



Raul Narits

*Professor of Comparative Jurisprudence,
University of Tartu*

Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts

I was inspired by several things in writing this article, at least two of which were a lucky coincidence. The first has to do with the 15th anniversary of the Constitution of the Republic of Estonia, and the second with several research papers on important problems concerning the working of constitutional courts and constitutional law which I came upon when studying literature on constitutional law and constitutional review for the above anniversary. But there is also a third factor, an international colloquium “The Future of the European Judicial System — The Constitutional Role of European Courts”¹ held in Berlin in 2005, where among many other questions the issue of constitutional courts in states with revolutionary changes in entire socio-political system was raised.

This issue undoubtedly holds significance because of where the Constitutional Review Chamber of the Constitutional Court of the Republic of Estonia is positioned in the legal system and due to the content of its work, especially some basic principles of the Chamber, two of which I have chosen for deliberation in this article. Those two are principles of law and legal dogmatics, which are significant methods (means) of formation of opinions, argumentation and of course also vocalising how the legal reality (in its broad sense) corresponds to the word and meaning of the constitution. The function of constitutional courts is not merely the traditional administration of justice. Work of constitutional courts has many contact points with legal policy. It is constitutional courts that are most influenced by legal policy, and yet it is constitutional courts who to some extent make legal policy. The author is of the opinion that principles of law and legal dogmatics are instruments that “work” for the benefit of implementation as well as formation of legal policy. Legal policy should be interpreted as shaping of social and political life by means of legislative provisions drafted and established by public authority.*² Such a definition also includes implementation of justice. Also a jurist can be active in the formation of legal policy. He or she has two tasks: a reasonable reconstruction of the problem that needs regulation, and thereafter a quest for a better solution. If he or she also works with constitutional law, then he or she needs to understand political processes for better lawmaking.

Concerning dogmatics — when jurists talk about dogmatics much remains unclear, even the definition. Moreover, mentioning dogmatics sometimes even evokes negative emotions. The reason for this is that in many cases dogmatics — regardless of the area of application — is understood as something unchangeable, even petrified. Below I will deliberate over whether law and also jurisprudence should say farewell to dogmatics, and explain what dogmatics exactly stands for. Those issues need to be reviewed not only in the context of

¹ On the initiative of the European Civil Liberties Network (ECLN) and in co-operation with the International Association of Constitutional Law (IACL) an international ECLN colloquium “The Future of the European Judicial System — The Constitutional Role of European Courts” was held on 2–4 November 2005 in Berlin.

² B. Rüthers. *Rechtstheorie*. 2. Aufl. München: Beck 2005, pp. 72, 91.

national legal orders but also in the European context. The question of boundaries of constitutional law was clearly raised at the above Berlin conference, where discussion was heated and a demand for the development of contemporary European constitutional law theory was voiced.^{*3}

Law is in fact a special instrument of power for the realisation of political will. In that way each legal provision embodies a piece of normatively secured policy. It is nevertheless a fact that courts do not base their judgments only on legislative provisions. For courts the regulatory basis for decisions is much wider. As I said, this article views principles of law and legal dogmatics as legal guidance for making relevant decisions, especially in constitutional courts, which have the most direct and open contact with law and legal policy.

1. Principles of law

Indeed, what are principles of law? One of the shortest definitions could be “very important general rules”. Yet, not everybody understands why that is the case. One explanation is that principles of law have to do with values.^{*4} Another opinion is that the importance of principles stems from their bond to the idea of law^{*5}, the most important component of which is justice. A reference is also made to the link between principles and the highest law.^{*6} The significance of principles is also associated with their sense of legal order as such.^{*7} The importance of principles is sometimes underlined in the context of the so-called metanormative function.^{*8} The study of principles has basically emerged in the context of globalisation.^{*9}

Contemporary literature in the field that has most contributed to the theory orientated discussion on principles in German language is “Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts”^{**10} by J. Esser published in 1956, and “Taking Rights Seriously”^{**11} by R. Dworkin published in 1977 regarding common law. The above authors agree on certain things, but have significant differences in others.^{*12} Both works underline that principles refer to the logical structure that derives from provisions, and not only in the sense of different gradation, but also definite differentiation. What are the differences in Esser’s and Dworkin’s positions on principles of law?

For Esser a principle always means a so-called larger leeway for the judge than offered by a provision in a legal source. The size of such a leeway depends on the fact that a judge must somehow form that principle. Dworkin is on an entirely contrary opinion that a principle narrows a judge’s decision-making space. For Esser a principle is needed to justify a judgment in the legal space, but for Dworkin it is a reference to something important. For Esser principles are separate from ethics. Dworkin on the other hand considers principles to be ethical, and the existence of principles disproves the positivist understanding of separation of right and moral; whereas according to Esser principle of law applies only when used in judgments. For Dworkin principles of law apply because they are just (provided that they are coherent with the legal order).^{*13}

The well-known legal theorist Robert Alexy finds, based on Dworkin and being familiar with Esser’s dogmatics, that principles are distinct optimisation orders, which need to be complied with at different levels. Whereas provisions are rules that either must be followed or need not be followed which makes them definitive.^{*14} Thus, implementation or formation of principles has nothing to do with deductive subsumation process. Another

³ Tagungsberichte. The Future of the European Judicial System — The Constitutional Role of European Courts. – Juristen Zeitung 2006/5, p. 242.

⁴ C.-W. Canaris. Systemdenken und Systembegriff in der Jurisprudenz. Berlin: Duncker und Humblot 1969, p. 50.

⁵ K. Larenz. Methodenlehre der Rechtswissenschaft. Berlin: Springer 1979, pp. 207, 410.

⁶ H. J. Wolff. Rechtsgrundsätze und verfassungsgestaltende Grundentscheidungen als Rechtsquellen. – Gedächtnisschrift für Walter Jellinek. O. Bachoff (Hrsg.). München: IsarVerl. 1955, p. 37 ff.

⁷ A. Peczenik. Principles of Law. The Search for Legal Theorie. – Rechtstheorie 1971, p. 30.

⁸ Two things are understood under metanormative function: first is the so-called programming function (*ex ante*), which is intended for example for legislation, and the motivation of provisions (*ex ante*). See J. Raz. Legal Principles and the Limits of Law. – The Yale Law Journal 1972, p. 839 ff.

⁹ A. von Bogdandy. Europäische Prinzipienlehre. – A. Bogdandy (Hrsg.). Europäisches Verfassungsrecht, Berlin: Springer 2003.

¹⁰ J. Esser. Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Tübingen: Mohr 1956.

¹¹ R. Dworkin. Taking Rights Seriously. Cambridge: Harvard University Press 1977.

¹² Several studies have analysed the arguments by those authors. E.g., see J. A. Pascua. Die Grundlage rechtlicher Geltung von Prinzipien – eine Gegenüberstellung von Dworkin und Esser. – G. Orsi (Hrsg.). Prinzipien des Rechts. Frankfurt am Main: Lang 1996; R. Alexy. Zur Struktur der Rechtsprinzipien. – B. Schiller, P. Koller, B.-Ch. Funk. Regeln, Prinzipien und Elemente im System des Rechts. Vienna: Verlag Österreich 2000; A. Jakab. Prinzipien. – Rechtstheorie 2006 (37), Duncker und Humblot, pp. 49–65.

¹³ For an abstract of Esser’s and Dworkin’s arguments see A. Jakab (Note 12), p. 49 ff. The author thinks that those differences do not have much bearing, though. What is important is what unites Esser and Dworkin — the different logical structure of principles of law and legislative provisions.

¹⁴ R. Alexy. Zum Begriff des Rechtsprinzips. – Rechtstheorie, Beiheft 1, 1979, p. 79 ff.

difference between principles and provisions is the fact that in case of conflicting provisions collision rules apply, whereas a conflict of principles is solved by “considering the circumstances of the case the preferential regulation is determined between both possible practicable principles”.¹⁵ Here preferential means that what follows is the required legal consequence deriving from the principle. The third difference between principles and provisions, according to Alexy, is that the higher the level of non-compliance, the bigger must be the importance of complying with the second principle.¹⁶

How to recognise principles and find them? An argument can be made for the importance of principles and what differentiates them from provisions, but without recognising them, the above is practically useless.

In civil law the most natural and also logical place to look for principles is the objective law itself. Text of a law may *expressis verbis* denote a certain part of a text as a principle, but a principle may be formally defined without being expressly named as a principle.¹⁷ Another possibility to find principles is to analyse current law (laws, regulations and administrative provisions). Principles are established the same way both in civil law and common law legal cultures.¹⁸ The underlying idea is that principles of law cannot be and are not something completely separate from objective law itself. Figuratively speaking, principles of law are similar to abstract provisions, but at a more general level. Nevertheless, two branches can be distinguished: the first is orientated to finding a traditional provision-based generalisation, and the other additionally includes study of the relevant political-moral context.¹⁹ Principles of law are formed also in jurisprudence. What is especially important in this context is that court practices, especially that of constitutional courts, can significantly contribute to principle of law.²⁰ In rule of law the role that courts play in formation of principles is very natural and even necessary. It is courts in rule of law who are the last instance of judgment. Therefore one can even speak about the triumph of judge-made law.²¹ In Germany, for example, first cases were filed already at the dawn of the 20th century. Legal theorist B. Rütters even argues that the most important part of today’s law is no longer statutory law, but the judge-made law of the last instance.²² Similar situation can be confirmed in all parts of today’s legal orders, but is especially recognisable where objective law has high level of abstraction (e.g., constitutional law) or where regulations have gaps.²³

I would like to elaborate on the functions of principles now. To explain their purpose — why they are needed at all. Generally speaking, the function of principles may be reduced to the function of a legal provision.²⁴ We can thus speak about the regulative function of principles. Direct regulative influence cannot be excluded²⁵, but in most cases the scheme operates through and by certain complete legislative provisions. This leads to but one logical conclusion: application of principles allows arranging the reality relevant to the law in accordance with the governing political will. Application of principle in civil law legal culture certainly requires some effort, since in most cases principles are not written down in legislation, but need to be formed and thereafter applied. Principles of law born out of analysis of positive law may often have a so-called heuristic function. Literature rightly notes that understanding and use of principle in the heuristic sense was first characteristic to Germanists in the 19th century.²⁶ It had to do with the fact that putting the idea of general codification into practice made legal order codified in quite an incomprehensible way and contained many contradictory provisions. There was an attempt to reduce all that to essential principles only and give comprehensive structure to legal order.²⁷ The same function is also needed in today’s rule of law. Structure and comprehensibility of legal order are the key factors of legal certainty. It is legal certainty, being a component of the idea of law and at the same time an independent principle of law, which in many cases is the immanent condition of effective functioning of society. But principles have an important role in the application of law. This gives a reason to mention the practical legal function of principles. The practical legal function of principles means first of all

¹⁵ R. Alexy (Note 12), p. 34.

¹⁶ *Ibid.*, p. 36.

¹⁷ O. Weinberger. Revision des traditionellen Rechtssatzkonzeptes, in B. Schiller. – P. Koller, B.-Ch. Funk. Regeln, Prinzipien und Elemente im System des Rechts. Vienna: Verlag Österreich 2000, p. 64.

¹⁸ S. Vogenauer. Die Auslegung von Gesetzen in England und auf dem Kontinent. Tübingen: Mohr Siebeck 2001, p. 1257 ff., 1273.

¹⁹ Literature suggests that Dworkin represents the latter branch. The so-called political moral has to be constantly kept in mind upon the right formation of a principle. A. Jakab (Note 12), p. 59; R. Dworkin (Note 11), pp. 66, 126.

²⁰ O. Weinberger (Note 17), p. 60.

²¹ B. Rütters. Rechtsdogmatik und Rechtspolitik – Eine verkannte Verknüpfung. – Zeitschrift für Rechtspolitik 2005, Heft 1, p. 6.

²² B. Rütters (Note 2), pp. 41, 235–258, 822, 865.

²³ What it actually upholds for legal dogmatics that statutory law is moving closer and closer to judge-made law elaborated in the legal dogmatics chapter of this article.

²⁴ Reference is made to the so-called complete legislative provisions, which are categorised into regulative and legal protection instruments according to their social content. See R. Narits. *Õiguse entsüklopeedia* (Encyclopaedia of Law). 2nd supplemented and amended edition. Tallinn: Juura 2002, pp. 104–106 (in Estonian).

²⁵ “Principles as grounds for particular exceptions to laws”. See J. Raz (Note 8), p. 840.

²⁶ A. Jakab (Note 12), p. 60.

²⁷ S. Jacoby. *Allgemeine Rechtsgrundsätze*. Berlin: Duncker und Humblot 1997, p. 139 ff.

that principles play an important role in argumentation. Literature denotes principles understood in that way to be rules of argumentation.^{*28} When talking about argumentation principles, it is only natural to speak about interpretation. Argumentation is after all the part of interpretation which, figuratively speaking, “meets the world”. It is therefore well justified to denote the practical legal function also as an interpretative function.^{*29} Of course, it does not make sense to use that method upon routine interpretation. But it is useful if two or more possible interpretations exist. Clear preference should be given to what is compatible with principle of law. Exemptions are possible, the most significant being perhaps a situation where a principle of law has definitive limits. Such situations should be solved restrictively.^{*30} Practical legal function also includes situations where principles are used in argumentation as a support method to reach the desired objective.^{*31} In practice principles can be used to reinforce legal power of a judgment. Here principles would be the so-called allowed arguments to help, alongside and with the obligatory arguments, to come to law abiding decisions.

I would like to point out a situation where principles obtain a very powerful meaning in legal practice. Namely, when a judgment is based solely on a principle of law. This is possible due to the fact that principle of law is — as mentioned above — with a very high level of abstraction. Moreover, such an option to use principles of law leads way to practice of avoiding formal reference to outdated provisions, which live on through the implementation of the principle of law. Use of principles of law in legal argumentation is a method how comparative law can influence national decisions. Use of principles of law allows referring to provisions of other legal orders and builds sort of a bridge between national and foreign law.^{*32} Literature in the field also underlines the connection between principles of law and moral. Interestingly, even celebrated legal positivists have done the same, not to speak about followers of natural law^{*33}, whereas for the latter principles are not an easy means to justify arbitrary moral but the embodiment of positivistic moral. And finally, I cannot help but note also the fact that the advancement of law by principles should also be treated as a practical legal function.^{*34} Be it added that one of the founders of the discussion on principles J. Esser was the legal scientist who, unlike earlier study of method, which argued that principles of law are established by a judge, highlighted the advancing role of principles of law themselves.^{*35} This function has always played a greater role at places where legal order is young, lacks or has contradicting doctrines and legal dogmatics.

To conclude the discussion on principles of law I would like to briefly rest on the argument that the validity of legal acts depends on their conformity to principles of law. Literature denotes this situation as the function of scales of principles of law.^{*36} For the sake of clarity it should be said here that traditionally legal orders have vertical structure, which means that provisions placed higher are *a priori* predominant over lower legislative provisions. The same applies to principles, which can also be found on different steps of the vertical legal order. We also mentioned the fact that courts can form principles (European Court of Justice), which are applied without a reference to a constitution or constitutional law (invisible constitution). There is nevertheless a situation where the formed principles have validity scale not because they are principles but because they are ranked higher in the legal order. It is possible that principles of law get incorporated in constitution but it is does not have to be this way. Not all principles, and especially in private law, have made their way into constitutions. Thus, the function of scales is not specific to principles, but a hierarchical maxim intrinsic to legal orders.^{*37}

²⁸ N. MacCormick. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. Oxford, New York: Oxford University Press 1999, p. 113.

²⁹ T. Eckhoff. *Guiding Standards in Legal Reasoning. – Current Legal Problems*. Oxford 1976, pp. 205–219; J. A. Usher. *General Principles of EC Law*. London: Longman 1998, p. 122 ff.

³⁰ S. Vogenauer (Note 18), p. 1275.

³¹ As an example Dworkin brings the case of *Riggs v. Palmer*, where in spite of a specific regulation the payment of inheritance was refused to the grandson who had killed his grandfather. Court ruled against the current regulation in the name of the principle that “one cannot benefit from one’s own wrongdoing”. See R. Dworkin (Note 11), p. 23.

³² A chrestomatic example is France after the adoption of *Code civil*, where due to the *principes généraux* Roman law continued to apply. The “bridge function” is especially important where representatives from different legal cultures are together trying to find a lawful decision. A traditional example here is union law or international law, as well as the European Union law as a relatively independent legal order. European Court of Justice is active in giving contemporary content to many principles of law by trying to emanate from the idea of supranationality. Europe is in essence a melting pot of different legal cultures, families of law, all of which have their own rich history, traditions, doctrines, etc.

³³ H. Kelsen underlined for example that legal principles always leave room for deliberation. See H. Kelsen. *Allgemeine Theorie der Normen*. Vienna: Manz 1979, p. 97. The follower of natural law G. Del Vecchio argues that provision of principles in codes is as sign of legislator’s foresight of a code could not function without such moral rules. See G. Del Vecchio. *Les principes généraux du droit. Recueil d’études sur les sources du droit, en l’honneur de Francois Génay*. Paris 1934, p. 73 ff.

³⁴ J. Raz (Note 8), p. 841.

³⁵ J. Esser (Note 10), p. 83.

³⁶ J. A. Usher (Note 29), p. 123.

³⁷ A. Jakab (Note 12), p. 64.

2. Legal dogmatics

It was mentioned in the introduction that legal dogmatics cannot be univocally defined. Supporters of multi-level approach^{*38} denote legal dogmatics also as practical jurisprudence. The reason for that is because legal dogmatics stands the closest to legal practice in the context of multi level study of law and is most directly linked to reality in the cognitive sense. Dogmatics has traditionally two levels: first the general level, where dogmatics is understood as scientific processing of all legal material.^{*39} In a more specific sense dogmatics is understood as sentences that form a certain system, which enable to conceptually and systematically value the application of law.^{*40} This is the level where dogmatics differentiate according to their subject areas. Thus, area-specific dogmatics are “[...] “saved” collections of right decisions, i.e., decisions that are reasonably grounded in the framework of the current legal order”.^{*41} Yet, there have always been critics of legal dogmatics. Reasons have been different, but one motif is that dogmatics cannot stand the test of time, because it should intrinsically depict something changeless, petrified. Giving such content to legal dogmatics would indeed confront it to the actual quality of life and the requirements that the ever-changing reality poses to and expects from law. Jurisprudence knows such a situation as a cyclically repeating argument over liberating the “current” dogmatics from its historic roots. That debate tends to surface especially when society is going through profound changes. It is thus an ancient topic for debate.^{*42} B. Rütters writes: “Examples show that dogmatic arguments over principles are regular side products of actual or desired turning-points. [...] Those standpoints and discourses have lead to an expansive divorce between legal dogmatics and history of law. Today, these are two different disciplines in Germany in the sense of subject, methods and interest of study.”^{*43}

Legal dogmatics should nevertheless not be dreaded. One has to keep in mind that legal dogmatics is not a collection of dogmas as such, but a study of dogmas (regardless of how much those dogmas have to do with history). Dogmatics has different meaning and weight, even function, in different subject areas. What is common with all dogmas is probably the fact that dogmas represent binding, recognised and usable basic knowledge for a certain field, whereas the nature and the degree to which they are binding may differ greatly. Jurisprudence has already since its inception expressed a tendency (even need) to formulate rationally provable basic standpoints.^{*44} We can regard as an axiom of today’s jurisprudence of values the argument that a legal judgment is one based on values, and that the first source to look for values is the constitution with its binding catalogue of fundamental rights and liberties. In this context — i.e., applied to law — dogmatics means explanation of fundamental values, solutions to as well as reasons of problems. “Dogmatics must explain current law with rational persuasion power and in the light of generally accepted fundamental values (beliefs on values). It is the **intrinsic system** of legal order that has evolved over different stages of development, is non-compensious and often controversially transcribed.”^{*45}

He also deliberates whether the time has come to abandon dogmatics in Europe, or if it has already actually happened. B. Schlink writes that jurisprudence also has a different path. A glance on American-type perception on constitutional law reveals that it is not characterised by dogmatic systems, but by cases and chronologies of their judgments, with significant and binding notes appended. Chronologies do not form dogmatic systems, but they do give a co-ordinated complex picture. It is based on *stare decisis*, a principle that requires abiding by decisions that are once already made.^{*46} In case law the *stare decisis* principle is the functional equivalent to dogmatic creation of systems in a legislation or regulatory provision based legal culture. We cannot find the *stare decisis* principle written down in constitutions or other laws — it is an object of argument the subject

³⁸ On the second level it has to do with “legal dogmatics”, i.e., the practical (dogmatic) jurisprudence, that researches law and its interpretations in a “systematic form”. See W. Krawietz. Theorie und Forschungsprogramm menschlichen Rechtserfahrung – allgemeine Rechtslehre Otto Brusiins. – Rechtstheorie 1991 (22), p. 17.

³⁹ Dogmatics as the synonym of the jurisprudence. See R. Alexy. Theorie der juristischen Argumentation. 2. Aufl. Frankfurt am Main: Suhrkamp 1991, p. 307.

⁴⁰ Fr. Müller, R. Christensen. Juristische Methodik. 8. Aufl. Berlin: Duncker und Humblot 2002, p. 403.

⁴¹ U. Volkmann. Veränderungen der Grundrechtsdogmatik. – Juristen Zeitung 2005/6, p. 262.

⁴² In many cases legal dogmatics generated and formed over times seems to be a network of principally outdated views, which contradict new perceptions of values, which should in fact be included in dogmatics. See C. Bergbohm. Jurisprudenz und Rechtsphilosophie. Abh. 1: Das Naturrecht der Gegenwart. Leipzig: Duncker und Humblot 1892, p. 531 ff.; H. Kantorowicz. Der Kampf um die Rechtswissenschaft. Heidelberg: Winter 1906, p. 104 ff.; H. Rottleuthner. Rechtswissenschaft als Sozialwissenschaft. Frankfurt am Main: Fischer-Taschenbuch Verl. 1973.

⁴³ B. Rütters. Die neuen Herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 2.

⁴⁴ Already ancient Roman jurists knew that laws are not ready-made solutions for solving legal issues. Jurist Pomponius has said: “[...] *quod sine scripto in sola prudentium interpretatione consistit*” (dogmatics, although not written down in law, is based on clever interpretation. – D. 1.2.2.12).

⁴⁵ B. Rütters (Note 43), p. 3.

⁴⁶ B. Schlink. Abschied von Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel. – Juristen Zeitung 2007/4, p. 160.

matter of which is clear to everyone.^{*47} What makes one think is what B. Schlink writes in his analysis of German constitutional court practice: “The changes in the practice of administration of justice at the German Constitutional Court are neither inspired by dogmatic tuning nor do they allow to be interpreted by the *stare decisis* principle, which is doctrine that allows derogations from the basically agreed way of administration of law. These changes do not react to new practical needs, new facts or new legal bases [...]. German constitutional court says farewell to the tradition of dogmatic jurisprudence and replaces it with a causative tradition of administration of law. In the author’s opinion it is not a rational way, though. Letting dogmatics go does not automatically mean commitment to precedent. What rather happens is that commitment to dogmatics is replaced by non-commitment to precedence and commitment to nothing.”^{*48}

The above is indeed part of the reality of today’s administration of law. I consider it perfectly normal that in Europe, where statutory law and case law have existed side by side, those two legal cultures tend to somewhat approach. I am not, and I could not be, talking about substitution of those cultures — which B. Schlink seems to be most afraid of — but the convergence and entwining of relatively independent cognitive legal cultures. It is thus a process both historical and objectively grounded. B. Schlink has probably felt so as well, since he ends his article with a chapter titled “New Constitutional Jurisprudence”.^{*49} The need for qualitatively new theory of constitution was spoken about also at the forum on constitutional courts in 2005.^{*50}

Appeals to give up legal dogmatics should not be taken seriously. Legal dogmatics can contribute to legal practice. First I would remind the regulating role of legal dogmatics. It is legal dogmatics that helps to organise — or even systematise — the ever expanding legal massive of law. Without dogmatics the today’s practice of law would probably be incomprehensible. The certain order created by the legal dogmatics helps to cast a glance at the inner value system of a legal order. Legal dogmatics has always played the role of a stabilisation agent. The observations settled in legal dogmatics are applicable to regulated areas of different quality. Today legal dogmatics helps to bring two different legal cultures closer to each other. Without legal dogmatics tensions between legal cultures would persist and the approaching of those cultures could be taken as substitution. At least in the civil law legal culture it is the legal dogmatics that helps to ensure that disputes of the same quality would not be argued over and over again, but be based on the existing dogmatics that has valued certain solutions and offered a dogmatic pattern of solution. It must not be forgotten that legal dogmatics has been and will be born in situations of tension — through arguments and even confrontations. But once being established, it is difficult to withstand and argue with it. That should be the case at least in a rationally understood legal practice. However, legal dogmatics cannot be something petrified, and if legal practice ignores a dogma, then it must be motivated, i.e., grounded with valid arguments. The thing with law is that repeated regulation of similar situations may, for example, be motivated with different ends in the view. Lawyers solve yesterday’s cases on the basis of week-old laws. This means that the objective of legal dogmatics cannot in any way be eternalizing existing guidelines, but neither can it be effortless neglect of the existing. Literature in the field argues: “For the sake of legal certainty deviation from traditional dogmatics cannot be justified even if there are good arguments for the deviant solution. The motivation behind the deviation must, in addition to breaking the already appreciated doctrine, justify also the society’s loss of trust against the current and thus far recognised legal order.”^{*51} Thus, if a ruling is made against current dogmatics, it requires a substantial load of argumentation. For the applier of law legal dogmatics is a legally binding limit, or more precisely — legal dogmatics is a boundary stone for legal interpretation.^{*52} We can but agree with systems theorist N. Luhmann who is of the opinion that legal dogmatics binds applications of law with constitutionalism, principles of democracy and separation of powers in a rule of law. To a large extent it determines the mutual relations between the program (law, principles of law, dogmatic statements) and solutions. He defines the terms and boundaries of the leeway for the judge’s decision to limit the admissibility and pattern of argumentation of new constructions for solutions to legal problems.^{*53}

In this chapter I would like to underline also dogmatics’s connection to legal policy. In reality countries do not actualize timeless values or timeless justice, but orientate to values scales accepted in the society (the

⁴⁷ B. Schlink nevertheless brings one example in his article on how in 1992 the U.S. Supreme Court explained the content of a principle related to a case. Court emphasised that application of a principle means general adherence to a made decision, and the principle itself requires no exceptions. Exceptions are justified, if the prior decision is no longer practical, relevant facts have changed or the relevant law has evolved. But even then there are circumstances that do not support deviation: the parties have become to trust the decision made, or the society is tuned in such a way that the deviation would hurt its legitimate expectations or involve material social damage. Whereas the minority of the court would nobly like to allow deviances, give more weight to new legal arguments and beliefs. But the minority nevertheless remains loyal to principle. See 505 U.S.833 (1992, 854 ff.) — referred to by B. Schlink (Note 46), p. 161.

⁴⁸ B. Schlink (Note 46), p. 161.

⁴⁹ *Ibid.*, pp. 161–162.

⁵⁰ See Note 2.

⁵¹ B. Rütters. Die Neuen Herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 10.

⁵² For the so-called unlimited interpretation see B. Rütters. Die unbegrenzte Auslegung. 5. Aufl. Heidelberg: Müller 1997.

⁵³ N. Luhmann. Rechtssystem und Rechtsdogmatik. Stuttgart: Kohlhammer 1974, p. 24.

today's globalised world). "It is in this "century of ideologies" [the 20th century — R.N.] [...] when the tense and often ignored issue of *law and metaphysics* or also *law and ideology* emerges."⁵⁴ This means that even within one state different understandings of "justice" often compete at the level of government, parliament and also administration of justice. The traditional standpoint worth supporting in application of law is that in a democratic state the source for the application of law is the written legislation. This is the only way to implement the legal policy objectives that the legislator has drafted. Here every absolute legal provision is a scale of behaviour for the applier of the provision. Any interpretation based on a provision must generally reveal the point or objective entered into that provision by the legislator. Thus, the applier of the law should above all find those values in the provision, which were considered as values by the legislator.⁵⁵ But since understanding of a text requires understanding of the reality which that provision attempts to regulate, then it may happen that the quality of the reality has since the adoption of the provision considerably changed. Tension arises between the historic reality and the present reality. The decision should obviously be made on the basis of current scales of values. In other words, the structure of facts and the perception of values are changing. A question arises whether and how can "old" legislative provisions be reduced to new factual circumstances and perceptions of values in order to be put into practice. Here the problem could probably be solved not by the traditional interpretation of law; instead legal dogmatics would be in the service of the applier of law in the meaning of judge-made law.⁵⁶ The situation has been critically assessed, and it is argued that in essence it is a question of power sharing between parliament and legal authorities.⁵⁷ Laws grow old and have in some sense gaps already at the moment of adoption, because life is dynamic and cannot be put on hold with an adoption of a law. That is why giving rational meaning to laws has always been and will always be legal authorities' long-term constitutional task, and legal dogmatics strongly supports the attainment of that task. In such a situation judges are on one hand of course bound to laws, objective law, but on the other hand they are engaged in the formation of legal order with the help of, inter alia, legal dogmatics. Upon the separation of powers in a rule of law it is thus not justified to strictly separate the application of law from any activities which help to develop judge-made law. Here I would not like to subscribe to the opinion that a judge must clearly recognise "[...] whether he or she is acting as a "servant of law" [...] or is a "builder of legal order" or a "legal piano payer" who forms law (judge-made law) on the basis of legislation".⁵⁸ Through judge-made law and legal dogmatics a judge inevitably takes hand in legal policy. It is clear that judge-made law has changed dogmatics. Jurisprudence has over times always with the help of "good interpretations" searched for some uniform internal system for legal order, whereas the central starting points have been goals of objective law. But we also need to see and admit that a dual nature of norm creating (or norm shaping) power is inevitable in a rule of law. Objectively and actually the responsibility lies with the legislator as well as the judicial power, especially higher judicial power. Guidelines of legal policy thus stem not only from objective law (legislation), but also to some extent from legal authorities.⁵⁹ What needs to be avoided is a parliamentary democracy becoming a state where instances of court create their own "free law".⁶⁰ Principles of law and legal dogmatics serve as a "compass" for judges, which, if used, help judges to come to a law-abiding decision.

3. In place of conclusions

It can be concluded from the above that the use of both principles of law and legal dogmatics includes a certain legal policy component. It is natural that this process will thrive, because courts, like any other governmental power centres, tend to take on more powers and tasks, not give away. In some ways it also concerns constitu-

⁵⁴ B. Rütters. Methodenrealismus in Jurisprudenz und Justiz. – Zeitschrift für Rechtsphilosophie 2007/1, p. 46.

⁵⁵ Literature in the field pointed out already long ago that if, in the course of application of law, value scales agreed in legislation are either expanded or confined or even ignored, then we are not talking about interpretation any more. See K. Engisch. Die Einheit der Rechtsordnung. Heidelberg: Carl Winter Verl. 1935, p. 88.

⁵⁶ In Germany several parts of labour law, but also several important areas of civil law (e.g., family law) were born due to the realisation of the judge-made law principle. The dogmatics of fundamental rights emerged the same way, mainly due to the work of the German Constitutional Court.

⁵⁷ B. Rütters asked already some years ago whether Germany is not on its way from a democratic rule of law to an oligarchic rule of judges. B. Rütters. Demokratischer Rechtsstaat oder oligarchischer Richterstaat. – E. Picker, B. Rütters (Hrsg.). Freiheit und Recht. Symposium zu Ehren von Prof. Dr. Reinhard Richardi. München: Beck 2003, pp. 111–136.

⁵⁸ B. Rütters (Note 2), pp. 235–257, 279.

⁵⁹ Case law of German Constitutional Court shows that provisions are not checked only against the constitution, legal instructions are also prescribed to the parliament on how legislation in a certain area should be in order to hold up in court. Rütters characterises the situation with the decisions of higher instances of court having law-like influences in legal practice. See B. Rütters. Die neuen herren – Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Judge-made laws. – Zeitschrift für Rechtsphilosophie 2005/1, p. 7.

⁶⁰ "Due to the methods used by the higher instances of court, the Federal Republic of Germany is heading from parliamentary democracy toward an oligarchic rule of judges. Higher instances are creating their own "free law"". See B. Rütters. Methodenrealismus in Jurisprudenz und Justiz. – Zeitschrift für Rechtsphilosophie 2007/1, p. 52.

tional jurisprudence. Its task is not to stop or reverse that process, but the process must change constitutional jurisprudence. It is also clear that it is more and more difficult to rationally form and systematise contemporary legislation and even more so constitutional review by means of dogmatic theories. In legal policy dispute it is correspondingly more and more difficult to forecast constitutional court judgments by the means of merely traditional legal rules. What position should constitutional judges take in that situation? They should probably engage actively in critical discourses with colleagues and also the public. Discourse with other colleagues in the same profession (the so-called judge dialogue) is especially needed. May it be noted here that in jurisprudence the most important cognitive method is the free discourse that gets inspiration namely from practice of law, especially from administration of justice. Yet, sitting judges are required to distance themselves from current political debate.^{*61} This is primarily necessary for the protection of the profession of judge as a politically neutral profession.^{*62} It definitely somewhat also depends on the personality of the judge. The Constitutional Court of Lithuania, which is mainly formed of university professors, has gained the reputation of a so-called liberal interpreter, by argumenting its judgments with principles hardly to be found in the constitution.^{*63} Lithuanian supreme judge E. Kuris deliberates on what exactly should be the legal basis for the development of a constitutional system, if speaking about non-elected and non-accountable constitutional courts (the so-called negative legislator). Is it even possible in a democratic system to control constitutional courts by limiting their role in constitutional policy? The author sees two solutions here: one is judicial self-restraint and the other free professional constitutional discourse. It is in any case clear that constitutional court rulings, containing official constitutional doctrine, are supplementary source to law.^{*64}

To encourage constitutional courts, may it be said that also many legal scientists do not have the patience to wait for legislator to come up with solutions, and they see jurisprudence as a value adding science^{*65}, being at the same time aware that rational legal policy has several obstacles and hindrances.^{*66}

The summarising word of advice to constitutional courts could be the traditional ending remark of Roman consuls: *feci, quod potui, faciant meliora potentes* — I have done what I could; those who can will do better.

⁶¹ Tagungsberichte (Note 3), p. 241.

⁶² One cannot agree with the radical argument that constitutional court has either become an instrument in the hands of bourgeoisie or it is not needed at all, as parliament could always make the needed amendments itself. Or that it should be deemed inappropriate that the same person is a judge and a creator of provisions (a constitutional judge). Constitutional review is inappropriate for parliamentary democracy like for any other democratic public order. See F. Gentile, P. G. Grasso (a cura di). *Costituzione criticata/ De "La Crisalide"*. Edizioni Scientifiche Italiane. Naples 1999, pp. 223–299; 300–349. The Chief Justice of the Supreme Court of Russia is most critical: "There is a danger of destroying international and national legitimacy as such. From the legal perspective we have indeed ended up in a chaotic world where everything is becoming unpredictable." See V. Zorkin. *Rol konstitutsionnogo suda v obespetcenii stabilnosti i razvitiia konstitutsii*. – *Sravnitelnoe konstitutsionnoe obozrenie* 2004/3, p. 84.

⁶³ E. Kuris. *Judges as Guardians of the Constitution: "Strickt" or "Liberal" Interpretation? – The Constitution as an Instrument of Change* 2003, p. 209.

⁶⁴ E. Kuris. *O stabilnosti konstitutsii, istotnikah konstitutsionnogo prava i mnimom vsemozhestve konstitutsionnyh sudov* (On the Stability of Constitution, Sources of Constitutional Law, and the Seeming Omnipotence of Constitutional Courts). – *Sravnitelnoe konstitutsionnoe obozrenie* 2004/3, pp. 92–103.

⁶⁵ C. Engel. *Rationale Rechtspolitik und ihre Grenzen*. – *Juristen Zeitung* 2005/12, pp. 582–583. Indirectly every constitutional law theorist is a party of that process when he or she compares provisions of objective law to a constitution, asking for the legitimate objective of the provision.

⁶⁶ As difficulties Engel sees for example the complex nature of the subject area, boundaries of human cognition; the addressees of law not mechanically reacting to law; addressees being bound to a certain social reality; a reality where no provisional scales of good law exist; attitude of judicial politicians themselves to law, which should be respectful to law as such. See C. Engel (Note 65), pp. 583–590.