gathered in the constitutional body such as "common good", "qualified majority", "constitutional rights", "human dignity", "formal law", "parliamentary sovereignty", etc, refer to concepts or intentions, or their sense is rather derived from an institutionalized psychological habituation in the community. On the other hand, the problem of a semantic limit in constitutional interpretation turns on the question if it is possible to set some limits to the interpretation of que words and definitions contained in the constitutional provisions. How far can we argue that something can be considered or not as democratic, as constitutional, as lawful, as free, as equal, as cultural identity, well-being, as a family, as a religious conviction, as proportional, etc? Both of these aspects, namely, the problem of the reference and the problem of a semantic limit, are intrinsically connected, for without a semantic point of reference, it is not possible to speak about a semantic limit for its interpretation.

Finally, the third element on which a theory of constitutional interpretation has to take stance is the question of the correctness criteria. It is possible to achieve correctness in interpreting the constitution? and, if the answer to the previous question is affirmative, how it this is possible? One can argue that this is impossible since the interpreter can ascribe to constitutional provisions whichever meaning he considers as rational or lawful or just, if the interpreter is a legal official, the correctness of the outcome of his interpretation will be correct based only in his understanding of the wording of the constitution and on his *ethos* as a public authority entitled to settle constitutional controversies.[11] Alternatively, one can argue that correctness implies necessarily

[11] Hans Kelsen is skeptical about the use of interpretative methods or criteria such as the classical canons of interpretation. He claims that "There is simply no method according to which only one of the several readings of a norm can be distinguished as correct", see Hans Kelsen, Introduction to the problems of legal theory. A Translation of the First Edition of the *Reine Rechtslehre* or the Pure Theory of Law, (Oxford: Clarendon Press, 1992), p. 81. Kelsen argues that the traditional theory of interpretation is a matter of legal politics. The only possible "interpretative criteria" are, eventually, the contextual meaning of the norm in the legal system (*ibid.*), and the difference between authentic interpretation, i.e. "the [law-creating]

justification. The correctness of the outcome will be provided by the reasons on which it is based. The sheer understanding of the wording of the norm or the interpreter´s convictions what justice is, have to be complemented with further reasoning criteria in order to render the interpretation as rational as possible. If the interpreter is a legal official, he cannot base the correctness of his interpretation of the constitution only on his *ethos* as a public authority, the wording of the constitution or his subjective idea of justice, he also has to justify his decision and make his reasoning process accessible for the public assessment and control.

The different positions within the debate on the interpretation of the constitution can be reconstructed as a bunch of different approaches to these three issues. In this sense, the nature, i.e., the constituting elements, of a theory of constitutional interpretation is made up of the answers to the issue of the role of moral reasons, the issue of the semantic content of the constitution and the issue of the correctness criteria of interpretation.

IV. The elements of an argumentative approach to constitutional interpretation

The argumentative approach to constitutional interpretation puts forward the claim that a high degree of correctness when interpreting the constitution is possible under three conditions: that some few critical moral reasons can be taken into account together with pragmatic and positive moral reasons in the reasoning process on the constitution, that the normative meaning of the words contained in the constitutional provisions derives from the community`s constant practice confers them, and that interpretative correctness requires a qualified form of legal interpretation, namely, legal argumentation.

1. Discourse based weak moral objectivism

A constitution is a product of an historical and political development in a given community. In this sense, a constitution enshrines the values which underlie the community´s aspirations and identity. Some of these values can be related to the way in which the community aim to reach its aspirations (pragmatic reasons), while other are

interpretation of a norm [performed] by [a] law applying organ" (*trad. alt.*), e.g. judicial interpretation, and not-authentic interpretation, i.e. the non-law-creating interpretation performed by an organ different from the law-applying organ, e.g. doctrinal interpretation, (Hans Kelsen, Pure Theory of Law, (New Jersey: The Law Book Exchange, 2008), p. 354 f).

central for defining its identity as a community (ethical-political reasons or positive morality). However, there might be some other values which go beyond of the community´s own aspirations and identity, values which foster agreement and peace among the different communities, values such as human dignity, human rights or social equality (universal moral reasons or critical morality) – in case of a disproportionate restriction or miscomprehension in any of these constitutional values when interpreting them, the outcome cannot be regarded as correct. Pragmatic reasons refer to the selection of the most suitable means to reach goals and preferences, ethical-political reasons revolves around of a shared self-conception of what good is in a given community, and critical moral reasons are concerned with behaviour guiding values meant to be universal.[12] In what concerns to the pragmatic and to the ethical-political reasons, verifying their fulfilment, as it has been mentioned above, does not represents a major problem. Indeed, while the correctness of pragmatic reasons could be explained in terms of how suitable the relationship between means and ends is, the correctness of ethical-political reasons is based on an evaluation in terms of the fulfilment of what is hold as an expected moral behaviour in a certain society, i.e., an evaluation according to the positive morality.

The central problem on substantial correctness in practical reasoning is the relevance of critical moral reasons, i.e. reasons meant to be universal valid and independent from their institutionalization as positive morality, and how to assess their fulfilment. Can be critical moral reasons valid criteria of correctness? This question is related to what in metaethics has been called moral objectivism, i.e. is a question on the existence of universal moral truths independently from individual opinions. The basic assumption of moral objectivism is that there are universal moral values which do not depend on subjective moral considerations about their rightness or wrongness. Regarding to this issue, it is possible to come up with at least three basic positions which claim that this is possible: first, a moral objectivism based in a radical metaphysical realism (robust moral objectivism), second, a moral objectivism based in a moderate metaphysical realism (weak moral objectivism), and third, a weak moral objectivism based on the requirements

[12] See, Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy, (Cambridge Mass.: MIT Press, 1996), p. 154 f, 230, 283. Habermas considers that these three kinds of practical reasons represent separate specifications of a neutral "general discourse principle", see, ibid., pp. 107-108. On the other hand, Alexy argues that these three kinds of practical reasons are connected in one overarching "general practical discourse" which express the "unity of practical reason", see, Robert Alexy, "The Special Case Thesis", in Ratio Juris 12 (1999), pp. 374-384, 377 ff.

of the discursive ethics (discourse based weak moral objectivism).[13] The robust moral objectivism claims that universal moral properties do exist and are pre-existent and superior to moral agents. The weak or modest moral objectivism claims that only some central values determined by the reason are meant to be the universal and independent from the moral subjects. Finally, discourse based weak moral objectivism is a form of weak moral objectivism which contends that morality has an existence as a regulative social convention which content is determined by discursive rules and that is committed to enhance agreement within the community.[14] From these three possible accounts of moral objectivity, only the last one could be useful as material criteria of correctness as long as one pursues to keep the practical reasoning open to reasonable disagreements, as the argumentative account of constitutional interpretation by definition does.

2. Semantic interpretation of the constitution

Norm propositions are made up of words which convey a deontic content, i.e. a semantic content which commands, prohibits, permits or empowers something. If interpreting the constitution amounts to ascribe meaning to the provisions gathered in it, then this task is indubitably connected with the very possibility of ascribing meaning to the words or speech signs which make up legal propositions. This issue leads us to the so-called "problem of reference". This problem turns on the question about if in the relationship between speech signs and their denoted objects there is place as well for concepts or intentions. Does the word or speech sign "family", to take as an example a problematic topic in several constitutions, stand for a concept or definition of it or we are only used by tradition to call "family" to a certain group of people living together? On the problem of reference there are three basic positions, the realism, the conceptualism, and the nominalism. The realism puts forward that universal concepts do exist and they are either independent of the objects denoted by them (*universalia ante res*) or bounded to the existence of the objects denoted by them (*universalia in rebus*). As an example to this, if one claims that the concept of "family" existed *before* humans beings came up with the idea that a certain group of people fulfilling certain conditions can be described as a "family" (*universalia ante res*), or the claim that the concept "family" owes his existences

[13] The possibility of the existence of objective moral values has been rejected by the sceptical moral accounts such as the emotivism, the decisionism, the subjectivism, the naturalism, etc.
[14] In this sense it has been exposed by the moral constructivism of Carlos Santiago Nino, The ethics of human rights, (Oxford: Oxford University Press, 1991), pp. 4, 83.

to the human beings who thought that only a group of people fulling certain conditions (*universalia in rebus*) can be called like that. In turn, the conceptualist account contends that concepts do exist, but these are not universal rather than social conventions which pretend to fit correctly to their denoted objects according to some features identifiable in them. Thus, for the conceptualism, the development of the content of concepts depends on a community of reasoning participants and not on ideal or universal entities. In this sense, the word or speech sign "family" exists only because a community of rational beings have a shared understanding of which kind of group of people ought to be regarded as a family. Finally, the nominalist account puts forward that there is no need for concepts or intentions, since there only exists speech signs and the objects denoted by them (extension). According to the nominalism, no rule of meaning connects speech signs and the objects; rather this connection takes place by naming acts and psychological habituation. Therefore, the word or speech sign "family" does not imply any concept or intention, it is rather a sheer psychological habituation shared by the members of a certain community.

The necessity of thinking, speaking and acting in community requires some minimal points of reference in order to make possible shared understanding about the objects of communication and optimize results. For instance, if every speaker thinks that there is an abstract and normative idea of the word "family", or claims that the speech sign "family" is just a name for calling a certain form of human organization to which we are merely habituated, then speaking and acting about what can be considered as "family" –and be therefore protected by the law – will depend either on an abstract idea of family or on what we are merely habituated to call a family. This can lead not only to a semantic relativism, but also to the impossibility of social development of concepts. In constitutional interpretation, it could lead to arbitrariness, legal uncertainty and the impossibility of adapting constitutional protection to new forms of human life or to extend that protection beyond of what can be reasonably considered as a family. Some minimal points of reference are necessary in order to understand what can be considered as a "family" and what goes beyond of that consideration; without reliable points of reference at thinking, at speaking or at acting in community, it would be virtually impossible to arrive to lasting agreements on any subject of communication. Therefore, realist and nominalist accounts of the problem of reference and the universalizability of meaning prove to be problematic, at least, in legal and constitutional interpretation.

The interpretation of legal propositions, such as the constitutional provisions – which are often cast in general and vague words, requires to have semantical points of reference which, although depending on the agreement of the community, do have certain normative features allowing to contrast them against the facts in different cases. A conceptualist approach to the problem of reference offers, at least at first glance, a more coherent relationship between semantical normativity and social practice. However, the problem of a classic conceptualistic approach to the meaning of words relies on how to justify the normativity of words and the limits to which can they be interpreted by the social practice. Certainly, the conceptualistic approach can explain that the normativity of the concept "family" allows to identify some groups of people, fulfilling some conditions, as such, and that this is possible due to a social agreement about those conditions, agreements which can eventually change including further groups of people within the class of the word "family". But, how these "conditions" gain acceptance? How to justify a new social use for a word as necessary?

The possible meanings of a word spreads from its minimal necessary content to the maximal semantic limit to which it can be interpreted. The problem now is how to identify the minimal semantical content of the social agreements and how to adapt them to further unforeseen cases, i.e. the question on their minimal truth conditions and their assertibility.[15] A modified version of conceptualist approach to the "problem of reference" appears to be the best option, namely a semantic conceptualism. This account puts forward that social conventions on meaning[16] are argumentative exchanges of justificatory reasons about the possible semantic features of the denoted object under the conditions of an ideal discourse.[17] It also claims that the necessary semantic features

[15] On this point see Robert B. Brandom, Truth and Assertibility, *The Journal of Philosophy* 73 (1976), pp. 137-149

[16] For the conventional character of definitions as syntactical or semantical rules of language see, Rudolph Carnap, Testability and Meaning, in Philosophy of Science 3 (1936), pp. 419-471, 445 f; The elimination of Metaphysics Through Logical Analysis of Language, in Critical Theory since Plato, Hazard Adams/Leroy Searle (eds.), (Boston: Thomson, 2005), pp. 980-989, 981 ff. Against this account W. V O Quine, Truth by convention, Readings in Philosophical Analysis, Herbert Feigl/Wilfrid Sellars, (New York: Appleton-Century-Crofts, Inc., 1949), pp. 250-273, 273.

[17] These ideal conditions are those of unlimited time, unlimited participation, and complete absence of coercion introducing complete linguistic and conceptual clarity, complete empirical information, complete ability and willingness to change roles, and complete freedom from prejudice. See, Robert Alexy, The Institutionalization of Reason, in The Law in Philosophical Perspectives: My Philosophy of Law, Luc J. Wintgens (ed.), (Dordrecht: Kluwer, 1999), p. 30. See also, Carsten Bäcker, Begründen und Entscheiden: Kritik und Rekonstruktion der Alexyschen Diskurstheorie des Rechts, 2nd edn., (Baden-Baden: Nomos, 2012), 129. These ideal circumstances of the social conventions have to be contextualized in the real limitations in which the argumentative exchange of reasons actually is meant to be carried on, namely the conditions of limited time, limited participation, and limited coercivelessness under limited linguistic and

which makes up the social meaning of the denoted object have to pass the test of the claim to correctness,[18] i.e., that the meaning must contain the necessary features which the society considers depicts the denoted objects in the best form. Finally, this version presupposes that the use of these necessary semantic features in the social practice will confer a deontic or normative force to them.[19] It is also implied by this approach to semantic conceptualism that if new factual or practical reasons arise, it will be possible to correct or optimize the meaning of the semantic object by embedding these new elements through a process which John Dewey named warranted assertibility.[20]

The interpretation of constitutional provisions requires a semantic approach that helps to define the minimal normative content of the words gathered in it, as well as to settles the limits of their interpretation. Two arguments can be put forward to justify the resort to a semantical conceptualism: first, the general necessity of thinking, speaking and acting in the community, and second, the argument of legal certainty understood as the reliance of the community in the prescriptions enacted by the law givers. Being the concretization of the values and expectations of a certain community[21], the constitution enshrines certain meanings which act as reference points to think, to speak and to act accordingly when one means to observe the constitution. Hence, it is a requirement of life in community that the values or prescriptions gathered in the constitution were identifiable and normative for the interpreters. It is also a requirement of legal certainty that the community was able to rely on certain meanings concerning its values or expectations which cannot be ruled out without a sound reason.

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conceptual clarity, limited empirical information, limited ability to change roles, and limited freedom from prejudice. See, Robert Alexy, The Institutionalization of Reason, *op. cit*., p. 24-46, 31.

[18] Immanuel Kant, KrV, A 58/ B 82.

[19] The semantic normativity of concepts has been developed by Robert Brandom in his influential book, Making It Explicit, in which he develops the thesis that our discursive praxis implicitly contains norms issued by the social practice (normative pragmatics) which semantical correctness is justified by material inferences (inferential semantics). See Robert B. Brandom, Makin It Explicit. Reasoning, Representing, and Discursive Commitment, (Cambridge Mass.: Harvard University Press, 1994), pp. 3 ff, 67 ff. For an explanation of Brando´s ideas and their role in legal interpretation see, Matthias Klatt, Making Law Explicit, (Oxford: Hart Publishing, 2008), pp. 115 ff.

[20] Dewey, introduced the term warranted assertibility as a substitute for knowledge or truth and defined it as the ongoing, self-correcting process of enquiry which confers a dynamic correctness to a proposition. See, John Dewey, Logic. The Theory of Inquiry, (New York: Henry Holt and Company, 1938), p. 7; Propositions, Warranted Assertibility and Truth, in The Journal of Philosophy Vol. 38 (1941), pp. 169-186, 170. See also, Hilary Putnam, Reason, Truth and History, (Cambridge: Cambridge University Press, 1981), p. 55.

[21] See for instance the theory of the integrative function of the Constitution advanced by Rudolf Smend, Verfassung und Verfassungsrecht, in Staatsrechtliche Abhandlungen und andere Aufsätze, 4th edn., (Berlin: Dunker & Humblot, 2010), pp.189,192 ff. See also Dieter Grimm, Integration by Constitution, in I-CON, Vol. 3 (2005), pp. 193-208, pp.193 ff.

Certainly, minimal semantic normativity and limits to the interpretation are necessary conditions for dealing with interpretative problems such as those related to the semantic indeterminacy of legal norms, as well as to ascertain their objective will. This necessary conditions play also a central role in the distinction between clear and hard cases in legal interpretation. In the specific field of constitutional law, the minimal semantic normativity and the limits to the interpretation are relevant in the so called "interpretation in accordance with the constitution", as well as in the doctrines on constitutional rights such as the internal and external theory of restrictions, the general theory of proportionality and the balancing of legal principles.

3. The argumentative legal methodology in constitutional interpretation

Ascribing meaning to a constitutional provision to settle a concrete problematic requires not only to consider questions related to their moral or semantical minimal content, the process of ascribing meaning plays as well a central role in the correctness of the outcome of the interpretation. According to the argumentative theory of constitutional interpretation it is possible to reach a high degree of interpretative correctness when interpreting the constitution through an interpretation based on the rules, principles and forms of legal argumentation. Correctness in constitutional interpretation is regarded by this approach as a question of procedural rationality, i.e., as argumentative correctness. This kind of correctness face two possible scenarios in which the interpretative process could be performed, namely, ideal circumstances, and real circumstances. While the former is concerned with an interpretative process under ideal conditions of unlimited time, unlimited participation, and complete absence of coercion introducing complete linguistic and conceptual clarity, complete empirical information, complete ability and willingness to change roles, and complete freedom from prejudice;[22] the latter turns on the real limitations in which the interpretative process actually is meant to be carried on, namely, the conditions of limited time, limited participation, and limited coercivelessness under limited linguistic and conceptual clarity, limited empirical information, limited ability to change roles, and limited freedom from prejudice.[23] To assess the correctness of an outcome obtained under the real interpretative circumstances it is necessary to test how far have been fulfilled the requirements of the ideal circumstances. Here is where a methodological account of interpretative correctness is needed.

[22] Robert Alexy, The Institutionalization of Reason, *op. cit*., (nt. 17), p. 30.
[23] Ibídem, p. 31.

Now, the question turns on the procedural standards of reasoning which act as a bridge between the real circumstances in which an interpretative process is performed and the ideal circumstances aimed to be achieved. Robert Alexy has developed in his *Theory of Legal Argumentation* a system of 28 rules and forms of the "general practical discourse", i.e., a system of rules and forms which guide the exchange of practical reasons in order to render it rational and correct as far as possible.[24] "*The more frequently these rules are violated, the less rational the discourse*".[25] This system purports to make it possible that the outcome of the practical reasoning depends solely on reasons (the ideal situation of reasoning) and not on other considerations which may emerge from the factual circumstances in which the exchange of reasons is performed or from subjective biases of the participants (the real situation of reasoning).

The system of rules and forms of the general practical reasoning, as Alexy formulates it, comprises "*rules that demand non-contradiction, universalizability qua consistent use of predicates, clarity of language, reliability of empirical premises, as well as rules and forms that speak to the consequences, balancing, exchange of roles, the genesis of moral convictions, and freedom and equality in discourse*".[26] The specific rules and forms of legal reasoning are structured in the internal justification and the external justification. The internal justification is built by the reasoning schemes such as the subsumption of rules and the balancing of principles, whereas the external justification is built by the canons of legal reasoning, the rules for the use of judicial precedents, the rules of factual reasoning, the rules and forms of the general practical reasoning, the analysis rules from the legal dogmatics, and the special arguments forms of legal reasoning.[27]

Now, when interpreting constitutional provisions, the external justification of the constitutional interpretation will be made up of a set of interpretative cannons (semantic interpretation, systematic interpretation, genetic interpretation and objective teleological interpretation) and is guided by topical criteria of constitutional interpretation[28] as well as by the tenets of the hermeneutical circle[29]. Whereas its internal justification will be made up of the reasoning structures of subsumption and balancing.

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[24] Robert Alexy, Robert Alexy, Theory of Legal Argumentation, (Oxford: Oxford University Press, 2009), pp. 188-206.

[25] Aleksander Peczenik, On Law and Reason, (Dordrecht: Kluwer, 1989), p. 191.

[26] Robert Alexy, Legal certainty and correctness, in Ratio Juris 28 (2015), pp. 441-451, 442.

[27] Robert Alexy, Theory of Legal Argumentation, *op. cit.*, (nt. 24), p. 285.

[28] Korand Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th edn., (Heidelberg: C. F. Müller, 1999), pp. 20 ff.

[29] On the hermeneutic circle see: Josef Esser, Vorverständniss und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis, (Athenäum Verlag: Frankfurt am Main,

Since the theory of legal argumentation considers hermeneutical, topical, and procedural correctness criteria, together with interpretative structures such as subsumption and balancing, as their constituting elements, it can give account of the particularities of the constitutional norms in which moral and semantical reasoning play a central role. What is more, regarding the possibility of hard cases which requires to enhance the scope of regulation or protection of the constitution beyond its wording (*Verfassungsfortbildung*), an argumentative approach to constitutional interpretation purports further criteria for reaching correctness as far as possible without eliminating the discretion of the interpreters.

1970), p. 134; Karl Engisch, Logische Studien zur Gesetzesanwendung, (Heidelberg, Carl Winter – Universitätsverlag, 1960), 2nd edn. pp. 35 f; See also, Wolfgang Fikentscher, Methoden des Rechts. In vergleichender Darstellung, Vol. 4, (Tübingen: Mohr-Siebeck, 1977), p. 201.