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Constitutional Activism and Deference Through Judicial Reasoning: Confirming an Indeterminacy Thesis

Introduction

One of the major problems a theory of constitutional adjudication is supposed to handle is identifying those techniques of reasoning and arguments, which are appropriate in constitutional cases. Determining what is permissible for a constitutional judge to do in the course of interpretation within procedural limits of constitutional adjudication (*i.e.* legal rules on jurisdiction, standing, deadline, evidence, *etc.*) promotes foreseeability and legal certainty considerations. On a micro level, the participants of an actual review procedure are informed as to what type of arguments may hold sway and, thus, they may formulate their case for or against the constitutionality of the challenged norm in terms accepted by the court. On a larger scale, it might make constitutional adjudication more predictable for other participants of the public discourse.

Furthermore, identifying those techniques of reasoning which are appropriate in constitutional adjudication is instrumental for identifying the scope of the legitimate exercise of the constitutional review power. It is important to see that judicial activism and deference are not encountered only when review fora trespass the procedural limits prescribing the jurisdiction of the courts and further confines of the review power. Another important domain of a study of activism and deference is an analysis of activism and deference via constitutional interpretation.[*1] The major threat stemming from activism is that of undue interference with the powers of other branches, and, thus, with the institutional guarantees established in a constitution securing the proper functioning of the government and the protection of constitutional rights. On the other hand, judicial deference has the potential to undermine the demand for reasoned judgment, and, in extreme cases, to

[1] N. Dorsen. How American Judges Interpret the Bill of Rights. – Constitutional Commentary, 1994, Vol. 11, No. 2, p. 383.

endanger the meaningful exercise of the review power. Like activism, deference also may result in an unsolicited interference of courts with the powers of other branches, a consequence that is often overlooked. Theories of constitutional interpretation, as well as theories of judicial review, represent a continuing intellectual struggle to establish a concept of constitutional interpretation which is capable of responding to even hard cases under the constitution without transgressing the limits of the legitimate exercise of the review powers.

Theories of constitutional interpretation which offer aids that might be relied on in order to define the proper interpretation of constitutional provisions promise more than certainty in defining the meaning of constitutional provisions once and for all. Such theories also suggest that it is possible to curb indeterminacy and judicial discretion in constitutional interpretation. Although, in principle, there is an infinite number of arguments and reasons which may be invoked in constitutional argument, theories of constitutional interpretation and judgments of constitutional review fora tend to refer to relatively few types of arguments when resolving constitutional issues. References to the (plain) text of constitutional provisions, previous judicial decisions on the subject (precedent) and scholarly arguments are often invoked. In addition to "legal arguments" in a narrow sense, constitutional review fora and theories of interpretation tend to rely on "extra-legal arguments", such as value arguments, consequential reasoning and on references to history and traditions.

Marika Lintamm's paper rests on the premise that constitutional interpretation is a process where values enframed in the text of a written constitution come to life. Theories of constitutional interpretation which hold that it is appropriate for constitutional justices to invoke value arguments and rely on judge-made principles are often criticised as the strongholds of unsolicited judicial activism. Critics usually mention the uncontrolled discretion of judges in identifying and defining the values and principles used as aids of interpretation, and the arbitrariness in prescribing consequences on the basis of such values and principles. Furthermore, such an approach might easily amount to judicial lawmaking, and it is also likely to undermine the protection and exercise of constitutional rights.

In contrast, however, another type of extra-legal arguments which are herein referred to as historical arguments have a flair of objectivity, neutrality and predictability. At the outset, historical narratives seem to bear all the characteristics that make an argument suitable to restrain judicial review and thus to keep the judicial power at bay. It is, therefore, worth examining whether references to history and traditions of the polity ("historical narratives") do indeed fulfil this promise. On the one hand, such an analysis would reveal whether this claim is correct. If so, it might be possible to conclude that theories which extensively rely on references to history and traditions may be capable of guiding constitutional interpretation. In contrast, however, in case the analysis reveals that references to history and traditions are not capable of delimiting the indeterminacy in constitutional reasoning, the analysis may still reveal some factors which contribute to or trigger indeterminacy in constitutional interpretation. This approach is believed to shed light on such problems of constitutional interpretation which might contribute to further critical analysis.

1. Historical narratives as means of limiting indeterminacy in constitutional reasoning

1.1. Qualities of historical narratives

As Justice Oliver Wendell Holmes of the US Supreme Court duly observed once, "[h]istoric continuity with the past is not a duty, it is only a necessity".[*2] Nonetheless, most lawyers attribute special weight to historical narratives in constitutional reasoning. Counsels and courts often rely on references to the past, history and traditions: parties introduce evidence on the historical background of a case, justices inquire into past injustice or past experiences, and courts establish tests in order to make references to the past manageable for the purposes of judicial reasoning. References to history are not always meant to set a positive example. The historical record may be invoked to consult the wisdom of the ancestors, and also, to remind about the evils of past times.

[2] O. W. Holmes. Learning and Science. – Collected Papers. New York: Harcourt, Brace, 1920, p. 139. For a detailed exposition of the problem see R. Posner. Past-dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship. – University of Chicago Law Review, 2000, Vol. 67, No. 3, pp. 588–592. In the essay Posner 'rediscovered' Nietzsche's essay "On the Uses and Disadvantages of History for Life" (1874) for the purposes of legal and constitutional reasoning.

References to historical facts and data are attractive for a number of reasons. They suggest clear-cut, black-and-white answers that can be established on the basis of objective data.[*3] If viewed so, references to history are descriptive and historical evidence is a non-interpretive tool of reasoning (facts speak for themselves). Thus, historical evidence suggests that the constitutionality of the challenged norm is going to be determined on an objective basis. Also, references to historical evidence imply that the interpreter is neutral (impartial) as the standard along which the issue was decided is an objective one. According to Owen Fiss, "Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained".[*4]

Historical arguments hint that every observer would have arrived at the same conclusion, and thus they suggest the neutrality (impartiality) of the decision-maker and of the decision.[*5] In addition, arguments in history suggest that the decision rests on well-set, firmly established grounds. In other words, judgments based on historical narratives seem to preserve the *status quo*; they create an impression of stability and continuity.[*6] An analysis of judicial decisions invoking historical narratives, however, does not seem to support the above findings.

Constitutional review fora are often criticised for writing bad history. Numerous scholars argue that in certain cases the justices misunderstood or misinterpreted historical data.[*7] The debate continues on the bench: justices often condemn each other for applying mistaken conclusions drawn on history in the case before the court. Sometimes these disputes on proper or tainted use of historical sources and data might go well beyond the legal issues that gave rise to the dispute.[*8] At this point a question presents itself in fairly clear terms: are these disagreements attributable to the fact that judges tend not to be professional historians, or else, do these disagreements follow from the characteristics of historical narratives?

Indeed, modern studies of historiography reveal that arguments in history and traditions of the polity are normative claims, implying value judgments. As a result, any historical analysis provides a 'history of today'. Thus, historical narratives are not descriptive but they are in essence normative.[*9] When resorting to historical narratives the interpreter has a privileged position at the end of the past; the observer identifies herself with the problem and with the assertion that a solution to that problem is within reach. Thus, instead of providing an objective, neutral justification, references to history and traditions of the polity are about construing the past for the purposes of present and future legal and constitutional reasoning. Historical examples are invoked to reinforce norms of behaviour in accordance with past examples, or to deter from a certain conduct using past analogies to model possible (undesired) outcomes.[*10]

As references to history and traditions of the polity are forward-looking, they might appear convenient for supporting future-oriented reasoning which is insensitive to the outcome (to the decision in the case). Arguments in history and references to traditions in particular offer themselves as suitable bases for principled judgment. This is one of the many reasons why they are so well-taken in legal and constitutional argument. However, historical narratives are invented, thus, they are *per se* context-sensitive and result-oriented. This is why they cannot fulfil their initial promise of objectivity and neutrality. As historical narratives are teleological and normative, they cannot give rise to principled legal and judicial decisions. These findings might form the framework of understanding arguments in history and traditions in constitutional adjudication.

Arguments in history and traditions may be formulated to preserve a certain institutional arrangement, and also to change it; that the very same references may foster as well as limit individual liberty; that the same

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[3] R. Gordon. Foreword: The Arrival of Historicism. – Stanford Law Review, 1997, Vol. 49, No. 5, p. 1025; I. Crosby. Worlds in Stone: Gadamer, Heidegger, and Originalism. – Texas Law Review, 1998, Vol. 76, No. 4, p. 849. For an argument that objectivity is a component of the rule of law (along with stability and neutrality) see P. Schlag. Authorizing Interpretation. – Connecticut Law Review, 1998, Vol. 30, No. 3, Note 11 at p. 1069.

[4] O. Fiss. Objectivity and Interpretation. – Stanford Law Review, 1982, Vol. 34, No. 3, p. 744.

[5] Neutrality in the judicial context may refer to the outcome of a judgment but also to a technique of decisions. Classic texts on the requirement of neutrality in judicial decision-making are H. Wechsler. Toward Neutral Principles of Constitutional Law. – Harvard Law Review, 1959, Vol. 73, No. 1, p. 1; R. Bork. Neutral Principles and Some First Amendment Problems. – Indiana Law Journal, 1971, Vol. 47, No. 1, p. 1.

[6] Historical narratives create discontinuity when the historical example refers to the "disliked past". R. Gordon (Note 3), p. 1028.

[7] J. P. Reid. Law and History. – Loyola of Los Angeles Law Review, 1993, Vol. 27, No. 1, pp. 197–203.

[8] In the U.S. see *e.g.* R. Brown. Tradition and Insight. – Yale Law Journal, 1993, Vol. 103, No. 1, pp. 210–211. In Canada see F. Vaughan. The Use of History in Canadian Constitutional Adjudication. – Dalhousie Law Journal, 1989, Vol. 12, No. 1, p. 61.

[9] R. Aron. The Forms of Historical Intelligibility. – R. Aron. Politics and History. New Brunswick-London: Transaction Books, 1984, p. 60.

[10] For a typology of the functions of historical narrative see H. White. Metahistory. The Historical Imagination in Nineteenth-Century Europe. Baltimore: Johns Hopkins University Press, 1993, p. 7 *et seq.*

set of references is capable of delineating as well as increasing the legitimate choices of the interpreter, and thus the scope of judicial review. Also, legal reasoning, or at least common law reasoning, has methodological features which may call for references to the past.*[11] In the context of constitutional adjudication, this means that arguments invoking the past may be devices for activism as well as for deference. Thus, arguments invoking the past should be analysed in a more comprehensive framework that also responds to teleological aspirations, claims of normativeness and continuity raised or masked by these references. A final caveat: the past does not bind the present unless the present chooses to be bound.*[12] According to Reid "[h]istory's great attractiveness for judges occurs when they are indulging in judicial activism. History lets them be activists 'in the name of constitutional continuity'."*[13]

1.2. History as facts

As a point of departure, it might be interesting to focus on the application of historical narratives in a context where the text of a constitution expressly called for reliance on history. In this respect the jurisprudence of the Canadian Supreme Court concerning aboriginal rights claims presents an appropriate illustration. Subsection 35 (1) of the Canadian Constitution Act (1982) provides constitutional protection for existing aboriginal rights.*[14]

The underlying dilemma encountered by the Canadian Supreme Court in aboriginal rights cases in the following terms: do aboriginal rights have an independent origin in a strictly legal sense, or do they follow from any legal act of the colonists or their heirs?*[15] The legal regulations in force did not exclude any of these interpretations. Indeed, responding to the above question is more than a symbolic gesture or a technical matter. Indeed, this question has been posed and answered in different ways during the years of European presence in Canada, and the response has had profound implications on the constitutional and legal status of aboriginal peoples in the Canadian polity. A position according to which the rights of aboriginal peoples were created by the colonists implies that the colonists occupied uninhabited lands (*terra nullius*) and that whatever happened to the inhabitants of North America for thousands of years prior to European occupation shall have no legal relevance in determining the legal status of aboriginal peoples. Indeed, this used to be the baseline of the legal position in all lands once occupied by the Imperial Crown (*i.e*. Canada, Australia or the United States).*[16]

In Canada a departure from this position was indicated in a decision of the Supreme Court in 1973 in the *Calder* case*[17] and was reaffirmed by the Court in the *Guerin* case*[18]: in these cases the justices held that aboriginal rights were not created by the colonists. The inclusion of § 35 in the Canadian constitution in 1982 recorded the affirmation of this position. Nonetheless, ever since 1982 political actors failed to agree on a conclusive, detailed regulation as to what constitutes aboriginal rights. It was left for the Supreme Court to determine "existing aboriginal rights" under § 35 of the Canadian Constitution Act (1982). In Canada, a typical claim for aboriginal rights is formulated as a constitutional challenge to a statutory provision with reference to an aboriginal right protected under § 35 (1) of the Constitution. In case a court finds that a law of general application is in conflict with an aboriginal right, it does not result in the overall invalidity of the challenged rule. Rather, the challenged rule is not applicable to the extent the aboriginal right was established.*[19]

When the Canadian Supreme Court established the standards of review guiding the application of § 35, the justices intended to find a technique of interpretation which is able to reveal already existing aboriginal

[11] As the essence of legal reasoning is to support a present position with examples and analogies drawn from sources of the institutionalised past, this finding might be true for any form of legal reasoning. M. Krygier. Law as Tradition. – Law & Philosophy, 1984, Vol. 5, No. 2, pp. 257–258.

[12] J. G. Wofford. The Uses of History in Constitutional Interpretation. – University of Chicago Law Review, 1964, Vol. 37, No. 3, p. 523.

[13] J. P. Reid (Note 7), p. 204.

[14] In the Canadian context the term aboriginal refers to 'Indians', 'Inuit' and 'Metis' peoples in accordance with § 35 (2), Constitution Act (1982).

[15] This dilemma is phrased and described in terms of the "contingent" and "inherent" approaches to aboriginal rights in M. Asch, P. Macklem. Aboriginal Rights and Canadian Sovereignty. An Essay on R. v. Sparrow. – Alberta Law Review, 1991, Vol. 29, No. 3, pp. 501–503.

[16] For a summary of the imperial doctrine of aboriginal rights see B. Slattery. The Organic Constitution, Aboriginal Peoples and the Evolution of Canada. – Osgoode Hall Law Journal, 1995, Vol. 34, No. 1, pp. 103–108. The foundations of the doctrine were defined by Justice Marshall of the U.S. Supreme Court in the trilogy of 'Indian jurisprudence'. – *J. v. M'Intosh*, 21 U.S. (8 Wheat.) 543 [1823], *Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 [1831] and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 [1832].

[17] *Calder v. A-G of British Columbia*, [1973] S.C.R. 313, dissenting opinion of Justice Hall.

[18] *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The Australian High Court made this leap in 1992 in *Mabo v. Queensland* [No. 2.], [1992] 175 C.L.R. 1.

[19] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1110; also *R. v. Adams*, [1996] 3 S.C.R. 101, paragraph No. 61.

rights and distinguish them from newly asserted ones. Requiring evidence on the origins of the aboriginal rights asserted seems to be a reasonable approach to the application of § 35 (1) and it is even possible to argue that this approach is invited by the text of the provision. In cases involving aboriginal rights the Canadian Supreme Court systematically examines arguments invoking the past.[*20]

The Canadian Supreme Court gave the first comprehensive account of § 35 (1) in *R. v. Sparrow*.[*21] The issue in the case concerned the reach of constitutionally permissible limitations on aboriginal rights.[*22] In *Sparrow* the Supreme Court held that in order to invoke § 35 (1) successfully the court shall find that (1) the applicant exercised an aboriginal right, that (2) the said right was not extinguished (*i.e.* it is existing)[*23], that (3) the challenged regulation infringed the said right, and that (4) the infringement of the said right cannot be justified (*the Sparrow-test*).[*24] The interpretive framework outlined in Sparrow is based on a purposive interpretation of § 35 (1): it shall be interpreted in a generous, liberal manner, and, it shall be construed in the light of history, traditions and treaties. In addition, the Court included another reason for the examination of the past in § 35 (1) analysis. This approach is necessitated by the longstanding trust relationship of the Crown and aboriginal peoples. Thus, in defining existing aboriginal rights under § 35 (1) the Canadian Supreme Court attributed special significance to the analysis of history.

The Canadian Supreme Court dealt with elaborating the criteria of ascertaining aboriginal rights (the first step of the Sparrow test) in detail in *R v. van der Peet*.[*25] In order to decide on the constitutionality of the fishery regulation the Supreme Court had to ascertain whether there exists an aboriginal right to fish under § 35 (1) of the Constitution. In *van der Peet*, the Canadian Supreme Court established a test which requires the right's claimant to show that the practice, custom or tradition is of central significance to the aboriginal community in question ("distinctive culture"), that the practice, custom or tradition "made the society what it was", and that the right claimed stems from a practice, custom or tradition prior to contact with Europeans ("continuity"). The justices of the Canadian Supreme Court disagreed about the outcome of the application of this test on the case at hand. The justices clashed about the proper phrasing of the claim, as well as about the level of prevision required for fulfilling the *van der Peet* test.

Following *van der Peet*, the Supreme Court encountered the issue of establishing aboriginal title in land for the purposes of § 35 (1) in the *Delgamuukw* case.[*26] The crucial difference between the *van der Peet* test (aboriginal rights) and the *Delgamuukw* test (aboriginal title) is that, while in *van der Peet* the Supreme Court pointed to first contact with Europeans for the purposes of establishing continuity, in *Delgamuukw* the justices said that the relevant point in time was the Crown's assertion of sovereignty.[*27] The pragmatic consideration behind this shift is that the assertion of sovereignty is easier to establish. In *Delgamuukw* the Supreme Court also seems to have relaxed the standards applicable to establishing continuity. The justices reaffirmed their position on allowing post-sovereignty evidence to show continuity with pre-sovereignty possession of the lands.[*28] This way, the array of potentially acceptable evidence was considerably broadened by the Supreme Court.

The practical application of any test requiring evidence on the past of aboriginal peoples results in special challenges concerning the availability, admissibility and assessment of evidence. As for the evidence itself, it is crucial to note that before the arrival of the Europeans the aboriginal people had no written history: "their history was recorded in their oral traditions".[*29] The application of the tests prescribed by the Cana-

[20] F. Vaughan (Note 8), p. 78.

[21] *R. v. Sparrow* (Note 19). Chief Justice Dickson and Justice LaForest wrote for a unanimous court.

[22] The standard of justification was refined in Gladstone. See *e.g. R. v. Adams* (Note 19), paragraph No. 34. The four-step "Sparrow test" is the standard approach in § 35 (1) cases applied by lower courts.

[23] In order to successfully argue extinguishment the Crown has to show that the regulation of the aboriginal right reflected a 'clear and plain' intent to extinguish the right. See *R. v. Sparrow* (Note 19), 1099. This standard of extinguishment was relaxed subsequently. The Australian High Court relied on the Sparrow decision when establishing the test for extinguishment *Wik Peoples v. Queensland*, [1996] 187 C.L.R. 1. In the U.S. the Supreme Court of Vermont introduced a new test for extinguishment in *State v. Elliott*, 159. See 102, 616 A.2d 210 [1992], cert. denied 507 U.S. 911 [1993].

[24] The burden of justification is on the government. *R. v. Sparrow* (Note 19), 1110.

[25] *R v. van der Peet,* [1996] 2 S.C.R. 507. Chief Justice Lamer wrote for a majority of 7, associate justices McLachlin and L'Heureux-Dube filed separate dissenting opinions.

[26] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the majority judgment was authored by Chief Justice Lamer.

[27] D. Elliott. Delgamuukw. Back to Court? – Manitoba Law Journal, 1998, Vol. 98, pp. 112–114.

[28] *Delgamuukw v. British Columbia* (Note 26), paragraph No. 142. *Cf.* with the position of the Australian High Court in Mabo holding that "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs." *Mabo v. Queensland* (Note 18), paragraph No. 64. The High Court continued by adding that the "ascertainment may present a problem of considerable difficulty".

[29] C. McLeod. The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to the First Nations. Breaking down the Barriers of the Past. – Alberta Law Review, 1992, Vol. 30, No. 4, p. 1279.

dian Supreme Court requires evidence on past events which are at best documented in the notes, reports and diaries of the conquerors, missionaries, military personnel and administrators. These written sources were once prepared to demonstrate the success of the measures of assimilation. Beyond the written sources in aboriginal cases the evidence is supplied by oral history, tales of origin, sacred rituals on origins and traditions, and oral submissions on long held, shared customs by group chiefs, elders and group members.*[30] In addition, aboriginal oral histories have an approach to the past significantly different from the approach of the Western tradition: aboriginal accounts of the past are not linear, not truth oriented and not human-centred.*[31] When submitted as evidence in a case, the truth or falsity of such oral histories and rituals is very difficult to assess via standard means of examining and assessing evidence. Courts of law are not accustomed to dealing with such sources of information. However, when such evidence is intended to establish an existing aboriginal right, a cultural gap*[32] of this sort may be fatal to the success of the claim.*[33]

Keeping in mind the *per se* interpretive nature of historical narratives, the Canadian cases highlight that an approach which does not acknowledge the particular features of historical evidence in the context of aboriginal rights is more likely to be inadequate to handle and analyse evidence on the past with regard to these rights. The lack of sensitivity towards history in the application of § 35 (1) and the test determining aboriginal rights may mean that judicial intervention cannot preserve the *status quo* as far as the status of aboriginal rights is concerned. Note that in the U.S. Frickey warned about the application of aboriginal history submitting that "unless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions."*[34]

In the Canadian aboriginal cases the primary purpose of historical reasoning is not the limitation of the discretion of the courts in defining the scope of aboriginal rights. Aboriginal rights defined by the courts under § 35 (1) are very limited and cannot be generalised: the courts are deciding about rights exercised by a particular group on a particular territory. This characteristic distinguishes the existing aboriginal rights ascertained by Canadian courts from the constitutional rights derived from penumbras in the U.S., from the "fundamental principles recognised by the laws of the republic" in France. Although aboriginal rights when established are placed at the level of constitutional norms, their scope is limited to aboriginal peoples*[35], and in the case of land-related rights, to the aboriginal territory. In contrast penumbra rights and fundamental principles are constitutional rights of general application. Certainly, from the perspective of an analysis of judicial activism, the specificity of aboriginal rights is indeed a strong, internal limit on the powers of the courts.

The above examples also suggest that historical reasoning in the context of aboriginal rights in Canada did not make the operation of § 35 (1) more predictable. Historical analysis in a test does not automatically limit the discretion of the decision-maker under a constitutional provision. The more complex the test, the higher the standard of review and the more evidence is required, the more decisional freedom the courts may exercise. The reason why the decisional freedom (loosely guided discretion) of the courts is not so apparent with regard to aboriginal rights is that when the courts ascertain a new aboriginal right, it does not affect the entire legal system at once. Note, however, that the effects of ascertaining aboriginal rights are not merely quantitative. Constitutionally entrenched aboriginal rights increase the plurality of the Canadian legal system as they alter the applicability of legal norms of general application to relatively small aboriginal communities.

In addition, presuming that aboriginal rights existed before the entry into force of § 35 (1) of the Constitution, the status of those aboriginal rights which are not certified by the Canadian Supreme Court in actual cases is questionable. Even if such rights exist below the level of constitution protection, they cannot be relied on in order to prevent the application of general laws which infringe the culture, lives, customs and traditions of aboriginal peoples. In this regard it is important to note that § 35 (1) has a temporal dimension which is not so apparent, since the provision is a recent one. Constitutional rights, the existence of which are not acknowledged today, may be established over time. However, it is at least doubtful whether an aboriginal right which is found to be not existing today can be entrenched at a later time. This consideration further elucidates the significance of court decisions under § 35 (1).

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[30] See the Western and aboriginal notions of truth contrasted in C. McLeod (Note 29), pp. 1280–1281.

[31] Report of the Royal Commission on Aboriginal Peoples (1996), Vol. 1 (Looking Forward, Looking Back), p. 33.

[32] Note that as of today the Canadian Supreme Court does not have an aboriginal member. This fact is noteworthy in the light of § 6 of the Supreme Court Act requiring that at least three of the justices of the Supreme Court shall be from Quebec.

[33] See G. Stohr. The Repercussions of Orality in Federal Indian Law. – Arizona State Law Journal, 1999, Vol. 31, No. 2, p. 687 pointing to the same problem in the U.S.

[34] P. Frickey. Adjudication and its Discontents, Coherence and Conciliation in Federal Indian Law. – Harvard Law Review, 1997, Vol. 110, No. 8, p. 1757.

[35] Aboriginal rights are collective rights, and can be exercised only by the members of a specific group of aboriginal peoples.

When ascertaining existing aboriginal rights under § 35 (1) of the Canadian Constitution, the Supreme Court is undertaking a task that the political process could not handle. While the decisions of the Supreme Court ascertain certain rights, they also discard many claims. Although the Supreme Court encourages negotiations concerning the scope and reach of aboriginal rights, especially in aboriginal title cases, it remains to be seen whether the political discourse will be able to reach an agreement on aboriginal rights via negotiations against this constitutional background.*[36]

The above analysis shows that even an uncontested constitutional authorisation offers very little guidance as to the practical application of historical narratives. In the actual cases, this indeterminacy is transformed into a lack of constitutional protection and, consequently, into limitations on the aboriginal way of life. In addition, the examination of case law reveals the extent to which the interpreter's self determines the construction of history from the past, an aspect which is relevant to the overall examination of historical narratives in constitutional adjudication.

1.3. History as a source of constitutional rights and obligations

The opposite of the problem discussed appears in cases where the constitution does not provide guidance to the resolution of a constitutional problem and the judicial review forum substitutes the text of the constitution with historical narratives. In the account of the Canadian Supreme Court's decision regarding the constitutionality of the unilateral secession of Quebec in the *Quebec secession reference*[*37] the justices held that although the Canadian constitution does not have a specific provision on unilateral secession, it is possible to ascertain four constitutional principles which are instrumental to the judicial determination of the issue. In the case the Canadian Supreme Court held that federalism, democracy, rule of law and constitutionalism, and the protection of minorities are such constitutional principles which have always marked the application and operation of the Canadian constitution ever since the making of the first constitution act in 1867. The justices inferred these constitutional provisions from the constitutional history and the past of the federation, referring to numerous examples. Thus, the reasoning of the Supreme Court is based on a robust narrative of continuity. On the basis of these constitutional principles the Supreme Court concluded that while unilateral separation of provinces is prohibited, secession is possible if the population of the province clearly decides for it in a referendum, and if — on the basis of such a referendum — the terms of the secession are negotiated. On the basis of unwritten constitutional principles derived from history, the Canadian Supreme Court established an obligation to negotiate secession. It is important to point out that the obligation to negotiate secession amounts to a new manner of constitutional amendment.

The Canadian Supreme Court's reliance on historical narratives in the case points to intricacies in understanding judicial deference and various problems pertaining to constitutional continuity and the status of unwritten constitutional norms.

1.3.1. Judicial deference

In the decision the Supreme Court stressed the non-enforceable nature of the obligation to negotiate. When holding that the obligation to negotiate secession is not enforceable in court, the justices emphasise that the decision on secession pertains to the political branches. Thus, as the decision of the Supreme Court leaves the resolution of the issue of secession to the political process, the decision is deferential as far as judicial involvement in the enforcement of the obligations prescribed is concerned. Note, however, that the Canadian Supreme Court derived the obligation to negotiate from four newly identified, unwritten constitutional principles. These aspects and potential implications of the decision of the Supreme Court are not the signature traits of judicial deference.

1.3.2. Continuity

In the *Quebec secession reference* the Canadian Supreme Court heavily relied on confederation history as a source of constitutional obligations. In order to turn past events into constitutional rules for the present, the Court used a strong narrative of continuity. Although so far the Supreme Court did not derive new constitu-

[36] See *Delgamuukw v. British Columbia* (Note 26), paragraph No. 195. For an argument that aboriginal title claims shall be negotiated rather than litigated see G. R. Schiveley. Negotiation and Native Title. Why Common Law Courts are Not the Proper Fora for Determining Native Land Title Issues. – Vanderbilt Journal of Transnational Law, 2000, Vol. 33, No. 2, p. 427.

[37] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (hereinafter: Quebec secession reference. The reference was an attempt to clarify the constitutional relevance and potential consequences of Quebec's long-voiced demands to secede from the rest of Canada.

tional principles and did barely use the ones created in the *Quebec secession reference*, the justices nonetheless created an interpretive device which has the potential to give rise to new constitutional norms and constitutional obligations any time in the future.

In this respect it is important to add that the Canadian Supreme Court is not the only constitutional review forum which attributes special significance to constitutional continuity. Since its decision in the freedom of association case in 1971[*38] the French Constitutional Council has confirmed numerous "fundamental principles recognised by the laws of the republic". "Fundamental principles" are mentioned in the preamble of the 1946 French Constitution, a document which — along with the 1789 Declaration of Rights of Man and Citizen — is invoked by the preamble of the French Constitution (1958) in force.[*39] The 1946 preamble does not specify "fundamental principles". The Constitutional Council ascertains these fundamental principles from legislation passed by republican governments in a self-restrained fashion.[*40] According to Favoreu the fundamental principles are the expression of the continuity of republican constitutionalism.[*41]

Certainly, in certain respects the French approach towards "fundamental principles" resembles the concept of interpretation followed by the Canadian Supreme Court in the *Quebec secession reference*. When deriving principles with normative consequences both judicial review fora constructed the past through the screen of a dominant rhetoric. The French Constitutional Council relied on the conceptual framework of the republican tradition of France; in the Canadian case the Supreme Court relied on the success of the federal structure of government (confederation). There is, however, a major difference: the power of the French Constitutional Council to establish fundamental principles may be based on the text of the preamble of the constitution. In the Canadian context such a textual support is not available in the written constitution. Furthermore, the French Constitutional Council derives the "fundamental principles" from legal rules which were in force or are still in force at the time of the decision. Thus, the normativity of the fundamental principles is well founded. In contrast, the Canadian Supreme Court established the constitutional principles on the basis of conclusions drawn from the history of the confederation.

1.3.3. Situating constitutional principles

In addition, when establishing the constitutional principles the Supreme Court did simply place them among the already existing constitutional norms, and did not describe their status in the system of written and unwritten constitutional norms (such as constitutional conventions). This failure might be partly due to the fact that constitutional principles were derived from a source external to the text of the Canadian constitution, from the history of the confederation along a sweeping narrative of constitutional continuity. Some may argue that as a result, it is highly unlikely that such principles may be in conflict with the constitution.

In this respect note, on the one hand, that the Canadian Supreme Court's reading of the message of constitutional continuity is only one interpretation. The secessionist politicians in Quebec draw different conclusions from the past of the confederation. What is a story of accommodation for one party is a story of abuse for the other. This finding may have especially serious consequences in the Canadian context as the obligation to negotiate established by the Supreme Court on the basis of the constitutional principles is not enforceable in court. As a result, the constitutional obligation to negotiate is a duty which may be breached without recourse or remedy. Those who do not agree with the Supreme Court's interpretation of confederation history and its constitutional consequences may share their disagreement with fellow actors of the political process but not with the Supreme Court. If the justices' interpretation of confederation history is contested, it results in a violation of a constitutional norm which cannot be remedied.

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[38] DC 71-44 of July 16, 1971 on the freedom of association. See especially '*Considerant 2*'.

[39] Note that the 1958 French Constitution does not have a 'bill of rights'. The preamble of the 1958 French Constitution refers to the solemn attachment of the French people to human rights and the principles of national sovereignty as defined in the 1789 Declaration of Rights of Men and Citizen, reaffirmed and complemented by the preamble of the 1946 French Constitution.

[40] The Constitutional Council ascertained about a dozen fundamental principles so far. L. Favoreu, L. Philip. Les grandes decisions du Conseil constitutionnel. 7th ed. Paris: Dalloz/Sirey, 1993, p. 265; also M. Lascombe. Droit constitutionnel de la Veme Republic. Paris: Hartmann, 1995, p. 248. Some of these 'fundamental principles' were established in the jurisprudence of the Conseil d'Etat before. P. Avril, J. Gicquel. Le Conseil constitutionnel. Paris: Monthchrestien, 1995, p. 41; C. Emeri, Ch. Bidegaray. La Constitution en France de 1789 a nos jours, Etudes de droit politique et constitionnel. Paris: Armand Colin, 1997, p. 174.

[41] L. Favoreu. Les principes fondamentaux reconnus par les lois de la republique. – La Republique en droit francais. B. Mathieu, M. Verpeaux (eds.). Paris: Economica, 1992, pp. 237–240. In this respect, it shall be noted that although the discretion of the Constitutional Council may be limited in confirming "fundamental principles" under the preamble, there are other unwritten constitutional principles recognised and applied in French constitutional jurisprudence, such as the 'principles particularly necessary in our times', the 'objectives of constitutional value or principles of constitutional value', the 'general principles of law', and the 'republican tradition'.

1.3.4. Amending the constitution

While the Supreme Court emphasised the legality of secession and a negotiated constitutional amendment, the justices did not specify which amendment procedure shall apply as a means to achieve that secession. To be more precise, the Supreme Court did not specify whether any of the procedures prescribed for constitutional amendment in the Canadian Constitution are applicable to secession[*42], or, should the requirement of negotiated secession prescribed by the Supreme Court replace all other procedures of constitutional amendment in the secession context.[*43] This way the Canadian Supreme Court placed itself into the delicate position of possibly altering the amending formula of the very constitution it is supposed to enforce.

Amending formulas of constitutions are usually regarded to be exclusive: they prescribe the only means of amending the constitution. Most constitutional review fora do not have the power to review the constitutionality of constitutional amendments. Express authorisation to do so is granted to the South African Constitutional Court[*44] and the Supreme Court of Nepal[*45] in their respective constitutions. Also, the Romanian Constitutional Court may review initiatives of constitutional amendment, *ex officio*, in a preliminary review procedure.[*46] Note, however, that the decision of the Constitutional Court may be overruled by a 2/3 majority obtained in both houses of parliament.[*47]

On the other hand, a number of judicial review fora asserted jurisdiction to review constitutional amendments indirectly or directly. In the second Maastricht decision[*48] the French Constitutional Council held that although the constitution-making power is sovereign and, as a result, it may abolish, alter or supplement norms of constitutional status in a manner it finds proper, and may also enact new constitutional provisions which violate constitutional norms in force, the power to amend the constitution may be exercised only within the substantive limits imposed by the constitution.[*49] According to Rousseau this finding is a clear indication that the French Constitutional Council finds itself competent to review the constitutionality of constitutional amendments.[*50]

In contrast, the German Constitutional Court held in express terms that the Constitutional Court has the power to annul unconstitutional constitutional provisions.[*51] While the jurisdiction of the German Constitutional Court to review unconstitutional constitutional amendments is not mentioned expressly in written norms, the reasoning of the Constitutional Court has a profound textual support in article 79 (3) of the *Grundgesetz* prohibiting certain categories of constitutional amendments, such as amendments intending to alter the federal structure, the protection of basic rights and human dignity. In the words of the Constitutional Court, the "purpose of article 79 (3) is to prevent both abolition of the substance or the basis of the existing constitutional order, by the formal legal means of amendment /…/ and abuse of the constitution to legalize a totalitarian regime".[*52]

The above cases in which constitutional review fora asserted their jurisdiction to review the constitutionality of constitutional amendment may be regarded as court-invented measures to limit the application of an already existing amending formula.[*53] The decision of the Canadian Supreme Court in the *Quebec secession reference*, however, does not necessarily command such a reading. The obligation to negotiate may be read as a limitation on the application of the amending formula of the Canadian constitution. Nonetheless, it is also possible to see the obligation to negotiate as a new means of constitutional amendment.

The tension between these two equally plausible interpretations was not resolved by the act providing for the rules on negotiating secession (Clarity Act of 2000). Thus, indeed it is possible that in the *Quebec*

[42] Note that before the 1982 constitutional revision the Canadian Constitution did not contain an amendment clause. See P. Hogg. Formal Amendment of the Constitution of Canada. – Law & Contemporary Problems, 1992, Vol. 55, No.1, pp. 255.

[43] P. J. Monahan. Doing the Rules. An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference. C.D. Howe Institute Commentary, 2000.

[44] Section 71 (2), interim Constitution, and §§ 144 and 167 (4) (d), final Constitution of South Africa.

[45] Article 116 (1), Nepalese Constitution of 1990. For an analysis see R. Stith. Unconstitutional Constitutional Amendments, The Extraordinary Power of Nepal's Supreme Court. – American University Journal of International Law & Policy, 1996, Vol. 11, No. 1, p. 47.

[46] Article 144 (a), Romanian Constitution.

[47] Article 145 (1), Romanian Constitution.

[48] DC 92-312, 2 September 1992.

[49] DC 92-312, 2 September 1992, 'Considerant 19' (referring to articles 7, 16 and 89 (4) and 89 (5) of the French Constitution of 1958).

[50] D. Rousseau. La revision de la Constitution sous la Veme Republique, Apres quarante ans, la Constitution de 1958 se reconnait-elle? Available at: http://www.conseil-constitutionnel.fr/ referendum/40q20.htm. Also P. Favoreu. Grandes decisions. 7th ed. p. 825, paragraph No. 74.

[51] BVerfGE, 1, 14 (1951) (*Southwest State* case).

[52] BVerfGE, 30, 1 (1970) (*Klass* (privacy of communications) case), reaffirming the Constitutional Court's jurisdiction to review unconstitutional constitutional amendments.

[53] To the extent such a power was not awarded to a court in the constitution or in subsequent legislation, the assertion of such a power is an instance of judicial activism.

secession reference the justices altered the rules on amending the constitution. This step is bothersome, not only because according to many the amending formula contains and preserves the *raison d'etre* of Canadian constitutionalism[*54], but also because the rules on formal constitutional amendment protect the integrity of the constitution from the passions of the majorities of the day. If so, the duty to negotiate secession derived from the constitutional principles might incidentally endanger the subject they were established to protect.

To conclude, the *Quebec secession reference* is a telling example of a constitutional argument where a historical narrative followed by a constitutional review forum resulted in ongoing political negotiations which affect the fate of numerous governments and individuals and might substantially alter the existing framework of governing. The decision demonstrates not only the flexibility of historical narratives, but also the side effects of a constitutional review forum's reliance on the interpretation of history as a source of constitutional obligations.

Conclusions

The analysis of historical narratives in the jurisprudence of various constitutional review fora from the perspective of the capacity of these references to curb judicial discretion in constitutional adjudication revealed that while the past and history may appear as very sound points of reference, historical narratives are interpretive and normative, and they depend not on objective foundations but on the discretion of the interpreter. These characteristics of historical narratives are especially bothersome in the context of constitutional adjudication. Exactly because of their reputation as objective and non-interpretive, judicial review fora have a tendency to rely on historical narratives in order to clarify or supplement constitutional provisions, to determine their proper scope of application, and sometimes even to substitute constitutional provisions. *Prima facie*, historical narratives look like the ultimate tools of mastering the virtue of judicial deference.

The perils of the application of historical narratives in constitutional adjudication are numerous. Due to the clash between the reputation of historical narratives and their actual characteristics, historical narratives may easily become the facade for asserting undisclosed value and policy preferences. As a result, reliance on historical narratives may undermine the very concept upon which the demand for reasoned opinions is based. References to the past have the potential to sidetrack constitutional reasoning: after all, courts are rarely ever petitioned to provide a proper historical account of a subject, but are rather asked to resolve a constitutional issue. Lengthy elaborations on the proper account of the past lose sight of the actual constitutional issue. In addition, historical narratives have the potential of freezing rights and obligations, and while being commanded to return to a long outgrown *status quo* is already problematic, knowing that there are numerous *status quo*s available for the courts to choose from makes adherence to a past state of affairs even more bothersome.

The analysis revealed that there are as many accounts of the past as there are interpreters. This aspect of historical narratives is especially disturbing when judicial review fora get to choose an account for the polity. In this sense historical narratives are means of inclusion and exclusion. Moreover, not all accounts of the past are intelligible for all interpreters. Unless the various narratives on the past are translated into a format accessible for judicial review fora, these accounts may go unnoticed or may be discarded. In the context of constitutional adjudication such failures tend to result in restrictions on constitutional rights. Furthermore, a restriction which results from such a clash of perspectives is not easy to restore, so missing one chance of being heard might perpetuate the injustice based on the inclusion of the rejected perspective.

Furthermore, because of their indeterminacy, historical narratives may easily deter judicial review fora to the farthest edges of legitimate exercise of the review power. After all, what the flexibility of historical narratives makes possible may not always be within the limits of the review power. The commands of the past might not be prescribed in the constitution — not even in a case where the history of the constitution is argued to give rise to certain obligations. History, indeed, may become a substitute replacing a written constitution, a source of norms to which only the constitutional review forum has access.

Indeed, despite the initial promise of forceful restraint, historical narratives are capable of increasing the indeterminacy of constitutional norms to a dangerous extent. On the one hand, some cases suggest this indeterminacy surrounding historical narratives may also result in the denial of constitutional rights. On the other hand, on the basis of these arguments constitutional review fora may, and do, establish new constitu-

[54] D. Greschner. The Quebec Secession Reference. Good-bye to Part V? – Constitutional Forum, 1998, Vol. 10, No. 1. p. 23. Also, A. C. Cairns. The Quebec Secession Reference. The Constitutional Obligation to Negotiate. – Constitutional Forum, 1998, Vol. 10, No. 1, p. 27; B. Slattery. First Nations and the Constitution. A Question of Trust. – Canadian Bar Review, 1992, Vol. 72, No. 2, p. 261.

tional rights and obligations which were not contained in the constitution. Via such devices judicial review fora redefine the contents of the constitution and command the cooperation of the political branches.

It is crucial to pay attention to serious dangers which call for caution regarding the application of historical narratives in constitutional adjudication. Despite the profound problems which have surfaced, it would be very unrealistic to demand that historical narratives be discarded from the theory or practice of judicial review. The most serious peril of the application of historical narratives is not that they perpetuate indeterminacy in constitutional reasoning, but that this potential is not accounted for. References to history are regarded as the least harmful arguments used in constitutional adjudication, and this premise often shields contestable judicial approaches from critical consideration. This caveat applies not only to specific theories of constitutional interpretation, but on a larger scale, independent of the theoretical framework in which historical narratives are invoked.