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CORRECTNESS AND *RATIONALITY* AS *PRESUMPTIONS OF BINDINGNESS* IN ADJUDICATION: ON THE METHODOLOGICAL RELEVANCE OF *JUDICIAL PRECEDENTS* AND *DOGMATIC MODELS* IN EUROPEAN *CIVIL LAW* AND *COMMON LAW* SYSTEMS

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1. The historically and intentionally diverse European Legal Systems' structures: *common law* and *civil law*

The historically and intentionally diverse European Legal Systems' structures — *civil law* and *common law* systems — share a partially common tradition in what concerns the methodological relevance of *Juristenrecht* in law's construction. Even though invoking

different intentionalities, and generating distinct *methodological* and *normative* consequences(-results), both in *civil law* and in *common law* systems a normatively constituting meaning is actually accorded — by academics, lawyers and judges — to the specific *roles* played by *judicial jurisprudence* and *legal dogmatics* in *adjudication*, whether they state this latter primarily as the *logically correct application of law* (*inductively* or *deductively* acknowledged…), on the one hand, or as a *normatively constitutive concrete realization of law* (*analogically* constructed…), on the other hand…

The dialogue between *common law* and *civil law* systems will be proposed, in this context, through the consideration of the *task* of *legal norms*, *judicial jurisprudence* and *legal dogmatics* in adjudication, entailing a specific overcoming of the normativistic heritage(s), in a *jurisprudentialist* approach, by understanding *adjudication* as a *judicative decision* — beyond *adjudication* as a strictly *theoretical-deductive application*, or as a sternly *practical-finalistic decision*… In such an approach, *judicial decision* represents an effectively *practical*, *concrete*, rationally dialectical-dialogical *realization of law*, to which the whole *legal system* is convoked, in all its *strata*: *normative principles*, *legal norms*, *judicial jurisprudence*, *legal dogmatics*, and *legal reality.* Therefore, *judicial jurisprudence* and *legal dogmatics* are understood as *methodological skills* which operate as constitutive juridical *criteria*, in their distinct *roles*, constitutively expressing the specific *juridically binding presumptions* they hold — respectively as a *presumption of correctness (Richtigket)* and a *presumption of rationality (Rationalität)*…

The *rule of law* in the European context has been historically represented by different expressions of the *role of law*. Still the contemporary (re)construction of European Community Law restates common law and civil law as ordinary experiences in the European Community context, while understood as a *community of law (Europäische Union als Rechtsgemeinschaft)*[1]. The nuclear question to be considered concerns the historical dialogue between *common law* and *civil law* systems, confronting *legal norms*, *judicial jurisprudence* and *legal dogmatics* in adjudication, which evolved, by approximation — a crescent «"continentalization" of English law and "insularization" of continental law» (P. Bronze) —, mostly through the overcoming(s) of

[1] See, for instance, the diagnosis published on 2003, about the construction of European Community Law, Reiner Schulze / Ulrike Seif, "Einführung", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, Köln: Mohr Siebeck, 2003, 7-8.

the normativistic heritage(s)[2].

The settled *traditional-historical* distinction between *civil law* and *common law* systems in the European context, as the mirror of a relationship between *law* and *power*, in its different forms, can be synthetically illustrated through the words by which Giovanni Orrù enlightens it in his *Lezioni di storia del pensiero teorico-giuridico Moderno*, pointing out that in continental Europe judges used to be instruments of regal absolutism, looking for law's certainty, while in England judges would be able to act even against the sovereign power: «Sul continente I giudici erano per lo più strumenti dell'assolutismo regio, ed in questo va vista la causa dell'esigenza della certezza del diritto, che doveva costituire un argine all'arbitrario imperversare del sistema contro il cittadino. Ben diversa e quasi opposta era la situazione in Inghilterra: qui il diritto prodotto dai giudici, detto *common law*, era sempre andato in direzione contraria alle tendenze del pottere sovrano, il quale invece cercava di consolidare la sua influenza proprio attraverso le leggi»[3]. And it should be emphasized right away, also exemplarily with Orrù, within that *diagnosis* of the past, that that measured distance is not anymore recognizable in the same way from the second half of the nineteenth century on, for not only by Bentham's and Austin's codification proposals, but also by the development of the techniques of *distinguishing* and *overruling,* the *bindingness* of judicial precedents changed: «In questi ultimi tempi, nel mondo anglosassone, la dottrina del precedente è andata via perdendo quel rigore que è stato in passato una sua caratteristica. Il precedente, infatti, non à piú in realtà strettamente vincolante, ma lo è quasi solo presuntivamente. L'idea della vincolatività assoluta ha avuto il suo momento di auge, nella dottrina e nella prassi della *common law*, solo nella prima metà del secolo scorso, più o meno durante il periodo della propagazione dell'idea di codificazione ad opera di Bentham e Austin. Le technique del *distinguishing* e del *overruling* permettono al giudice inglese di liberarsi da un precedente, se giudicato manifestamente irragionevole (*plainly unreasonable*)»[4].

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[2] On the crescent "'continentalization' of English law and 'insularization' of continental law", see F. Pinto Bronze, "*Continentalização" do direito inglês ou "insularização" do direito continental? (proposta para uma reflexão macro-comparativa do problema)*, Coimbra: Coimbra Editora, 1982, 123 f., especially 165 f., 174 f. See also Álvaro Núñez Vaquero, "Five Models of Legal Science", *Revus* 19 (2013) 53-81 <https://revus.revues.org/2449#text>.

[3] Giovanni Orrù, *Lezioni di storia del pensiero teorico-giuridico Moderno*, Torino: Giappichelli, 1988, 191.

[4] Giovanni Orrù, *Lezioni di storia del pensiero teorico-giuridico Moderno*, 192.

Despite the obvious confluence, the meanings of *law* and *reality* and their connections — considering the *problem-case* and the *legal statute* as starting points to legal thinking and adjudication — emphasize the essential difference between *common law* and *civil law* systems. As it has been remembered, though not absolutely defended, by Reiner Schulze and Ulrike Seif, regarding *Richterrecht*'s contemporary relevance in the building of European law's systems, the *methodological* distinction between continental *civil law system* and *common law system* rests, *traditionally*, mostly on the *deductive* character of the former and the *inductive* nature of the latter. In fact, in such a distinction, the *continental* civil law would be understood as mainly *deductive*, for a systematic codification is composed by abstract norms, this way providing the basis for solving cases, whereas *English* common law would be mainly *inductive*, for in this latter general rules would derive from cases, so that decision-making in common law systems would be typically determined by *stare decisis*[5].

1.1. The normativistic heritage: 19th Century

1.1.1. *Rules* and *principles* as *norms*

In normativistic proposals, from the nineteenth century on, mostly, *rules* and *principles* should be understood as *norms* — meaning *general* and *abstract* normative *criteria* to action, ordered by the authority of the institutionalized instance to establish them —, both

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On the doctrine of codification by Bentham an Austin, see 195-198. See also F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 177 f.

[5] *See* Reiner Schulze / Ulrike Seif, "Einführung", 8 f.. «There are two major legal systems within the European Union: continental civil law as opposed to the common law of England and Ireland. Their characteristic features are marked by a distinctly different method and style of legal reasoning.

The continental approach is mainly deductive: a systematic codification provides abstract norms, which provides the basis for solving cases. By contrast, common law is mainly based on induction: general rules are derived from cases. Therefore, decision-making is largely determined by precedent: if precedents are not distinguished then they are legally binding (doctrine of stare decisis).

(...)

(...) Common law and civil law are neither purely inductive nor purely deductive. Both systems require a certain degree of abstraction on the on hand and concretion on the other hand». — Reiner Schulze / Ulrike Seif, "V. Summary", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 22-23.

in *common law* and in *statute law*. In civil law systems, a normativistic *intentional dualism* would counterpoint the practical character and intention of *law* — created and instantiated as *legal norm* — and the theoretical, apophantic character and intention of *legal thinking* — understood and instantiated as *legal positivistic science…* —, which was to consider *legal norms* as *cognoscible objects*[6]. As illustrated by Jhering's proposal, in his quasi-*chemical* understanding of *legal system* as a *formal-abstract structure* logically constructed through *legal(juridical) concepts,* the *Begriffsjurisprudenz* exemplarily showed the meaning of *legal thinking*, and *legal dogmatics*, as *legal science*, to be assumed as a logical inductive production of progressively general and abstract logical formulations, while growingly both normatively *simpler* and logically *clearer*. The *juridical bodies (Körper)*[7] would then represent the logical purification of legal *data* (whether *consuetudinary* or *legal* criteria, translated by *normative propositions*), in order to construct *objective* law. And the pyramidal structure of Puchta would also demonstrate the inductive/deductive *rationale*, by logically relating *criteria* and *concepts* with each other, in different hierarchical levels[8]. In common law systems, similarly, the relevance of criteria *inducted* from *rationes decidendi* was decisive, and legal dogmatics was also invoked[9], as it could be considered in *civil law* systems, also relating case-law and doctrinal reasoning, in the Middle-Ages, in the early Modern and in the Enlightenment period[10].

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[6] A. Castanheira Neves, *Teoria do Direito*. Lições proferidas no ano lectivo de 1998/99, Coimbra, 1998, policop., 57-69 (A4 version).

[7] Pierluigi Chiassoni, "21.4.1. Rudolf von Jhering", in Enrico Pattaro / Corrado Roversi, ed., *Legal Philosophy in the Twentieth Century: The Civil Law World*, vol. 12, Tome 2, Enrico Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht etc.: Springer, 2016, 590-597.

[8] Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Heidelberg: Springer, 1960), 3. Aufl., Berlin / Heidelberg: Springer: 1995,17 f., 263 f.

[9] David J. Ibbetson, "Case-Law and Doctrine: a Historical Perspective on the English Common Law", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 27 f., 37; Aleksander Peczenik, *Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law*, vol. 4, Enrico Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht etc.: Springer, 2007, 17 f.

[10] David J. Ibbetson, "Case-Law and Doctrine: a Historical Perspective on the English Common Law", 29 f.; F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 123-142.

1.1.2. *Unidimensional* horizontal-coherent and vertical-consistent legal systems

Concomitantly, in such normativistic approaches the *legal system* was structured as a logically rational concatenation of norms from which general principles of law and concepts would be logically constructed, conferring a *horizontal-coherent rational unity* to the system of norms, which is to be clearly distinguished from a *vertical-consistent logical rational unity* of a system of norms, such as the one Kelsen's proposal states[11]. Such a *horizontal-coherent rational unity* would, then, lay on the concatenation of concepts with each other and within the legal system, as a matter of coherence, meaning the relation between the subjects should be considered as their content. Conversely, the *vertical-consistent logical rational unity* of a system of norms asserts an *architecture* in which the norms which constitute the system must take place in a specific level, both in their construction and in order to be valid.

1.2. *Law* as *system*, *system* as *law(?)*: on the one-dimensional/ multidimensional debate on legal systems' construction

Stating the possibility of invoking judicial precedents and dogmatic models as criteria to judicial adjudication demands some clarifying notes on the constitution of a legal system, mostly the presupposition of a multidimensional legal system, in overcoming the positivistic one-dimensionality of legal systems[12].

Distinctly from both the nineteenth century *legal science* and the subsequent, even if differently stated, contemporary discussion confronting positivist and non-positivist proposals on legal thinking, in post-positivist approaches, distinct structures of legal systems arise, mostly focusing on a multidimensional structure, such as in the *jurisprudentialist* model presented by A. Castanheira Neves — particularly stating a specific practical-normatively constructed and axiologically

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[11] A. Castanheira Neves, *Teoria do Direito*, 55-56; Idem, "A unidade do sistema jurídico: o seu problema e o seu sentido", *Boletim da Faculdade de Direito de Coimbra: Estudos em Homenagem ao Prof. Doutor Joaquim José Teixeira Ribeiro*, Número Especial / vol. II (1979) 73-184; also *in Digesta — Escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros*, vol. II, Coimbra: Coimbra Editora, 1995, 95-180.

[12] A. Castanheira Neves, "A unidade do sistema jurídico: o seu problema e o seu sentido", *passim*.

bounded legal system[13], meaning that the unity of the legal system should be conferred not by the reduction of its constitutive elements to a formal-rational-logical presupposition, but by the dialectically normative-substantial relation of bindingness among its constitutive elements, or *strata*: *normative principles*, *legal norms*, *precedents*, *dogmatics*, and *legal reality*[14]. Such a multidimensional, or multi-layered, legal system requires, consequently, distinguishing *normative principles* as *foundational* axiological principles, from which *normative criteria* — presented by *legal norms*, *judicial precedents*, and *legal dogmatics* — are normatively operative *consequences*, whose task is to accomplish that axiology in its relation with intersubjective juridical reality — and, so, entailing *juridical intentionality* as *teleonomology*.

2. Adjudication among *theoretical-deductive application*, *practical-finalistic decision* and *practical concrete realization of law*

Notwithstanding the foregoing, and even if following the perspective described by Reiner Schulze and Ulrike Seif, it must be kept in mind that the characteristic *inductive* construction of English Common Law, presented by the inductive creation of *criteria* by selecting *rationes decidendi* and *obiter dicta*[15], could also allow for a *deductive* construction of *legal solutions* in subsequent *analogous* cases. Such an understanding would denote that *deduction* would always be present in the *moment* of judicial decision, whether in *common law* or in *civil law* systems, since the approach to *legal reality* would comprehend the latter as the factual correlative of normative propositions — whether of *common* law or of *statute* law. This shows the relevance of a *para-*

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[13] See Ana Margarida Gaudêncio, "From Centrifugal Teleology to Centripetal Axiology (?): (In)adequacy of the Movement of Law to the Velocity of Praxis", *Boletim da Faculdade de Direito* 88/1 (2012) 91-103, 100-101.

[14] A. Castanheira Neves, "A unidade do sistema jurídico: o seu problema e o seu sentido", 167-180, and *Apontamentos complementares de Teoria do Direito. Sumários e Textos*, policop., Coimbra, 1998, 48-51 (A4 version); J. M. Linhares, *"Na 'coroa de fumo' da teoria dos princípios: poderá um tratamento dos princípios como normas servir-nos de guia?"*, in Fernando Alves Correia / Jónatas E. M. Machado / João Carlos Loureiro, *Estudos em Homenagem ao Professor Doutor José Joaquim Gomes Canotilho,* vol. iii — *Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo*, Coimbra: Coimbra Editora, 2012, (Studia Iuridica 106; *Ad Honorem* 6), 395-421.

[15] *See* Reiner Schulze / Ulrike Seif, «*Einführung*», 8. See also F. Pinto Bronze, *"Continentalização" do direito inglês ou "insularização" do direito continental?*, 156 f.

digm of application in judicial decisions, which is not exclusive of the nineteenth century legal thinking, since it shows up nowadays, in many, mostly formal-argumentative, approaches [16].

Considering adjudication as a theoretical-deductive application, and, so, stressing that *paradigm of application*, the *legal norm* would be taken as the major premise to the *deduction*, and the minor premise would be built through *subsumption* itself, while considering the *fact(s)* under analysis as a *species* of the *gender* abstractly prescribed in the *norm's hypothesis*. If it were so, a logical deduction would determine the application of the legal consequence stated by the norm to the fact(s) in question. And it would presuppose that there would be no normatively constitutive contribution of reality to juridicity[17]…

Overcoming *legal positivism* has often stated an alternative *paradigm* of judicial realization as a *practical-finalistic decision* — it could be said a *paradigm of decision*[18] —, even mobilizing *rational theories of decision* to figure adjudication as an effective option taken amongst alternatives considered as means to ends which would be stated as objectives in law — whether judicial decisions or statute law — as a *final program*. In such a perspective, the selection of alternatives and the viability and adequacy of judicial decision would be determined by its effective consequences, as objectives turned into effects-*results*. That would mean that law should be pragmatically valuated (as in American Legal Realism and in Law and Economics, for instance), in function of, and as a function of, the objectives to whose accomplishment it could be used as an instrument, and, concomitantly, the effective results obtained through judicial performing in the social stage[19].

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[16] Joachim Lege, "Subsumtion pragmatisch: Deduktion, Induktion und Abduktion. Eine Kampfansage an die Verächter der Logik", in Gottfried Gabriel / Rolf Gröschner, Hrgs., *Sumsumtion*, Tübingen: Mohr Siebeck, 2012, (Politika 7), 259-280.

[17] A. Castanheira Neves, *Teoria do Direito*, 58-60, and "Método Jurídico", *Enciclopédia Polis*, Lisboa, S. Paulo: Verbo 1983-86, and *in Digesta*, vol. ii, 283-336, 301-308; F. Pinto bronze, *Lições de Introdução ao Direito*, Coimbra: Coimbra Editora (2002), 2.nd ed., 2006, 370-376, 763-775.

[18] A. Castanheira Neves, *Teoria do Direito*, 102-105.

[19] «Hence, not accepting a consequentialist proposal, in which the concrete results of the judicial decision — its *effects* — wouldn't be specifically *juridical effects* — those resulting from the teleology of norms, e. g., the *effects* that the *Tatbestand* of applicable normative criteria predicts and requires to be *juridically assimilated*, subject to a previous, dialectical and normative assimilation through the *strati* of the *legal system (normative principles*, *legal norms*, *precedents*, *dogmatics*, and *legal reality)* —, but the "external" or "real" (empirical) effects, requiring empirical social predictive judgments». — Ana Margarida Gaudêncio, "From Centrifugal Teleology

Considering *adjudication* as a *judicative decision*, beyond a sternly *theoretical-deductive application* or a strictly *practical-finalistic decision*, requires the enunciation of judicial decision as an effectively *practical concrete* rationally dialectical-dialogical *realization of law*, to which the whole *legal system* is convoked. Such a *practical concrete realization of law* requires a specific *analogical relation* between the *case-problem* presented and the (constituting) *legal system*[20]. So, it is not a matter of *subsumption* of *facts* to the *hypothesis* of *norms*, or of *finalistic selection* between *alternatives*, it requires a specific practical dialectical-dialogical *judgment*, through practical legal rationality — materially founded and constituted, and, nonetheless, normatively and argumentatively enounced. Consequently, the *judicative decision* is progressively built within a *methodical scheme* in which the distinction *question-of-fact / question-of-law* is only allowable as an analytical tool. Indeed, the distinction *question-of-fact / question-of-law* is not in question in such a construction, meaning that what is at stake is the dialectical link constructed between the concrete *case-problem* — the case-*thema* — and the legal system as a whole (or the case solved in abstract by the legal norm — the case-*foro*, or *exemplum*), in its distinct dimensions, or *strata*[21].

3. The place of *judicial precedents* and *legal dogmatic models* in adjudication

Beyond all the divergences on the historically and intentionally

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to Centripetal Axiology(?)", 101. See A. Castanheira Neves, *Metodologia Jurídica. Problemas Fundamentais,* Coimbra, Coimbra Editora, 1993, 205 f.

[20] A. Castanheira Neves, *Metodologia Jurídica*, 159, and "O actual problema metodológico da realização do direito", *Boletim da Faculdade de Direito: Estudos em Homenagem ao Prof. Doutor António de Arruda Ferrer Correia*, vol. III, Coimbra: Coimbra Editora, 1984, (1991), 11-58, also *in Digesta*, vol. II, 249-282.

[21] See A. Castanheira Neves, *Metodologia Jurídica,* 196-197, 205; Fernando Pinto Bronze, *A metodonomologia entre a semelhança e a diferença (reflexão problematizante dos pólos da radical matriz analógica do discurso jurídico),* Coimbra: Coimbra Editora, 1994, (Studia Iuridica 3), 139; Fernando Pinto Bronze, "Breves considerações sobre o estado actual da questão metodonomológica", *Boletim da Faculdade de Direito* 69 (1993) 177-199; Idem, "O jurista: pessoa ou andróide?", in *Ab uno ad omnes — 75 anos da Coimbra Editora,* Coimbra: Coimbra Editora, 1998, 73-122, 110-122; Idem, "A metodonomologia (para além da argumentação)", in Jorge de Figueiredo Dias / José Joaquim Gomes Canotilho / José de Faria Costa, org., *Ars Iudicandi — Estudos em Homenagem ao Prof. Doutor António Castanheira Neves,* vol. I — *Filosofia, Teoria e Metodologia,* Coimbra: Coimbra Editora, 2008, (*Studia Iuridica* 90; Ad Honorem 3), 335-373; Ana Margarida Gaudêncio, "From Centrifugal Teleology to Centripetal Axiology(?)", 95-96.

European Legal Systems' structures, the common tradition and development of *civil law* and *common law* systems still entail, in what concerns judicial decision, a reflection on the kind of *juridical criteria* both *judicial precedents* and *legal dogmatic models* embody — and, within it, on their methodological relevance, though they play distinct roles in law's construction —, and how they relate to *legal statutes*, in their creation — as *legislation* — and in their projection in *judicial law-making* — as *judicial decision*.

3.1. Normativistic and post-normativistic approach(es) on legal criteria, judicial precedents' and legal dogmatic models' methodological relevance

3.1.1. Adjudication as deduction: the normativistic understanding of legal norms, judicial precedents and legal dogmatic models and the rational role of *analogy* in *legal gaps*

In normativistic understandings, law should be stated in *legal norms*, thus set as the primarily relevant *criteria* of *juridicalness* — as constitutive juridical *criteria*, mostly in statute law creation, but also as adjudicating/judicial deciding juridical *criteria* —, placed on a logically organized one-dimensional *system*. Judicial jurisprudence and legal dogmatics would represent, in such approaches, external, logical and reflective consequences of the logically-deductive application of legal norms. This would be a fundamental question on common law systems' construction, on the assumption of judicial jurisprudence as a source of law, for the binding force of *stare decisis*, representing an effective *auctoritas*, would rest on *rationes decidendi*, as constitutive practical *memories* of valuation, which — with or without considering, or overcoming, *obiter dicta* — would be institutionally binding as *criteria* to future decisions in *analogous* cases, according to *stare decisis*, as *norms*. In such point, the distinction between *interpretation* and *application* would be decisive. The core question would be the distinction between *judicial precedents* as *concrete cases' decisions* — and their eventual *normative bindingness* — and as *normative general and abstract criteria* — inductively obtained from those decisions. Furthermore, it would be required to consider the possibility of regarding *judicial precedents* as *criteria*, meaning the judicial decision as a decision of a former *analogous* concrete case, or as solely the solution *scheme* proposed in its *ratio decidendi*[22]. In civil law

[22] See, on this distinction, Karl Larenz, *Methodenlehre der Rechtswissenschaft*,

systems, the *principle of legality* would affirm a strictly logical distinction between *interpretation* and *application*, in order to state a *deductive application* of law.

Consequently, *analogy* would be stated as a logical operative mechanism, allowed, under certain circumstances, if and when there wouldn't be the possibility of *subsumption* — through *syllogism* — of the *facts* under analysis to the interpretative (literally) admissible meanings of the *legal criteria*, mostly when there would be no connection between the literal selected meanings of the legal text (*grammar*) — in association with the meanings admitted by the other *intra-textual* elements — *logic*, *history*, *system* — and, when acceptable, the *extra-textual* element — *teleology* — and the *empirical factuality* in question[23]. *Analogy* would then compare *facts*, in order to state the capability of the *omitted facts* — the omissions, or gaps… — to be subsumed to the literal positive relevance of the juridical criterion's text — such a subsumption would be called *analogia legis*, and, when it were impossible to achieve, there could be the possibility of subsumption of the omission to the *general principle(s) of law* in force on the matter in which the omission could be subsumed — there it would be *analogia juris*[24].

3.1.2. Beyond normativism(s), adjudication in a *paradigm of judicative decision*: a practical-normative understanding of legal norms, judicial precedents and legal dogmatic models and the role of *analogy* as the specific juridical *rationale*

Beyond normativism(s), mostly considering a *paradigm of adjudicative decision*, regarding adjudication as a practical concrete realization of law, as it has been declared, entails several intentional and methodological changes.

When considering a *practical-normative rationalization* of adjudication, *interpretation* will be included *in adjudication*, as an operative step towards the concrete realization of law, in which there will be integrative moments, which means that the formal-logic scission between *interpretation* and *integration* will have no place. This way,

252-261, especially 253. See also Aleksander Peczenik, *Scientia Juris*, mostly 26.

[23] A. Castanheira Neves, "Interpretação Jurídica", in *Digesta — Escritos acerca do Direito, do pensamento jurídico, da sua metodologia e outros*, vol. II, Coimbra Editora, Coimbra 1995, 337-377.

[24] A. Castanheira Neves, *Teoria do Direito*, 108-110.

there will be no intentional distinction between *interpretation* and *application*, on the one hand, neither between *application* and *integration*, on the other hand. *Interpretation*, *application* — not as deduction — and *integration* will be, therefore, methodological steps in the construction of *judicative decision*, with or without the mediation of a *legal norm*, and, then, to the normatively constitutive dialectical relation settled between *problem* — the concrete situation of reality requiring a legal answer — and *system* — the juridical intentionality and content proclaimed in the legal system[25], considering *normative principles* as axiological foundations, and *legal norms*, *judicial precedents* and *legal dogmatic models* as practical-normative criteria intentionally joining in *judicative decision*. Thus, in such a *judicative decision*, taken as a *practical realization* of law, there will be no deductive application, as stated on logic *normativistic subsumption* or on strict *argumentative deduction* or on some other strictly *procedural mechanism*, but a specific dialectical-analogical relation between *legal system* and *concrete problem*.

Therefore, considering *analogy* as the specific juridical *rationale*, interpretation in legal adjudication should not be affirmed anymore as a logical and abstract operation accomplished in an autonomous methodical hermeneutical moment, for the meaning of a juridical criterion is to be understood in the moment of and by the mediation of the concrete relevance of the case-problem *sub judice*. Analogy translates, here, then, a distinct judgment, in Aristotelian terms, representing a *comparison* between two terms, as *relata*, without implying a transition of level from the particular to the general and back to the particular, through a *tertium comparationis*, the *meaning-sense of legal normativity*[26]. And, then, a *judicative decision* will be constructed by stating the similarities and differences between those *relata*. This way, it would make no sense looking for a strictly logical distinction between *interpretation* and *application*, on the one hand, and between

[25] A. Castanheira Neves, *Metodologia Jurídica*, 238 f.; F. J. Bronze, 'O problema da *analogia iuris* (algumas notas)', in *Estudos em homenagem ao Professor Doutor José Dias Marques*, Almedina: Coimbra, 2007, 147-162; and "Pj → Jd: A equação metodonomológica (as incógnitas que articula e o modo como se resolve)", *Boletim da Faculdade* 87/2 (2011) 87-134, and 88/1 (2012) 13-53, and also *in Analogias*, Coimbra: Coimbra Editora, 2012, 311-391.

[26] F. Pinto Bronze, "Breves considerações sobre o estado actual da questão metodonomológica", 177-199; also *in Analogias*, 9-29, 24-25; and "Pj → Jd: A equação metodonomológica (as incógnitas que articula e o modo como se resolve)", in *Analogias*, 311-391, 345 f.

application and *integration*, on the other hand[27].

3.2. The judicial precedents and legal dogmatic models' *methodological presumptions of bindingness*: *correctness* (*Richtigkeit*) and *rationality* (*Rationalität*)

Correspondingly, in a *paradigm of judicative decision*, as considered above, *judicial precedents* and *legal dogmatic models* assume practical methodological relevance, with specific presumptions of *bindingness*, in non-normativistic terms — respectively, presumptions of *correctness* (*Richtigkeit*) and *rationality* (*Rationalität*).

3.2.1. The meaning(s) of judicial precedents' *correctness* (*Richtigkeit*)

Stating the meaning of judicial precedents' *correctness* (*Richtigkeit*) in the *jurisprudentialist* approach requires taking James Kent's consideration, in the *common law* context, of *correctness* as a *presumption* in favour of a mature deliberation, which would translate a methodological and institutional legal requirement to adjudication[28]. Stating the judges' adjudication as *correct* would be, and, it might be said, still is, understanding its *reasonableness* as a key point, in the adequacy of judicial decisions both to the reality and to the legal system — meaning a guarantee of *legal security* and, also through it, but, maybe, even beyond, of a certain sense of *legal justice*. Such a *presumption*, for Martin Kriele, would be one of (*non-absolute*) *justness/correctness — Richtigkeit*[29]. And for Larenz, and, after him, for Alexy, this *justness/correctness — Richtigkeit* — would be taken as a specific characteristic of judicial decisions, though not always as a *presumption*

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[27] A. Castanheira Neves, *Teoria do Direito*, 60 f.

[28] «A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness (…)». — James Kent, *Commentaries on American Law*, Vol. 1, O. Halsted: New York (1826), 2.nd ed., 1832, 475-476.

[29] Martin Kriele, *Theorie der Rechtsgewinnung*, Berlin: Duncker und Humblot, 1976, 253-254, and *Recht und praktische Vernunft*, Göttingen: Vandenhoeck und Ruprecht, 1979, 91 f.

of bindingness to future decisions[30].

Considering judicial precedents as normative *criteria* with *presumptive bindingness* in civil law systems presupposes in tandem that this *presumptive bindingness* might be contested, under some circumstances, observed particular conditions and fulfilled specific requirements[31] — therefore, at once, recognizing the influence of Chaïm Perelman's *principle of inertia*[32] (which Alexy says *Trägheit* - Trägheitsprinzip[33]) and the correlative *burden of contra-argumentation* (in the meaning exemplarily explained by Perelman, and Orrù[34]). Besides, understanding this *presumptive bindingness of justness/correctness* presented by judicial precedents may also require — and it is required by the present proposal — recognizing it as an effectively methodologically constructed *source of law*, in a *phenomenological-normative perspective*[35], whether it is stated or not stated in positive *legal norms* concerning *legal sources*. This does not mean, however, to ascribe institutionally authoritative *formal bindingness* to judicial decisions in civil law systems. This *presumption of bindingness* — considering the role conferred to it by Martin Kriele, differently from that acceptable to Franz Bydlinsky, Karl Larenz, or Robert Alexy — states a materially and argumentatively based point of reference to a judge's decision. And this is so, in a *civil law* system, whether there is a *legal norm*

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[30] Robert Alexy, *Theorie der juristischen Argumentation*, 334 f.; and Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 252-261, especially 254-255, and note 165-166.

[31] Franz Bydlinsky, *Grundzüge der juristischen Methodenlehre*, Wien: Wien Universitätsverlag, 2005, 107.

[32] Chaïm Perelman, *Logique juridique : nouvelle rhétorique*, Paris: Dalloz, 1976, ii, 2.; Chaïm Perelman, *L'empire rhétorique: rhétorique et argumentation*, Paris: Vrin (1977), 2002, 93. See also Sebastián Urbina, *Reason, Democracy, Society: A Study on the Basis of Legal Thinking*, Dordrecht: Kluwer (1996), 2010, 8, 75; Edgar Bodenheimer, "Perelman's Contribution to Legal Methodology", *Northern Kentucky Law Review* 12 (1985) 391-417.

[33] Robert Alexy, *Theorie der juristischen Argumentation*, 336.

[34] Giovanni Orrù, *Richterrecht: il problema della libertà e autorità giudiziale nella dottrina tedesca contemporanea*, Milan, Giuffré. 1983, 109-111 («Differenze relativamente minime tra *common law* e *civil law*»). «In ogni caso, sia il giudice continentale, sia quello inglese sono obligati a consolidare le loro decisioni inserendole nel sistema: possono essere diversi i modi in cui questa coerenza viene cercata e dimonstrata, ma il risultato cui si deve arrivare è sostanzialmente il medesimo...» . — *Ibidem*, 111.

[35] A. Castanheira Neves, "Fontes do Direito. Contributo para a revisão do seu problema", *Boletim da Faculdade: Estudos em homenagem aos Profs. Doutores Manuel Paulo Merêa e Guilherme Braga da Cruz* 58/2 (1982) 169-285; also *Enciclopédia Polis*, Lisboa, S. Paulo, 1983-86, and *Digesta*, vol. ii, 7-94.

which might be methodologically employed as a *tool of understanding* to the construction of the judicative decision, or not[36]. So, this *presumption of bindingness* is methodologically refutable, if justified, when the judge, concluding that the specific meaning of the judicial precedent convoked is not adequate to be invoked as a foundational normative argument to the construction of the present judicative decision, rejects its *presumption of bindingness* through a *burden of contra-argumentation*[37].

3.2.2. The meaning(s) of legal dogmatics's *rationality* (*Rationalität*)

Understanding legal dogmatic's *rationality* (*Rationalität*) as it is intended in the considered *jurisprudentialist* approach will require, on its turn, to discern *legal dogmatic models* as effective *rationally* normative relevant *models*, as foundations-*principles* or as *criteria*, in both cases taken as effective operational materially normative and dialogically argumentative mechanisms of *judicial adjudication*.

Recognizing to legal dogmatics a distinctive *presumption of bindingness* requires ascribing to it a specific function in judicial and legislative law-making. Such *bindingness* is not institutionally conferred, not in common law nor in civil law systems, thus it rests on the reasonableness of the reflective enouncements presented, meaning the relevancy of the materially constructed foundations, on the one hand, and justifications, on the other hand, to the normative relevance of reality when related to the normative relevance of juridical senses stated by and/or allowed by law and legal system. Therefore, ascribing to legal dogmatics a normatively constitutive rational relevance requires recognizing it to be not based on procedimental and/or argumentative terms nor on a mere descriptive function, rather laying on a subs-

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[36] J. M. Linhares / Ana Margarida Gaudêncio, "The Portuguese Experience of *Judge-Made Law* and the Possibility of *Prospective* Intentions and Effects", in Eva Steiner, ed., *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Ius Comparatum — Global Studies in Comparative Law, Vol. 3, Springer International Publishing, 2015, 185-201, especially 185-186, and 195 f.

[37] «The (…) judgments in question will benefit from a *presumption of justness* or *correctness* («Richtigkeit»), meaning that they should be understood as substantially adequate according to the juridical significances inscribed in the legal system they presuppose. This presumption is, however, refutable: if the judge contemplates refuting it, he must normatively and methodologically justify this change in orientation, complying with a *burden of contra-argumentation* (*Argumentationslast)».* — J. M. Linhares / Ana Margarida Gaudêncio, «*The Portuguese Experience of Judge-Made Law and the Possibility of Prospective Intentions and Effects*», 191-192.

tantially developed *rationality*, which stands for a multidimensional construction of judicial judgment as *judicative decision*.

Understanding legal dogmatics ahead of the normativistic-constructivist comprehension, mostly proposed by the dogmatic positivism of the nineteenth century — specifically in the way stated by Jhering[38], as has been said — requires not only the recognition of the three activities-tasks, or dimensions, that Alexy assigns to it — *descriptive-empirical*, *logical-analytical* and *normative-practical*[39] —, but also the recognition of the assertion that, besides these activities-tasks, though within them, legal reasoning must be understood not in strict *practical-argumentatively* terms but rather with normative *practical-material-argumentatively* intention and content.

Considering legal dogmatic models as *practical-material-argumentative criteria*, and, when justified, as *foundations-principles*, means taking *legal reasoning* as a practical-rationally foundational substance to law, not as a formal-logically procedural construction. And this brings about the statement of a *presumption of rationality* conferred to legal dogmatics[40]: the rationally *practical-material-argumentative* constructed models proposed by legal thinking represent law's construction as a materially autonomous critical reflection on legal reality, so that those models are methodologically available to be invoked in judicative decisions — in order to uphold a specific juridical answer, whilst interpreting statutes or common law rules, or autonomously constituting juridical *answers*(-solutions) to juridical *problems*(-cases). Thus, legal dogmatic models might accomplish specifically normative-constitutive tasks, such as *stabilization*, *heuristics*, *desoneration*, *technique*, and *control*, not only with argumentative, and/or semiotic, but also with specifically normative-constitutive meaning[41].

Accordingly, legal dogmatics may not be considered as a methodological tool specifically created to scientifically describe the normativity of law, or to supply any failure or gap in law — this would mean looking for dogmatic criteria as subsidiary tools in face of *hard cases*, namely if considering *hard cases*, globally, as those to which, due to *legal indeterminacy*, it would be possible to offer different, and even opposite, solutions, equally justifiable by *legal criteria*[42]. *Legal dogma-*

[38] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Leipzig: Breitkopf und Härtel, 1858.

[39] Robert Alexy, *Theorie der Juristischen Argumentation*, 307 f.

[40] A. Castanheira Neves, *Apontamentos complementares de Teoria do Direito*, 51.

[41] Fernando P. Bronze, *Lições de Introdução ao Direito*, 660-662.

[42] On this meaning of *hard cases*, see Álvaro Nuñez Vaquero, *"Some Realism for Hard Cases", in Theory & Practice of Legislation* 1/1 (2013) 149-171. See also Au-

tic criteria, otherwise, of argumentatively and axiologically substantial-normative compositions stated by legal thinking, reflecting on present binding positive law, de *jure condito*, and on future normatively bounded positive law, de *jure condendo*.

Legal thinking is, therefore, meant to be a practical, material, normative and argumentative construction, on legal practice and legal theory, a critically proposed construction of normativity — though not ideologically or politically engaged, neither in favour of nor in opposition to a certain ideological institutionalized power, rather as a dialogical reflection on what the law *is* and what it *should* be.

The *presumption of bindingness* conferred to *legal dogmatics* is, consequently, one of *rationality*, refusing a *normativistic-constructivistic* conceptualization, by general abstraction and/or inductive formal reasoning, and, therefore, ascribing to legal thinking the role of a materially normative reflection *about* the legal system, *de jure condito* and *de jure condendo*: a reflection able to critically state a *diagnosis* on the normative answers given to the practical-concrete problems, in order to consider the conditions of possibility of their maintenance, or of their overcoming, and, above all, the substantial and argumentative densification of the foundations of the former or of the latter normatively founded alternative —, and, thus, towards *normativity*, not *normativism*[43].

4. Conclusion: Correctness (*Richtigkeit*) and rationality (*Rationalität*) as constitutive juridical *criteria* in European law adjudication

Contemporarily, in the European Union Law — considering the *Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012*[44] —, as it has been affirmed by David A. O. Edward, «(…) case-law of the Court of Justice is the work of judges working in a unique multinational and multilingual environment.

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lius Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification*, Dordrecht etc.: D. Reidel, 1987, 13 f.

[43] A. Castanheira Neves, *Teoria do Direito*, 108-110.

[44] David A. O. Edward, "Richterrecht in Community Law", in Reiner Schulze / Ulrike Seif, Hrg., *Richterrecht und Rechtsfortbildung in der Euröpaischen Rechtsgemeinschaft*, 75-80, 75-76. The regulation is nowadays distinct. *Vide Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012*, recently amended, in <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf> (6/3/2017).

European *Richterrecht* is not legislation, it is no intended to be legislation and it should not be interpreted as if it were»[45]. This means that, though presenting different *intentionalities*, and generating distinct methodological and normative *consequences*(-*results*), whether in *civil law* or in *common law* systems, a specific methodological relevance shall be accorded to *Juristenrecht* in *adjudication*…

As considered above, judicial precedents and legal dogmatic models are to be taken methodologically as effectively constitutive *judicative criteria*, as effective operative materially normative and dialogically argumentative mechanisms to *judicial adjudication*, distinctly from *legal norms* as *criteria* — which assert a general and abstract determination and its *potestas*, within the corresponding *presumption of authority.* In their distinctive relevance and *presumptions of bindingness* — *correctness* and *rationality*, respectively —, judicial precedents and legal dogmatic models allow for a multidimensional construction of the judicial judgment as a *judicative decision*.

Legal norms, *judicial precedents* and *dogmatic models* — in their distinct normative *relevance* and *bindingness* — though constituting different operating *judicative criteria* — not alternative, rather collaborative —, in their distinctive *presumptions of bindingness* — *authority*, *correctness* and *rationality* —, presuppose the *legal system* as a set of normative meanings — in its complexity and in its multidimensionality, including the essentially founding *normative principles*, in their *validity*, also taken as a *presumption of bindingness* —, a set of foundations and of criteria normatively available to the effective construction and realization of law, in their *abstractness* and in their *concreteness.* And, whilst regarding the methodological relevance of *judicial jurisprudence* and of *legal dogmatics* as constitutive juridical *criteria* in a *normatively constitutive concrete realization of law*, it allows, then, for the highlighting of their different *roles*, therefore supporting the specific *juridically binding presumptions* they hold — as *correctness* (*Richtigket*) and as *rationality* (*Rationalität*) —, not merely *de facto*, but effectively *de jure*[46].

[45] David A. O. Edward, "Richterrecht in Community Law", 80.

[46] Aleksander Peczenik, *Scientia Juris*, 25-28.