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MORE ABOUT TELEOLOGICAL ARGUMENTATION IN LAW

Summary: *Teleological argumentation is a means of legal interpretation. Much has been written about legal and teleological argumentation. Why do we then deal with it again and what else can be said to this? There are two reasons for this that we would like to point out. Firstly, there is consensus in legal theory only about the statement of teleological argumentation that the best or real meaning of legal provision is the one expressing its goal. However, teleological arguments can have several aspects (subjective and objective teleological arguments). They are close in meaning to other arguments (in particular to the historical ones) and appear under various names: contextual arguments, functional arguments, arguments from purpose, political arguments, arguments from the intention and arguments from substantive reasons. Secondly, given that the teleological argumentation seeks the best meaning of legal norms, it is the most popular method of explaining (reasoning) used both at certain national courts and at the European Court of Justice. The method is applied by the European Court of Human Rights too.*

Keywords: *teleological argument, historic argument, subjective theories of interpretation, objective theories of interpretation, static theories, dynamic theories*

1. INTRODUCTION

The notion of goal carries a special meaning in law – both in legal norms and in a legal system as a whole. Goals imply interpretation. In other areas beyond law, which are also subject to interpretation (all the cultural performances), goals do not bear such relevance. Indeed, one is not focused on what a theatrical or television play or a literary work or a piece of art is all about or what kind of a message it is supposed to convey but on the successfulness of its performance.

Identification of the objective (goal) of a legal provision requires interpretation or more precisely, teleological interpretation. For this purpose, legal theory employs terms such as

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"teleological method" or "teleological argument". Most authors are familiar with methods and arguments and thus teleological interpretation (usually together with linguistic, systematic and historic interpretation) is included into methods while arguments are reduced to classical "logical" arguments (*a contrario*, *a minori ad maius*, *a minori ad minus* etc.). The authors who are acquainted only with arguments put teleological arguments into the same category and challenge traditional science for gathering interpretative rules under the name "interpretation method".[1] The term of "methods", from Visković's perpective, "creates an illusion that they are the only possible and certain rules for finding the absolutely true meaning of legal norms. He regards interpretative rules as mere "arguments or reasons which are characterized by compulsion (...) which are selected by the interpreters, guided by their own interests and goals..."[2]

Teleological argumentation has been elaborated in numerous works – it is dealt with both independently, together with other arguments, and in general theoretical works dedicated to legal argumentation. Among papers and authors dealing with teleological argumentation, one needs to single out A. Barak and his Monograph on Target Argument, followed by A. Peczenik, R. Alexy, G. Tarello, R. Alexy/R. Dreier, A. Peczenik/G. Bergholz, A. Aarnio, Z. Bankowski/D. Neil MacCormick, M. La Torre/E. Pattaro/M. Taruffo, D. N. MacCormick/R. S. Summers, R. S. Summers, M. Troper/C. Grzegorczyk/J.-L. Gardies, J. Wróblewski, E. Zuleta-Puceiro, E. Feteris and F. Müller/R. Christensen.[3] Croatian authors who deserve special attention in this context are O. Mandić, B. Perić, D. Vrban, N. Visković, V. Miličića and Ž. Harašić[4] while among authors

1 What is indicated is that 'methods' originate from broad acceptance of Savigny's typology. See, e.g. Zuleta-Puceiro, E, "Statutory Interpretation in Argentina", in: N. D. MacCormick/R. S. Summers (ed.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, p. 41 i Alexy, R./R. Dreier, "Statutory Interpretation in the Federal Republic of Germany", in: N. D. MacCormick/ R. S. Summers (ed.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, p. 82. Savigny himself did not involve the teleological method into the four methods representing the canons of interpretation (the linguistic, logical, historic and systematic method), see Jančar, M.,"Teleološka razlaga pravnih aktov (problematika opredelitve cilja in poteka teleološke razlage)", 57 *Pravnik* (2002) 4–5, p. 192; Adomeit, K., *Rechtstheorie für Studenten. Normlogik – Methodenlehre – Rechtspolitologie*, 4th ed., C. F. Müller, Heildeberg, 1998, p. 65.

2 Visković, N., *Teorija države i prava,* Birotehnika CDO, Zagreb, 2006., p. 246.

3 Barak, A., *Purposive Interpretation in Law*, Princeton University Press, Princeton, 2005; Alexy, R., *Theorie der juristichen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristichen Begründung*, Suhrkamp Verlag, Frankfurt am Main, 1983, especially pp. 295–299; Peczenik, A., *On Law and Reason*, Kluwer Academic Publishers, Dordrecht (*etc.*), 1989, pp. 404–418; Tarello, G., "Argumentacija tumačenja i sheme obrazlaganja u pridavanju značenja normativnim tekstovima", *Zbornik za teoriju prava* IV, Beograd, 1990., pp. 260–261, (translation of part of a book entitled *L'interpretazione della legge*, Milano, 1980); Alexy, R./R. Dreier, *op. cit*. especially pp. 88–89; Peczenik, A./G. Bergholz, "Statutory Interpretation in Sweden", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 316–317; Aarnio, A., "Statutory Interpretation in Finland", in: N. D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 141–142; Bankowski, Z./D. N. MacCormick, "Statutory Interpretation in the United Kingdom", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*) .1991, especially pp. 370–373; La Torre, M./E. Pattaro/M. Taruffo, "Statutory Interpretation in Italy", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially p. 222; D. N. MacCormick/R. S. Summers, "Interpretation and Justification", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 514–516, 518–521; Summers, R. S. "Statutory Interpreation in the United States", in: N. D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 415–416; Troper M./C. Grzegorczyk/J.-L. Gardies, "Statutory Interpretation in France", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 183–184; Wroblewski, J., "Statutory Interpretation in Poland", in: Neil D. MacCormick/R. S. Summers (eds.), *Interpreting Statutes*, Aldershot (*etc.*), 1991, especially pp. 271–272; Zuleta-Puceiro, E., *op. cit*. especially pp. 43–44; Feteris, E., "Teleological Argumentation", *IVR encyclopedie*, 2009, avaliable at http://ivr-enc.info/index.php?title=Teleological Argumentation (last accessed 28th November 2014); Müller, F./R. Christensen, Juristische Methodik, I., 10th ed., Dunkcer & Humbolt, Berlin, 2009, pp. 364 *et seq*.

4 Mandić, O., *Sistem i interpretacija prava*, Narodne novine, Zagreb, 1971, especially pp. 201–203; Perić, B., *Država i pravni sustav*, 6th ed., Informator, Zagreb, 1994, especially pp. 220–221; Vrban, D., *Država i pravo*, Golden Marketing, Zagreb, 2003, especially p. 473; Vrban, D., *Metodologija prava i pravna tehnika*, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2013, especially pp. 69–70; Visković, N., *Argumentacija i pravo*, Pravni fakultet u Splitu, 1997, pp.74–77; Visković, N., *Teorija..., op. cit*. pp. 249–252; Miličić, V., *Opća teorija prava i države*, 8th ed., Zagreb, 2008, especially pp. 181–192; Harašić, Ž., *Sudska argumentacija*, Pravni fakultet Sveučilišta u Splitu, 2010., pp. 71–85.

from the territory of the former Yugoslavia, R. Lukić, M. Jančar, B. Stepanov/G. Vukadinović, M. Novak and M. Pavčnik seem to be the most prominent ones in this view.[5]

Why do we, despite the abundant literature on teleological argumentation, speak again about it? Before all, this type of argumentation appears to be the most controversial in legal thought[6] whereas such qualification of teleological argumentation is the only thing that brings to an agreement in this light. Accordingly, the best or the true meaning of a legal provision is the one that reveals its goal. With all the other things, or better to say, with most of the other things related to teleological argumentation, an agreement is less likely to be reached. In fact, arguments referring to the goals of a legal rule appear, except under the name teleological arguments, under other names as well: purposive arguments, functional arguments, contextual arguments, goal reasons, arguments from intention, arguments from the ultimate purpose of a statute, policy arguments, substantive arguments; they entail several aspects – a subjective and objective one; they have a similar meaning or they partly overlap with other arguments – historic, genetic, originalist ones; they tend to be linked with subjective and objective interpretation theories and with static and dynamic (evolutionistic) theories.[7]

The reason why teleological argumentation should be paid special attention is hidden in the fact that the teleological method is the most common method of the European Court of Justice concerning interpretation of legal provisions[8] and it is applied as well by the European Court of Human Rights[9] and by national courts.

2. THE CONCEPT OF GOAL

Determination of the concept of *telos,* which engages various terms such as "purpose", "aim" or "goal", represents an additional difficulty in comprehending teleological argumentation. Here are two approaches which are, among others, applied in law: the first one can be denoted as a sociological approach and the second one as a legally philosophical approach.[10] According to the sociological approach, the teleological method studies the historically established action of the legislator with respect to the action and interests at the time of law inter-

5 Lukić, R. D., *Tumačenje prava*, Savremena administracija, Beograd, 1961, especially pp. 130–142; Lukić, R. D./B. Košutić/D. Mitrović, *Uvod u pravo*, 18th ed., Službeni list SRJ, Beograd, 2002., especially pp. 545–551; Jančar, M., *op. cit*. pp. 191–201; Stepanov, B./G: Vukadinović, *Teorija prava II*, Futra – Petrovaradin, Novi Sad, 2002, especially pp. 87–92; Novak, M., *Argumentacija v praksi*, Planet GV, Ljubljana, 2010, pp. 115–124; Pavčnik, M., *Teorija prava, Prispevek k razumevanju prava*, 4th ed., CV Založba, Ljubljana, 2011, especially pp. 395–398; Pavčnik, M., *Argumentacija v pravu. Od življenskoga primera do pravne odločitve*, 3th ed., CV Založba, Ljubljana, 2013, especially pp. 98–103.

6 See, e.g. Jančar, M., *op. cit*. p. 192; Vrban, D., *Metodologija…*, *op. cit*. p. 69.

7 It is this bond between teleological argumentation and a number of theoretical issues that complicates indication of all the points where a particular author deals with teleological argumentation, so here are only quotations in which authors primarily speak about this kind of argumentation. See *supra* note 3, 4 and 5.

8 Van Hoecke, M., *Law as Communication*, Hart Publishing, Oxford and Portland, Oregon, 2002, p. 144; http://wikis.fu-berlin.de/display/oncomment/Teleological+Interpretation (last accessed 20th August 2014)

9 http://wikis.fu-berlin.de/display/oncomment/Teleological+Interpretation (last accessed 20th August 2014)

10 Jančar, M., *op. cit*. p. 195.

pretation, and the factual effects of a law within a society. Pursuant to the second approach, a goal is ideologically based – a legal rule is a reflection of the legal values in a legal provision.[11]

Without an intention to dive into the particular theoreticians' perception of a goal, we rather stress the diversity of their concepts thereof. For example, Wank differentiates between concrete and abstract goals: concrete goals have already been qualified as legal provisions in a law and abstract goals require from the interpreter selection of solutions. According to Engisch, the concept of goal ranges from concrete and realistic effects to abstract and ideal goals. On the other hand, Hensche divides goals into primary and secondary ones. The former are depicted as relevant conditions, accomplishment of which is the main motivation of enacting rules, and the latter are understood as desirable effects which did not result from legal regulations but they still have to be salient when applied. Coing links his concept of goal with the term of *ratio legis* which is defined as an objective goal that sets ground for legal norms and logically arranges them. Pavčnik makes a distinction between the goal of a legal rule, the goal of a legal institute, the goal of a legal branch and, finally, the goal of a legal system as a whole which is attached to the constitution and the value system contained therein. Ihering (without a clear boundary between interests and goals) deals with egoistic, social ad national goals.[12]

Just as it is possible to talk about subjective and objective teleological interpretation,[13] one can also differentiate between a subjective and objective purpose. A subjective purpose is the intention of an author of a text whereas an objective purpose refers to the "intention" of a respective legal system or the intention of a sensible author.[14] As far as subjective purposes are concerned, if the author is an individual, it is easy to disclose that the author's purpose is an intention. It comes to a problem if the author is a collective body (e.g. parliament).[15] Subjective purposes relate to the real (true) intention at the time when a text is drawn up. It is a "genetic" fact. Therefore, the German tradition utilizes the phrase "genetic interpretation" and it refers to subjective interpretation. The intention of an author encompasses goals, values, function, interests and policies that, in the author's opinion, need to be updated.[16]

A goal is an extralegal element such as needs, interests and values which are also considered an object of teleological argumentation. Ihering was the first one to take account of these extralegal elements and according to him, law is an instrument for exercising powers and interests; one should find the goal of a norm and not search for concepts (notions).[17] Interest jurisprudence is even more focused on the role of interests: the basic function of law is resolution of conflicts of interest.[18] Such standpoints proceed with evaluation jurisprudence which promotes that legal resolution of conflicts of interests does not always imply exercise

11 *Loc. cit*.

12 Jančar, M., *op. cit*. p. 196.

13 See *infra*, subtitle 3, fract. 3.

14 Barak, A., *op. cit*. p. 110.

15 *Infra* subtitle 4, fract. 2.

16 Barak, A., *op. cit*. p. 120.

17 *Legal Lexicon*, "Miroslav Krleža" Lexicographic Institute, Zagreb, 2007, p. 455. Ihering is the founder of teleological jurisprudence (which together with interest jurisprudence in its narrow sense and evaluation jurisprudence constitutes interest jurisprudence). His standpoints are available to the public in a book called (*Zweck ums Recht – Goal in Law*), published in 1883.

18 *Op. cit*. pp. 455, 456. Interest jurisprudence gained relevance in the 1920s due to the work of s Ph. Heck.

of only one interest and suppression of another one but also assessment and evaluation of those interests and their conversion into a law or judgement.[19] Sociological jurisprudence is the branch of science that deals with social interests and the function of law and it is most often connected with American jurist Roscoe Pound.[20]

3. TELEOLOGICAL ARGUMENT

Arguments relating to the goals of a legal rule are frequently attached to the adjectives "teleological" and "purposive" which are genuine synonyms, yet it should be said that the term of "teleological" is usually used in EU law.[21] Sometimes, though less often, the adjective "functional" is applied in this context too.[22] What is common to all kinds of arguments (including those mentioned above)[23] is that they refer to the purpose or goal of rules as instruments that promote particular legal, social or economic values which are deemed essential from the perspective of justice or a public good.[24]

There is no unique standpoint on the concept of teleological argument: a) there is though a belief that a teleological argument can be viewed from two perspectives – a subjective and objective one; b) the existence of the subjective aspect is rejected and there is only objective teleological argumentation; c) however, some equalize subjective teleological arguments with historic ones; d) a historic argument is regarded as a type of subjective teleological argumentation; e) others see historic arguments as auxiliary means of subjective teleological argumentation.

Teleological argumentation is based on the assertion that every legal provision has a goal and that among its possible meanings, the most significant one is the reason why it has been adopted anyway, i.e. its purpose. Such a designation induces the question who is the one who decides on the goal of a provision. Consequently, this argumentation comes in two variants – subjective and objective teleological arguments. Subjective teleological arguments suggest that the best meaning of a provision refers to those goals which were meant by the norm maker on the occasion of norm adoption. Objective teleological arguments result from the current interests and needs of a society and hint that the best meaning of a norm involves those goals which correspond to the needs of the respective society at the time of norm ap-

19 *Op. cit*. p. 456. Evaluation jurisprudence started with H. Stoll in the mid-1880s. It has remained the main course of the civil law of German speaking areas and its main assumptions play the major role in other areas too [Vodinelić, V., *Građansko pravo. Uvodne teme* (*Civil Law*, *Introductory Topics*, Nomos, Beograd, 1991, p. 140)].

20 R. Pound 1870–1964. About jurisprudence of sociology, see Harris, J. W., *Legal Philosophies*, 2nd ed., Oxford University Press, New York, 2004, p. 249 *et seq*.

21 Conway, G., *The Limits of Legal Reasoning and the European Court of Justice*, University Press, Cambridge, 2012, p. 20; Murray also believes that the teleological method of interpretation is sometimes called "purposive" (Murray, J. L., "Methods of Interpretation – Comparative Law Method", p. 39), available at http://curia.europa.eu/common/dpi/col murray.pdf (last accessed 20th August 2013). Barak says that purposive interpretation belongs to the family of teleological interpretation (Barak, A., *op. cit*. p. 89). And Van Hoecke, M., *op. cit*. p. 144, says "teleological" or "purposive" method.

22 Troper, M./C. Grzegorczyk/J-L. Gardies, *op. cit*. p. 183. Zuleta-Pucriro, E., *op. cit*. p. 43; "Teoria generale dell'interpretazione", Enciclopedia Treccani, avaliable at http://www.treccani.it/enciclopedia/teoria-generale-dell-interpretazione (last successed 2nd August 2014) where the adjectives "functional" and "teleological" are mentioned. Wroblewski, J., *op. cit*. p. 271.

23 *Supra* Introduct, fract. 2.

24 Feteris, E., *op. cit*.

plication.[25] Obviously, the first aspect of teleological argumentation matches law with the will of the legislator,[26] while the second aspect detaches the goals from the will of their creators.[27] In other words, it is assumed that when judges take advantage of subjective teleological argumentation, they justify their interpretation by referring to the subjective intention of the real historic legislator; when they apply objective teleological argumentation, they mean the objectively reconstructed intention of the rational legislator.[28] Accordingly, these viewpoints are concentrated on the issue which purposes govern the interpretative process (subjective and objective purpose) and which materials are employed when identifying those purposes. It seems that considering the latter standpoint, subjective teleological arguments are equalized with historic ones since the utilized materials are reduced to the so-called travaux préparatoires.[29] However, historic interpretation is not regarded as a type of subjective teleological interpretation[30] "but as its ancillary agent".[31] Historic argumentation is not identical with subjective teleological argumentation since the former, from Visković's point of view, reveals, beside the goals of norm makers, some interests and values which can also be applied in objective teleological interpretation.[32]

Barak provides for formulation of teleological interpretation (calling it *purposive*) which is neither completely subjective nor completely objective. He considers a purpose a legal structure such as the concept of ownership, right and liabilities (duties). The author integrates subjective and objective elements which act rather simultaneously than in different phases of the interpretative process.[33] In his opinion, teleological interpretation is based on three components: language, *purpose* and discretion. The central element is definitely purpose. This is a *ratio iuris* purpose in the core text (will, contract, law and constitution). These purposes include values, goals, interests and policies which should be updated by the text. [34]

Furthermore, sometimes one speaks, within the framework of teleological argumentation, only about objective teleological argumentation. In fact, Aarnio suggests that the interpreter needs to, while dealing with objective teleological argumentation, take into consideration reasonable goals and the social consequences of a law. "A reasonable goal" here means a goal supported by many relevant substantive and authoritative reasons ("ratio legis").[35] In other words, such standpoints indicate that a goal has nothing to do with the will of the legislator,

25 Visković, N., *Teorija*..., *op. cit*. p. 250.

26 About background of doctrines of will, see Müler, F. R. Christensen, *op. cit*. pp. 267, 268.

27 Visković, N., *Teorija*..., *op. cit*. p. 250 and Visković, N., *Argumentacija*..., *op. cit*. p. 74. The division of teleological arguments into subjective and objective ones is supported by, for instance, Peczenik, A., *op. cit*. p. 405; Alexy, R./R. Dreier, *op. cit*. p. 88; Stepanov, B./G. Vukadinović, *op. cit*. pp. 88 *et. seq*.; Feteris, E., *op. cit*.; Müller, F./R. Christensen, *op. cit*. pp. 94, 95.

28 Feteris, E., *op. cit*.

29 See Feteris, E, *op. cit*.; Peczenik/G. Bergholz *op. cit*. p. 316. We think also Rehberg equalizes subjective teleological interpretation with historic interpretation (Rehberg, M., Statutory Interpretation and Civil Law Methodology, University Summer Training in European and German Law, available at http://vertragsheorie.de/wp-content/uploads/2010/mustmethodology.pdf (last accessed 20th August 2013).

30 Peczenik, A., *op. cit*. p. 405 *et seq*.; Alexy, R./Dreier, *op. cit*. p. 88.

31 Visković, N., *Teorija*..., *op. cit*. p. 254.

32 Visković, N., *Teorija*..., *op. cit*. p. 254; See also Stepanov B./G. Vukadinović, *op. cit*. p. 5.

33 Barak, A., *op. cit*. p. 88.

34 *Ibid*., p. 89.

35 Aarnio, A., *op. cit*. p. 141.

i.e. with the intention perceived as a psychological fact. They explicitly remove teleological subjective argumentation from the concept of teleological argumentation and cater only for the latter which implies what is known as teleological objective argumentation.[36]

The division into the narrow subjective and objective teleological method has been known to Hoecke too. The subjective teleological method places the law against the background of the legislature's concrete intention in enacting the interpreted statutes. The accent in most cases lies on historic rather than on topical objectives. The objective teleological approach or, as he says, the systemic teleological method, for its part, locates the statutes against the purpose underlying the entire legal system. This enables, among other things, the court to base its interpretation on topical rather than on historic objectives.[37]

In terms of interpretation of EU regulations, Lovrić states that "if a regulation lacks a firm ground and just cause for its adoption and designation of the goals which are to be achieved (...) the court shall conduct prior fundamental investigation on the true will of the legislator".[38] The will of the legislator seems, at first glimpse, to deal with subjective teleological argumentation. However, reference to the will of the legislator is just a formality since the interpreters do not actually check what the norm maker wanted to say by a legal norm but they are interested in the current needs of a society and thus this implies objective teleological argumentation.[39]

Teleological arguments used to be called functional arguments. They are derived from the idea that every rule has a special function. The meaning of a rule is the one that enables exercise of its function. Functional arguments sometimes relate to their subjective and sometimes to their objective function. The subjective function arises from the will, explicit or implicit, of the norm maker himself/herself. The objective function – an economic or social one – is exercised by a rule, regardless of the original norm maker's intention. This kind of an argument is widely used if courts intend to adapt old laws.[40] These are teleological arguments in their essence.

3.1. TELEOLOGICAL ARGUMENTATION AND VALUES OR GENERAL LEGAL PRINCIPLES

MacCormick and Summers clarify that judges, while providing objective teleological argumentation and reconstructing the purpose, often recall values which are considered to belong to an objective legal order and general legal principles.[41] Having in mind the fact that there is no (clear) border between principles and values and the major role of general principles in in-

36 Per Olof Ekelof proposed the "radically teleological method" based on the objective reason and purpose of the statute (Peczenik, A./G. Bergholz, *op. cit*. p. 317.

37 Van Hoecke, M., *op. cit*. p. 149.

38 Lovrić, V., "O sudu Europskih zajednica i Europske unije uz analizu pesude tog suda u predmetu *Keck* broj C-267/91 I C-268/91", available at http//www.vtsrh.hr/uploads/Dokumenti/Savjetovanje/analizapresude ECJ.pdf (last accessed 18th April 2014). p. 19.

39 Visković, N., *Teorija*..., *op. cit*. p. 250.

40 Troper, M./C. Grzegorczyk/J.-L. Gardies, *op. cit*. p. 183.

41 MacCormick, D. N./R. S. Summers, "Interpretation and Justification", in: MacCormick, D. N./R. Summers (ed.), *Interpreting Statutes*, Aldershot (*etc*.), pp. 522–525.

terpretation since these principles cater for fundamental values with which they shall comply and according to which all the other legal norms shall be interpreted, the authors prefer the term of "value principles".[42]

Namely, from a functional point of view, legal rules can be deemed as an instrument for accomplishment of particular goals and values – legal, social and economic ones. From the same perspective, judges, when applying a legal rule and making a decision in a concrete situation, frequently justify their judgements by means of teleological argumentation which demonstrates that the interpretation is coherent with a particular legal goal or value.[43]

What legal principles or values are we talking about here? Let us emphasize that fundamental principles are not restrained only to public law such as constitutional, public administrative and international law. They are applied to the relations between the state and an individual as well as between individuals. Fundamental principles are principles of a whole legal system.[44]

Furthermore, one cannot draw up a comprehensive list of general principles – they vary from legal system to legal system as well as from period to period. For example, there are two classifications. The first one starts from the fact that principles represent the foundation and prescriptive expressions of human needs which have to be regulated by every legal order and hence there are two types of legal values: those which are law-specific – fairness (righteousness), peace, legality, legal security, completeness and coherency of the system of legal norms – and those which are not law-specific – life, health, freedom, personal security, family, truth, work (labour), property, education, goods transactions, privacy etc.[45] Also, legal principles can be conditionally divided into three groups: ethical principles (such as justice, morality, fairness (righteousness), good faith, human rights); social goals (safeguarding the state and its democratic character, public peace and security, separation of powers, rule of law, judicial independence, consistency and harmony of rights, certitude and security in human agreements, realization of reasonable expectations, human rights); models of conduct (prudence, righteousness, good faith). The fluidness of the categories are disclosed in the fact that e.g. human rights can be perceived as an ethical value and a social goal.[46]

One can speak about the values contained in the EU pattern. The pattern consists of three layers: traditional European civil values (justice, righteousness, freedom, human dignity etc.), new interpretations of traditional values (social justice, social peace and order or social, economic and legal security) and new European values (particularly universality, supranationality and autonomy).[47]

Let us single out that a number of general principles are today no longer only utterance of legal science and legal practice[48] but they have also been standardized, i.e. they have been in-

42 Visković, N., *Argumentacija*..., *op. cit*. pp. 60 *et seq*., Miličić, V., *op. cit*. pp. 63 *et seq*.

43 Feteris, E., *op. cit*.

44 Barak, A., *op. cit*. p. 164.

45 Visković, N., *Pojam prava*, 2nd ed., Logos, Split, 1981., pp. 105 *et seq*.

46 Barak, A., *op. cit*. p. 165.

47 Mitrović, D. M., "Evropska unija kao obrazac vrednosti evropske zajednice naroda", u: Vukadinović, G./A. Kartag-Odri (eds.), *Evropska zajednica naroda i univerzalne vrednosti*, Novosadska asocijacija za teoriju, etiku i filozofiju prava, Novi Sad, 2010., p. 45.

48 About fundamental values in court opinions see Barak, A., *op. cit*. p. 164; Harašić, Ž., *op. cit*. pp. 111 *et seq*.

corporated in legal norms as their content. Many of them are contained in the constitution, in provisions stipulating action in criminal, civil and administrative proceedings and in a number of provisions of substantive law.

3.2. CONTEXT

Wróblewski indicates that teleological interpretation (using the term of functional interpretation) entails a fairly complicated functional context which comprises various factors that are considered relevant for detecting the meaning of interpreted legal provisions. Interpretation ideologies apply a different number of such relevant factors which are provided with different importance. It is common to take into consideration the following elements of the functional context: a) socio-political facts and relations, their modifications and their evaluation, b) purposes which are attributed to the law or norm maker, c) ideology of law and its application, d) extralegal rules and evaluation which are deemed relevant for the law and its evaluation.[49]

The importance of the issue of context is revealed by the diversity of law (statute) interpretation which can sometimes be contradictory, depending on the law context.[50] The teleological method qualifies the goals of a law as an interpretative context.[51]

The context is supposed to resolve the ambiguity and vagueness of a text. The literature differentiates between an internal and external context. Internal contexts refer to textual contexts and are constituted by phrases embracing the phrase which is to be interpreted. External contexts are broader. They involve every context beyond textual ones. They as well encompass the history of a text, the status of a law prior and after the preparation of the text, the general framework of a law within the respective legal system, the social background of a legal system and fundamental principles.[52]Among several contexts, one needs to focus on the context which is relevant for an interpretative activity. In order to identify such a context, the goal of interpretation should be evaluated. Purposive interpretation is based on the posture that the goal of legal interpretation is to realize the purpose of the interpreted text. The purpose is a relevant context. In other words, a relevant context is the one that provides information on the purpose in the core of a legal text.[53]

Why is the objective-purposive approach promoted? Since the history of legal rules (it is primarily a legislative history, but in *common law* systems, it is composed of previous judicial decisions too) is often ambiguous and vague, their purposes and goals shall be restored. Still, even if the history is clear, new developments within a society which could not be anticipated

49 Wróblewski, *op. cit*. pp. 271, 272. It is interesting that Wróblewski uses the typology that is, except with functional, also familiar with linguistic and systematic interpretation. Such a typology is based on the semantic approach to legal interpretation and singles out three types of arguments which correspond to the types of context that influence the meanings in operative interpretation. Such a typology represents theoretical rationalization and/or reconstruction of interpretative arguments which are actually applied in the practical judicial interpretation of the Polish Supreme Court and the Polish Constitutional Court (Wróblewski, J., *op. cit*. p. 269).

50 Hoecke, M., *op. cit*. p. 150.

51 Hoecke, M., *op. cit*. p. 144.

52 Barak, A., *op. cit*. p. 101.

53 *Ibid*., p. 102.

by the legislator demand that a rule is provided with the meaning which is in accordance with the current situation. Indeed, in modern societies, technology, human needs, values and social relations swiftly change, which implies that the initial reasons (goals) for adoption of norms become obsolete in no time. Considering that norms are supposed to satisfy current human needs, it is beyond any doubt that those who apply them shall also amend or adapt their meaning to new circumstances.[54] Those who stand by the teleological (purposive) approach assert that a court should be capable of finding the objective goal of a rule by reconstructing its rational purposes.[55]

4. HISTORIC, GENETIC AND ORIGINALIST ARGUMENTS

There are some arguments that are closely connected with the above arguments which appear under the name teleological and *purposive* (sometimes even functional). These arguments are known as historic, genetic and originalist arguments. Genetic or historic arguments are, when applied as synonyms, oriented towards discovery of the meaning of laws through the will of the norm maker, no matter if the meaning cannot be detected through linguistic interpretation, i.e. it is poorly presented in the wording. Some use the term of "historic" – but not as a synonym of the adjective "genetic". "Genetic" refers to the historic conditions prior to the enactment or at the time of the enactment. "Historic" refers to interpretation taking into account all the historic developments that have taken place since the enactment.[56] Moreover, genetic interpretation is considered a special version of teleological interpretation – or subjective teleological interpretation.[57],[58]

Genetic argumentation is facing the issue of identification of the intention subject, particularly when it comes to a collective body such as the parliament. Feteris claims: "When one mentions the historic legislator, it implies a discussion between different political groups which frequently differentiate between "intentions" and make a clear univocal intention impossible to reconstruct." [59] Often it is hard to find out who the subject of "the will of the legislator" is and what "the will of the legislator" exactly is.[60] The subjective intention of the

54 See Visković, N., *Teorija…*, *op. cit*. p. 250; Stepanov, B./G. Vukadinović, *op. cit*. p. 89.

55 Feteris, E., *op. cit*.

56 Troper, M./C. Grzegorczyk/J.-L. Gardies, *op. cit*. p. 184. Müller and Christensen also recognize historic and genetic interpretation (Müller, F./R. Christensen, *op. cit*. pp. 93–95).

57 Or, according to Alexy and Dreier, subjective interpretation theories prefer genetic arguments (Alexy, R./R. Dreier, *op. cit*. p. 93).

58 It requires an investigation into the meaning of legal terms as intended by the historic legislator and/or into the purposes he pursued by enacting the statute (Alexy, R./R. Dreier, *op. cit*. p. 85).

59 Feteris, E., *op. cit*.

60 Feteris, E., *op. cit*. Let us say that regarding the issue of will, a school named "Egzegeze", which is known as the founder of the modern interpretation theory, disseminated, in the second half of the 19th century, the opinion that law is expression of the will of the norm maker and as such it is fully incorporated in the text of a statute (law). It sufficed to explore what the norm maker had in mind, consulting the travaux préparatoires of the codex. Hence, the interpretation of a law and the intention of the legislator coincided in the principle (Troper, M./C. Grzegorczyk/J.-L. Gardies, *op. cit*. p. 190). Pursuant to Gényja (end of the 19th century), who was a representative of the free scientific research school, the meaning (purpose) of a law differs from its linguistic meaning and from the will of the legislator (*ibid*., p. 191). See also Aubert, J.-L., *Introduction au droit et themes fondamentaux du droit civil avec annexe documentaire*, 8th ed., Armand Colin, Paris, 200, pp. 114–118.

parliament can be summed up as follows: The parliament is constituted of a large number of its members and each of them has their own motifs and intentions. On the contrary, the parliament has got one intention. It is the product of the negotiations between various MPs and of the final agreement reached by them. It is a joint intention agreed upon on the occasion of law (statute) adoption.[61] Harris believes that application of the term of "legislative intention" can suggest three things: firstly, it can denote, under the condition that the wording is clear, an authoritative source of law which is superior to the judge's shaping of law; secondly, it can refer to the assumption that any statute is to be read as a coherent and consistent whole, as though it were the product of a single, rational mind; finally, it can imply that permitted biographical information on what the person involved in the legislative process actually has in mind, a controlling role in the interpretations of a statute.[62]

What is the further relation between historic and genetic interpretation? Genetic interpretation is regarded as an aspect of historic interpretation.[63] Genetic interpretation explores the history of the emergence of a legal text, i.e. it relates to the meaning of a legal text, taking account of the appertaining legislative proceedings. In this case, draft laws, prior discussions in parliament committees and discussions in the legislative body itself, meaning the entire material relating to law adoption, are subject to interpretation.[64] With respect to the second aspect, historic interpretation calls for the economic, political and cultural-civilization relations and characteristics of the age in which a law was created and which co-tailored its content, i.e. the cultural-historic context.[65] In regard to historic interpretation, Aarnio asserts that a law can be appropriately interpreted only if it is placed in its historic context.[66]

Some authors call historic interpretation originalist interpretation[67] while having in mind determination of the meaning of a text in line with the perception at the time of its adoption (enactment). One can still draw a line between the subjective and objective approach to originalist interpretation. Subjective originalist interpretation is intentionalist interpretation: it sheds light on the intention of the author or the one who has ratified the referring legal provision. Moreover, the scope of originalist interpretation can conceptually overlap with subjective teleological interpretation if the purpose is understood as the one that is meant by a historic or original legislator.[68] In compliance with objective originalist interpretation, legal terms are embraced by legal systems at the moment of their adoption /enactment/ and therefore, they are bound to the legal tradition rather than to the author's specific intentions or beliefs.[69] From our point of view, historic arguments are applied to disclose the meaning of a legal provision by examining the historic circumstances which preceded the adoption of the provision. Usually there are three groups of circumstances. The first group consists of the

61 Barak, A., *op. cit*. p. 133.

62 Harris, J. W., *op. cit*. p. 163. About legislative intent in Anglo-American theories see, Eskridge, W. N./Ph. Frickey/E. Garret, *Legislation and Statutory Interpretation*, Foundation Press, New York, 2000, pp. 213 *et seq*.

63 Alexy, R./R. Dreier, *op. cit*. p. 87.

64 Pavčnik, M., *Argumentacija…*, *op. cit*. p. 93; Vrban, D., *Metodologija…*, *op. cit*. p. 68.

65 Pavčnik, M., *Argumentacija…*, *op. cit*. p. 93; Vrban, D., *Metodologija…*, *op. cit*. p. 68.

66 Aarnio, A., *op. cit*. p. 139.

67 The concept "originalist" is used mostly in American literature, see Conway, G., *op. cit*. p. 20.

68 *Loc. cit*.

69 *Ibid*., p. 21.

so-called preliminary works (which set ground for some subjective teleological interpretation theories) entailing the whole material emerged when passing legal provisions – draft provisions, their amendments, reasoning, discussions in competent bodies (parliament, its committees) and press, session minutes and similar.[70] The second group relates to comparison of interpretative provisions with the preceding abolished or amended provisions which regulated the same relation. The third group includes the reason for enactment of a legal norm (*occasio legis*).[71] Pavčnik singles out another group of reasons represented by historic interpretation in its broader sense and this involves the economic, political and cultural-civilization relations of the period in which the respective legal provisions emerged.[72]

Among numerous standpoints concerning this issue, there is the one suggesting that genetic interpretation is a variation of functional interpretation because the former interrogates the function of a law while searching for its meaning at the time of its adoption, particularly historic relations which the legislator attempted to remedy.[73]

5. SUBJECTIVE AND OBJECTIVE INTERPRETATION THEORIES

In line with the aforementioned, teleological interpretation can be viewed through the lenses of subjective and objective interpretation. Yet, it turns out that neither subjective nor objective interpretation theories are consequently deduced and thus there is no agreement on the number and order of interpretation canons.[74] This is reflected in the fact that some authors tend to specify two methods or two interpretation theories within subjective and objective interpretation and all the other interpretation methods are then based on them.[75] On the other hand, some classify subjective and objective interpretation as interpretation methods.[76]

In accordance with subjective theories, the goal (purpose) of interpretation is to find the real intention of the historic legislator whereas pursuant to objective theories, interpretation goals shed light on the rational meaning of a law.[77] Subjective theories privilege genetic arguments while objective theories prefer objective-teleological arguments.[78] Vrban is also acquainted with subjective and objective interpretation theories and in his opinion, objective interpretation attempts to reveal the sense or the purpose of a law – *ratio legis* and it is close to the teleological method whereas subjective interpretation theories are close to the historic method.[79] Stepanov/

70 *Infra*, subtitle 5.

71 Taking into consideration the above three groups implies application of historic arguments pursuant to Lukić, R. D., *Tumačenje*..., *op. cit*. p. 128; Mandić, O., *op. cit*. pp. 204, 205; Visković, N., *Teorija*..., *op. cit*. p. 254; Pavčnik, M., *Argumentacija*..., *op. cit*. p. 93; Perić, B., *op. cit*. p. 218, 219.

72 Pavčnik, M., *Argumentacija*..., *op. cit*. p. 93.

73 Troper, M./C. Grzegorczyk/J.-L. Gardies, *op. cit*. p. 184.

74 Alexy, R./R. Dreier, *op. cit*. p. 77.

75 Alexy, R./R. Dreier, *op. cit*. p. 93; Perić, B., *op. cit*. p. 213; Rehberg, M., *op. cit*.

76 Zlatarić, B., *Krivično pravo. Opći dio*, Informator, Zagreb, 1972., pp. 88 *et seq*.; Stepanov, B./G. Vukadinović, *op. cit*. pp. 107, 108.

77 Alexy, R./R. Dreier, *op. cit*. p. 93.

78 *Loc. cit*.

79 Vrban, D., *Metodologija*..., *op. cit*. p. 66.

Vukadinović suggest that objective interpretation arises from the objective circumstances of reality which shape a norm.[80] It seems that on such an occasion, subjective theories are equalized with static interpretation theories and though not explicitly, with historic interpretation while objective theories match dynamic (evolutionistic) or purposive interpretation.

Static interpretation promotes that the real sense of a legal norm is the one that the norm had at the time of its adoption[81] while pursuant to evolutionistic interpretation, the real meaning of a legal norm can be best disclosed at the moment of its interpretation.[82] Stepanov/Vukadinović propose that regarding the real purpose of legal norms, evolutionistic interpretation be inclined "to the spirit of acquired knowledge, experiences and needs brought by a new age".[83]

The static and dynamic way occur to be different approaches to the judge's role in the application of law.[84] Those who prefer the static approach believe that from the perspective of legal security, only subjective-teleological arguments can be regarded as strong (solid) justification. Theoreticians who favour the dynamic approach think that the judge's task is to apply and interpret law in a way that the goals and fundamental values of law are taken into account, which means that they permit application of objective-teleological (purposive) argumentation.[85]

On such an occasion, the static approach is supposed to control judges in their determination of the meaning of a rule in case its meaning is not clear whereas other interpretation methods such as the linguistic and systematic one do not offer a satisfactory solution. As far as teleological argumentation is concerned, one can apply only additional "outweighing" to support the choice between the other two possible interpretations. In other words, the respect for subjective teleological argumentation shall provide (guide) the judge with adequate and reliable information on the intention of the legislator.[86]

The dynamic approach guides judges to frequently use objective teleological argumentation when it is necessary to expand or limit the scope of a legal rule in order to avoid an unexpected or absurd result which would be unacceptable from the perspective of the legal system in question. Accordingly, judges have to bear in mind the reasons which require expansion/limitation of the scope of a rule and thus shape a coherent rule together with its objective purpose.[87]

These two perspectives of subjective and objective interpretation can be analysed through the issue of going beyond the interpretation limits under the condition that the state is featured by separation of jurisdictions and powers of state bodies and by a constitutionally governed relation between the three powers: the legislative, executive and judicial one. Besides, what has prevailed in the development of legal thought is the standpoint that a legal text is granted autonomous survival which is (relatively) independent of its creator. Therefore, ob-

80 Stepanov, B./G. Vukadinović, *op. cit*. p. 108. About problems of subjective and objective interpretation, see also Müller, F./R. Christensen, *op. cit*. pp. 50, 51.

81 Lukić, R., *Uvod…*, *op. cit*. p. 99.

82 *Ibid*., p. 100.

83 Lukić, R., *Uvod…*, *op. cit*. p. 99.

84 Feteris, E., *op. cit*.

85 Feteris, E., *op. cit*.

86 Feteris, E., *op. cit*.

87 Feteris, E., *op. cit*.

jective interpretation is not focused on "the will of the legislator" but on the purpose of a law (*ratio legis*) or even broader, in the sense of a legal system as a whole or with respect to the coherence of some of its branches, subfields and institutes (*ratio iuris*).[88]

The subjectivist standpoint is founded on the idea of honouring the will of the legislator. It leans on the respect for the institutional and legal organization of the state, according to which law enactment belongs to the tasks of the legislator whereas other bodies are invited to apply laws and not to autonomously interpret them or amend their meaning. Such an attitude exposes extended interpretation of a legal text to harsh criticism and it does the same to the teleological interpretation method.[89]

To sum up, in regard to the aspect of will, both the subjective and objective approach question whether an interpreter should rely on the will of the historic author of a text or on the will of the contemporary author, meaning if the current circumstances should be taken into consideration or not. If a text is depicted as independent of its creator, then it can be assigned meanings which provide it with new purposes – objective-dynamic interpretation.[90]

Most theoreticians share the opinion that the will of the legislator represents a powerful argument when it comes to new (fresh) laws while with older laws, it does not work so well and then one needs to take account of new social circumstances or values which were not known or recognized at the time of the appertaining statute (law) adoption. In such a case, the ideal contemporary legislator pushes back the historic legislator. That way, historic interpretation would be modified and one would, leaving the territory of the historic legislator, opt for actualization of their (historic legislator) intention (shift from subjectivist-static to subjectivist-dynamic interpretation).[91]

Subjective and objective interpretations imply pro and contra arguments. Arguments supporting the subjective standpoint include as follows: what is actually taken into consideration is the historic will of the legislator; law was generated by people for people; only MPs are democratically elected and not the interpreter; law can only be understood considering the time of the adoption of an act.[92] Here are some arguments that back up the objective standpoint: an individual can find the ideas which have been incorporated in the act itself; law develops at its own speed of time travel; the legislator cannot be identified; the interpretation procedure is necessarily influenced by the viewpoints, experience etc. of the interpretation.[93]

Not making a difference between the subjective and objective approach, the advantages of teleological interpretation encompass a flexible approach permitting judges to develop law and manage the situations which have not been predicted by the parliament.[94] One of its main

88 Vrban, D., *Metodologija…*, *op. cit*. p. 68; see also Pavčnik, M., *Argumentacija…*, *op. cit*. pp. 94, 95.

89 Vrban, D., *Metodologija…*, *op. cit*. p. 69.

90 *Loc. cit*.

91 Vrban, D., *Metodologija…*, *op. cit*. p. 69; Pavčnik, M., *Argumentacija…*, *op. cit*. p. 96.

92 See Rehberg, M., *op. cit*.

93 Rehberg, M., *op. cit*.

94 http://www.e-lawresources.co.uk/Purposive-approach.php (last accessed 10th November 2014).

flaws is the fact that judges are provided with too much power to develop law and thus interfere with the power of the parliament.[95]

6. RELATION BETWEEN TELEOLOGICAL AND OTHER ARGUMENTS, PARTICULARLY BETWEEN TELEOLOGICAL AND SYSTEMATIC ARGUMENTATION

Some legal systems include the rule indicating preference of the teleological over other methods.[96] However, there are no firm rules prescribing which interpretation methods and arguments, when being applied, are to be utilized and in which order nor can such rules be introduced on the occasion of interpretation in general. Even Savigny, who developed the division of interpretation methods into the linguistic, logical, historic and systematic method, claims that it is not necessary to specify a hierarchy of these four methods since they "do not represent four types of interpretation among which one can freely choose but four procedures that have to act together if we want the interpretation to succeed."[97] Pursuant to Vrban, the legal nature of teleological interpretation indicates that it has to be connected with other criteria referred to by legal techniques and a legal system or that application of some methods along with the teleological one is necessary: if an interpreted text does not explicitly suggest a linguistic-logical sense, the so-called logical arguments need to be applied (e.g. *a contrario* argument); then historic interpretation is to be used (which implies the dilemma between the subjective and objective approach, i.e. the will of the historic or contemporary maker) and finally systematic interpretation which is excepted to identify the position of a norm within a legal system and by means of its own "internal logic", to facilitate detection of the desirable meaning.[98] Miličić asserts that the teleological (purposive) method, unlike other methods, is the only one that can be applied independently whereas all the other methods, particularly the systematic, linguistic and logical one, are utilized only in combination with the teleological method.[99]

In Murray's view, there is certain uncertainty in the nomenclature of interpretation methods. The linguistic, teleological and comparative method constitute the primary group of such methods.[100] Ademović emphasizes that the court (in this particular case the Constitutional Court of Bosnia and Herzegovina, but this counts for every court) shall, before all, apply linguistic interpretation which involves the following three subgroups: lexical, grammatical and systematic interpretation and that historic and teleological interpretation are unavoidable interpretation methods.[101]

95 http://www.e-lawresources.co.uk/Purposive-approach.php (last accessed 10th November 2014).

96 For express formulations of statute about advantages of teleological method see, Van Hoecke, M., *op. cit*. pp. 145, 146.

97 Kaufmann, A./W. Hassemer (hsrg.): *Einfuhrung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 6th ed., Heidelberg, 1994, pp. 139–140.

98 Vrban, D., *Metodologija…*, *op. cit*. p. 69.

99 Miličić, V., *op. cit*. p. 181.

100 Murray, J. L., *op. cit*. p. 39.

101 Ademović, N., "Značaj i metode tumačenja kroz praksu Ustavnog suda Bosne i Hercegovine", Anali Pravnog fakulteta Univerziteta u Zenici, p. 29, avaliable at http://www.prf.unze.ba/docs/anali/godina5brojS/NAdemovic. pdf (las accessed 20th September 2014).

In our opinion, it is not always necessary or possible to apply all the methods/arguments. The author is prone to the standpoint that the starting point in this light should be the linguistic method which comprises determination of the meanings of particular words (lexicological rules), syntax and grammar[102] and in case several (other) methods cater for a different meaning, the decisive element should be teleological (purposive) argumentation.[103] In the event one needs to choose between two or more solutions in a case, if two or more arguments are confronted, the most convenient thing is to opt for the solution which best fits the purpose of the appertaining legal norm.

The relationship between teleological and systematic interpretation is a special one. According to the prevailing standpoint in legal theory on the occasion of systematic interpretation, one needs to take account of the goals of provisions as to assure that the interpretation would lead to an appropriate result. It was Ihering who propagated that the meaning of a legal norm should be subject to its goal.[104] The significance of the goal of a legal norm is also potentiated by Raisch who states that when examining the compatibility of a selected norm with other norms, the purposes and values should be paid due attention.[105] Hoecke thinks that some cases require interpretation of a law in the light of the purpose of a statute or an entire legal system in order to understand the statute properly or to prevent absurd or irrational statute application.[106] Similarly, Ost mentions general instructions which invite the interpreter to, on the occasion of systematic interpretation, bear in mind the "value system" proclaimed by the legal order in the effort to promote "the harmony of its own spirit" and "compliance with its own solutions". These instructions guide the interpreter to the assumption, according to which, the intention of the legislator was to "honour the values and not to deviate from the principles of the referring society".[107] Obviously, at this point, Ost means objective teleological interpretation. In terms of the relation between teleological and systematic interpretation, Rehberg declares that this kind of interpretation maintains the internal coherence of law; that many rules can only be comprehended with regard to other provisions.[108]

7. APPLICATION TELEOLOGICAL ARGUMENTATION BY COURTS

Hoecke claims that if a court applies the teleological method, it must have an active role in law development. This is a combined play between the legislator and judges: based on the goals set by the legislator, judges adapt conclusions which are normally derived from literal application of a legal text and thus "reformulate" the rule. In other words, judges may remedy

102 See, e.g., Müller, F., *Fallanalysen zur juristichen Methodik*, 2nd ed., Duncker &. Humbolt, Berlin, 1989, p. 9.

103 Christensen, R./H. Kudlich, *op. cit*. p. 363; Visković, N., *Teorija*..., p. 249. On the establishment of a hierarchy between methods and the preference for the teleological method see Đerđa, D., "Neke primjedbe o tumačenju prava", Zbornik Pravnog fakulteta Sveučilišta u Rijeci, (2002) 2, p. 629 and Vrban, D., *Država*..., p. 470.

104 *Legal Lexicon*, *op. cit*. p. 455.

105 Raisch, P., *op. cit*. p. 34.

106 Van Hoecke, M., *op. cit*. p. 144.

107 Ost, F./M. van der Kerchove, *Entre letter et l'esprit. Les directives d'interprétation en droit*, Bruylant, Bruxelles, 1989, p. 63.

108 Rehberg, M., *op. cit*.

an inappropriate meaning of a legal text or implement a new environment for the ideas put forward by the legislator.[109]

In their decisions, Croatian judges seldom explicitly lay down arguments which set grounds for their argumentation.[110] It is more common for judges to provide their judgements with argumentation by the bare act of judgement delivery and reasoning, irrespective of possible classification of their argument as one of the theoretically prescribed arguments.[111]

In the below examples, the court explicitly refers to "teleological (purposive) interpretation" and hence it can be asserted that use of teleological/purposive argumentation is obvious in cases in which the judge bluntly refers to the "goal" or "the purpose of a provision" or to "the interest".[112]

7.1. EXAMPLES OF EXPLICIT APPLICATION OF A TELEOLOGICAL ARGUMENT

EXAMPLE I[113]

A first instance decree led to acceptance of a petition for correction of a wrong entry in a way that registration of the ownership over plot no. on behalf of the applicant was adjudicated. The second instance decree amended the first instance one and the petition for correction of a wrong entry was thus rejected. Due to revision, the case appeared before the Supreme Court of the Republic of Croatia which raised the legal question if permitting the person who has filed the petition for correction of a wrong entry to submit an appeal within the time period specified by the court, in the light of Article 117 paragraph 3 of the Land Registry Act (hereinafter: LRA), implies justified grounds for the petition or not. In fact, what needed to be interpreted was the provision of Article 117 paragraph 3 of the LRA, pursuant to which, if an agreement on correction of a wrong entry is not reached, the Landed Estates Court shall refer those who have requested the correction to civil procedure and specify an appropriate deadline for claim submission. If they do not submit the appeal within the given deadline, it shall be considered as if an agreement on the correction had been made.

109 Van Hoecke, M., *op. cit*. p. 145.

110 This assertion is based on conducted research on the frequency of particular arguments in decisions of Croatian courts – in civil, commercial, criminal and administrative decisions – contained in the records of the Supreme Court of the Republic of Croatia, and as such it refers to a single case. The civil and commercial records comprise the first instance, the second instance and the third instance ruling passed by the Supreme Court of the Republic of Croatia (hereinafter: SCRC) on the occasion of the case revision. The criminal records encompass the first and second instance ruling delivered by the SCRC as a response to the appeal. The administrative records involve the first and second instance ruling passed by the SCRC as a response to the petition for protection of legitimacy. The research spans a total of 388 rulings and was conducted as part of a book entitled "Judicial Argumentation", Law School of the University of Split, Split, 2010. Arguments which application is examined are contained in the list drawn up by Italian theoretician Giovanni Tarello.

111 *Ibid*., p. 122.

112 Visković says that teleological arguments come from powerful topos "interest" and "goal". See Visković, N., *Argumentacija…*, *op. cit*. p. 74.

113 Judgement of the Supreme Court of the Republic of Croatia, Rev 1864/10-2, 25th July 2012.

The Court of Revision (Appeal) decided that the first instance court misapplied the provision of Article 117 paragraph 3 of the LRA. In its reasoning, the former suggested that superficial reading of this provision might bring to the conclusion that if the person requesting the correction does not submit an appeal, their petition shall be accepted. Pursuant to the position of the Court of Appeal, if such a conclusion is sustained, there will be no answer to the question why the applicant's court refers to initiation of civil procedure since the applicant, based on such interpretation of the provision, could be issued entry correction without submitting an appeal and initiation of civil procedure would bring *accomplishment of that goal in jeopardy* due to an uncertain outcome of the procedure. Furthermore, the Court stressed that application of Article 117 paragraph 3 of the LRA is in contrary to common sense and legal logic and such interpretation leads to the situation in which the consequences of omissions of one party in the proceedings do not affect them but the opposing party. The Court of Appeal comprehended the provision of Article 117 paragraph 3 of the LRA in a way that "the omission of the applicant to submit an appeal facilitates the applicant's concludent consent to the disposition of the opposing party who denied the grounds for filing the petition for the correction earlier and hence a failure to initiate civil procedure leads to an agreement of the parties ("agreement on the correction") that the petition for correction of a wrong entry is not well-grounded".

"Due to the presented reasons (...) the petition for correction of a wrong entry is to be rejected (...) and the reasons given out by the applicant are not acceptable since they are *contrary to the logical and teleological interpretation of Article 117 paragraph 3 of the LRA*."

To sum up, the above provision explicitly contains application of teleological interpretation since it ought to define what the (true) purpose of the provision of Article 117 paragraph 3 of the Land Registry Act is. It is clear that the court called for linguistic interpretation of the provision. However, the interpretation is not explicit in this case since the provision involves no words which meaning is not apparent for the court as an experienced interpreter, so one can say that the court applies it by default.

EXAMPLE II[114]

Deciding in family law disputes (e.g. divorce, child maintenance, child custody, contact between the child and the non-resident parent), courts often analyse the legal standard "interest of the child" and in this particular case "interest of the minor child", "best interest of the child" and "welfare of the child".[115]

The applicant submitted a constitutional complaint to the Constitutional Court of the Republic of Croatia, claiming that that his constitutional rights were violated in the proceedings that preceded the proceedings initiated at the Constitutional Court (the right to a fair trial, the right to family life).

114 Judgement of the Constitutional Court of the Republic of Croatia, U-III-1969-2011 18th December 2014.

115 Concern for "the interest of the child" is derived from the Convention on the Rights of the Child (1990) and from the family legislations that have embraced it. A solid study on this topic appears to be a M. Šeparović book entitled *Dobrobit djeteta i najbolji interes djetata u sudskoj praksi*, Novi informator, Zagreb, 2014.

The marriage between the applicant (father) and the mother of the girl was dissolved at regular courts (1999). The girl was entrusted to the mother and the court determined the manner in which the applicant was expected to maintain contact with the child (2008). After that, the mother initiated civil procedure which was aimed at prohibition of the contact between the applicant and the child (2009). In the 2010 decree, the first instance court decided that the mother retains the child custody and ruled modification of the contact between the child and the non-resident parent in a way that the contact shall be maintained at the mother's place of residence (considered that the mother changed her place of living) every first and third Saturday in a month from 2 to 6 p.m. The applicant was ordered to pick up the child at the mother's household and returns it to the same place at the prescribed time.

The first instance court used the term of "interest of the minor child" and explained it in the following way: "Although neither parent is completely fit for care about the minor child, but considering that the child has so far lived with the mother, it shall continue living with the mother. Indeed, separation from her parent (…) would encourage the feeling of guilt for the new situation and could have negative effect on her further emotional development… Supervision measures, i.e. professional assistance and advice provided to the mother, are supposed to help her take care of minor X.Y. Nevertheless, maintaining contact with the father at the mother's place of residence every first and third Saturday in a month from 2 to 6 p.m. in a way that the father picks up the child at the mother's household and returns it to the same place at the prescribed time is also in the *interest of the minor child*."

As a response to the applicant's appeal, the second instance court decreed that the appeal lacks ground and reaffirmed the first instance decree. This court also used the expression "the welfare of the child" accompanied with the following explanation: So, both social welfare centres proposed that the contact with the father be maintained at the mother and child's place of residence once to twice a week and thus the first instance court (…) considering that it is in the *interest of the child* ruled that this shall be the first and third Saturday in a month…"

Neither centre proposed that the contact with the child be maintained in the father's household since they did not find it beneficial for the child, so the court, in compliance with the highly comprehensive opinions of the centres, duly decided that such contact would be, for the time being, contrary to the welfare of the child, particularly due to the fact that the proceedings revealed that the parents' behaviour, inappropriate incidents and way of life had a negative effect on the psycho-physical development of the child (…) consequently, the parents were deprived of the right to live with minor X, but later that decree was suspended and the child was entrusted to the mother since separation from the parents "would make the child feel guilty for the new situation and could have negative effect on her further emotional development."

In terms of the constitutional complaint, the court adjudicated that "all the proceedings referring to child custody and proceedings dealing with a right related to the family life of a minor child should highlight *the best interest of the child*".

"(…) it is concluded that living with her mother is in *the interest of minor X* as well is maintaining contact with her father.

The analysis of the evidences performed by the courts showed that 'the decision is based on the protection of *the best interest of the child*; both findings and opinions of the social welfare

centres were assessed and the analysis suggested that it is in the best interest of the child' to continue living with her mother, bearing in mind the adequate integration of the child into the mother's new place of residence and the child's need to maintain contact and an emotional bond with the father.

Provided that the child's contact with both parents is a prerequisite for successful exercise of the right of the child to full and well-balanced development of its personality and taking account of all the circumstances in this concrete case, the Constitutional Court instructed that the overruled judgement established a fair balance between the *interests of the minor child* and the applicant whereat the applicant's right granted by Article 35 of the Constitution was not violated."

7.2. APPLICATION OF TELEOLOGICAL ARGUMENTATION BY THE EUROPEAN COURT OF JUSTICE

Let us say something about the application of teleological argumentation by the European Court of Justice, which also discloses the importance of systematic interpretation. The fundamental role of the European Court of Justice in the development of the constitutional law of the European Union has been broadly recognized (hereinafter: EU), which is witnessed by comprehensive literature.[116] In this context, teleological interpretation bears great relevance – it can be said that such interpretation is the prevailing interpretation technique at the above court.[117] Murray claims that the comparative interpretation method has been of primary importance for the court since its establishment.[118] Lovrić thinks that comparative law is the expected method of interpretation of EU law since the European Court of Justice is constituted of particular representatives of the national legal systems of the EU member states and since EU law, irrespective of certain differences between the legal systems of the Member States, has been based on the same principles since Roman law.[119] The second most popular method is the teleological method, though it uses the linguistic approach as its starting point.[120] However, the court does not only go into defining the goal of a particular legal provision but it also interprets rules in the light of a broader context foreseen by the EU legal order and its "constitutional telos". There is a clear bond between the systematic (context) and teleological elements in court's reasoning. It is not only the simple *telos* of the rules which are interpreted but reference is also made to the *telos* of the legal order in which these rules exist. Therefore, we can talk about teleological and meta-teleological reasoning at the court.[121] Indeed, the court sets forth and understands the purpose at the systematic level: it does not take into consideration only the teleological interpretation of an individual provision but also

116 Conway, G., *op. cit*. p. 21.

117 Maduro, M. P., "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", 1 *EJLS* (2007) 2, available at http://cadmus.eui.eu/bitstream/handle/1814/7707/EJLS 2007 1 2 8 POL EN.pdf (last accessed 8 August 2014), p. 7.

118 Lovrić, V., *op. cit*. p. 39.

119 Lovrić, V., *op. cit*. p. 20.

120 Murray, J. L., *op. cit*. p. 39.

121 Maduro, M. P., *op. cit*. p. 5.

the teleological interpretation within the entire context of the legal order of the EU.[122] Such a meta-teleological approach was affirmed by the court in the CLIFT case stating "that each provision of EU law shall be placed in its context and interpreted in the light of the provisions of EU law as a whole..."[123] Legal interpretation at the European Court of Justice is governed not only by *telos* or purpose and context but also by language.[124] Lovrić finds the following interpretation methods characteristic of the ECJ: literal, historic, contextual and teleological method.[125] Concerning contextual interpretation, the same author states that it includes analysis of the entire legal system of the EU and interpretation of individual provisions in a mutual correlation and hence, it is beyond any doubt that she means systematic interpretation.[126]

One should also bear in mind that the EU legislation is conceived as a multilingual project.[127] EU law introduces special terminology which is inherent to none of the legal systems of the Member States, so seeking an appropriate term in the legal system of one of the Member States is not possible. When an ECJ judge faces a legal issue which answer is not contained in the text of the Treaty on European Union or in some other applicable legal rule, they turn to fundamental legal principles.[128] Accordingly, one of the reasons why the ECJ applies teleological interpretation is to eliminate any kind of misunderstanding which might occur due to a difference between two or more EU languages.[129] Besides, pluralism of languages and legal traditions implies translation problems. Linguistic rules would be of little use since translation is not an exact science.[130] Moreover, teleological interpretation is the most appropriate form since it guarantees unique application of EU law at national level and can be the best guidance provided to national courts. In the end, it does not envisage only specific legal consequences of a respective case but also provides for a broader normative "lesson" which relates to future cases.

Croatian judges, when interpreting the national legislation, are required to apply the purposive approach whenever they apply part of EU law in order to cater for interpretation compliant therewith.[131] The teleological approach exercises great influence and judges apply it even when they interpret national legislation which is not related to EU law.[132]

122 Conway, G., *op. cit*. p. 22.

123 http://wikis.fu-berlin.de/display/oncomment/Teleological+Interpretation. Last accessed 20th August 2014.

124 These three methods were referred to in case of Van Gend en Loos (ECJ, Case 26/62, Van Gend & Loos, 1963, ECR, p. 1.) in which the judgment indicated "the spirit, general scheme and literal text" of the legal provisions which shall be interpreted by the Court, Maduro (Maduro, P., *op. cit*. p. 4).

125 Lovrić, V., *op. cit*. p. 19.

126 Lovrić, V., *op. cit*. p. 20.

127 http://wikis.fu-berlin.de/display/oncomment/Teleological+Interpretation (last accessed 20th August 2014).

128 Lovrić, *op. cit*. p. 20.

129 http://wikis.fu-berlin.de/display/oncomment/Teleological+Interpretation (last accessed 20th August 2014).

130 http://www.e-lawresources.co.uk/Purposive-approach.php (last accessed 10th November 2014).

131 http://www.e-lawresources.co.uk/Purposive-approach.php (last accessed 10th November 2014).

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8. CONCLUSION

Once again, teleological argumentation is consistent with the purpose and enables accomplishment of goals set by a legal rule and legal system as a whole. One should qualify an interpretation as valid in situations in which interpretation of a law cannot be conducted in an acceptable way based on other arguments, primarily linguistic and systematic ones. Therefore, teleological arguments often have the crucial role in justification just like "ultimate" arguments provide for a decisive reason in weighing or balancing arguments which point to opposite directions.[133]

Considering that teleological argumentation may annul the justificatory strength of other arguments, it functions as an argument for limitation of the scope of a legal rule or for widening the area of its application. That is why it comes to the question how far a judge can go in reformulation of the content of a legal rule. If linguistic application of a legal rule produces absurd results which would be incompliant with the goal of the rule, the judge must not apply such a rule.[134]

Authors give arguments relating to the goals and purposes of a legal rule various names such as teleological arguments, purposive arguments, functional arguments, contextual arguments, goal reasons, arguments from intention, policy arguments and substantive arguments. The common "core" of all these forms of argumentation reflects in the fact that they refer to the purpose or goal of rules as instruments which promote certain legal, social or economic values deemed essential from the perspective of justice or a public good.[135]

This paper is not aimed at systematic elaboration of teleological arguments but at demonstration that legal literature is unanimous neither in conceptualization of teleological argumentation nor in its relation with other arguments (particularly historic ones) nor in its relation with subjective and objective interpretation theories and with static and dynamic theories. Consequently, the following variants and perceptions of teleological argumentation have been identified: a) a teleological argument implies two aspects – a subjective and objective one; b) the existence of the subjective aspect is rejected and there is objective teleological argumentation; c) however, some equalize subjective teleological arguments with historic ones; d) a historic argument is regarded as a type of subjective teleological argumentation; e) historic arguments are regarded as auxiliary means of subjective teleological argumentation.[136]

The most prominent standpoint in this view suggests that there are two aspects of teleological argumentation – subjective and objective teleological argumentation, bearing in mind that teleological argumentation is more appropriate for interpretation of legal norms. At this point, it is assumed that the history of legal rules is often ambiguous and vague and that the purposes and goals need to be reconstructed. Still, even if the history is comprehensible, new developments within a society which could not be anticipated by the legislator demand that a rule is provided with the meaning which is in accordance with the current situation. Indeed, in

133 Feteris, E., *op. cit*.

134 Feteris, E., *op. cit*.

135 *Supra* note 24.

136 *Supra* p. 4, fract. 2.

modern societies, technology, human needs, values and social relations swiftly change, which implies that the initial reasons (goals) for adoption of norms become obsolete in no time. Considering that norms are supposed to satisfy current human needs, it is beyond any doubt that those who apply them shall also amend or adapt their meaning to new circumstances. A judge should be capable of detecting the objective goal of a rule by reconstructing its rational purposes.[137]

Teleological interpretation is depicted as the most convenient interpretation method due to another aspect, the aspect of a political system. Barak thinks that among various interpretation systems, teleological interpretation should have priority over other interpretation systems when it comes to democracy.[138] Furthermore, an interpretation system which suits a democratic regime is not necessarily convenient for a totalitarian regime. Every type of a regime takes advantage of an interpretation system that suits it. In other words, when asserting that teleological interpretation is the most convenient interpretation system, Barak restrains to the context of a democratic system.[139] Maduro also shares the opinion that teleological interpretation may seem reliable for democratic consequences since it prevents the textual manipulations of legal rules. In fact, interpretation which raises concern for the goals of rules and not simply for a literal text prevents opportunistic conduct and reduces the risk of interpretative manipulation of legislation.[140]

The reason why teleological argumentation should be paid special attention is hidden in the fact that the teleological method is the most common method of the European Court of Justice concerning interpretation of legal provisions and is as well applied by the European Court of Human Rights and national courts.[141]

The purposive approach implies numerous advantages but it contains some flaws too, among which one should stress the fact that judges are provided with too much power to develop law and thus interfere with the power of the parliament or differently said, they become law makers and disturb the separation of powers.[142]

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137 *Supra* p. 8, fract. 3.

138 Barak, A., *op. cit*. p. 9.

139 Barak, A., *op. cit*. p. 11.

140 Maduro, M. P., *op. cit*. p. 10.

141 *Supra* p. 3, fract. 2; p. 14.

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JOŠ O TELEOLOŠKOJ ARGUMENTACIJI

Sažetak

Teleološki argument jedno je od sredstava pravne interpretacije. Mnogo je pisano o pravnoj argumentaciji i teleološkoj argumentaciji. Zašto onda ponovno govorimo i što još možemo reći o teleološkoj argumentaciji? Istaknuli bismo dva razloga. Prvo, jedino o čemu postoji suglasnost u pravnoj teoriji jest da teleološka argumentacija kaže da je najbolje ili pravo značenje pravne odredbe ono koje izražava njezin cilj. Međutim, teleološki argumenti mogu imati više aspekata (subjektivni i objektivni teleološki argument), imaju blisko značenje s drugim argumentima (naročito historijskim), javljaju se pod različitim nazivima: kontekstualni argumenti, funkcionalni argumenti, svrhoviti razlozi, svrhoviti argumenti, politički argumenti, namjenski argumenti, bitni argumenti. Drugo, budući da se teleološkom argumentacijom dolazi do zaključka o najboljem značenju pravnih normi, ona je najčešće upotrebljavana metoda u obrazlaganju, kako pojedinih nacionalnih sudova, tako i Europskog suda pravde. Koristi je također i Europski sud za ljudska prava.

Ključne riječi: *teleološki argument, historijski argument, subjektivne teorije interpretacije, objektivne teorije interpretacije, statičke teorije, dinamičke teorije*