Qualitative Content Analysis of Federal Constitutional Court's Decisions

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Abstract

What do judges of a constitutional court do? The common answer to this question is: They consider political issues based on legal criteria. Constitutional courts present themselves and are regarded as an expert group which decides by the means of the constitution. The paper, however, shows that judges of constitutional courts do not only use statutory interpretation of the respective constitution within their argumentation.The general aim of this paper is to present a method for a qualitative content analysis of the constitutional court's decisions: a text-immanent and in-depth analysis of the styles of argumentation within the published decision. As I am interested in the impact of the constitutional court's decision on the political system, more precisely on public debates and public opinion, the essential feature of each pattern of argumentation is the way in which an argument creates persuasiveness. I analyzed three coherent decisions of the German Federal Constitutional Court on asylum politics by which I identified nine different patterns of argumentation, which I named as follows: Argument by Analogy, Argument by Authority, Argument by Purpose, Argument by Declarative Statement, Missing Argument, Supporting Argument, European Community Argument, Argument by Experience, International Law Argument.

Keywords: qualitative analysis, Federal Constitutional Court of Germany, patterns of argumentation, persuasiveness, decision-making

Introduction

The point of departure of my inquiry is the following general assumption: A better understanding of the internal decision-making process helps in understanding the role of constitutional courts in political systems as well as in transformation processes.

The internal decision-making process of a constitutional court is a particular point of interest because it differs from other legal institutions and from other constitutional bodies, especially the parliament. The difference to other legal institutions lies in the cases and in the questions they have to answer. They have to decide frequently on politically controversial topics. The key differences to the decision-making in a parliament are that only a limited number of persons are involved and that the judges at a constitutional court decide behind closed doors. Furthermore, the judges are regarded as experts and are highly-skilled in a legal education system. In contrast to parliaments, constitutional courts present themselves and are regarded as institutions which decide only on the basis of legal criteria.

This specific way of decision-making at constitutional courts is a reason for the trust of the public in this institution. The trust in the German Federal Constitutional Court (FCC) is very high compared to all other German political institutions (Vorländer/Schaal 2002: 367). Therefore, the decisions of the FCC have an impact on political debates and public opinion in Germany. As a consequence, I am arguing that for an understanding of the impact of a constitutional court in the political system, it is essential to understand how the judges create persuasiveness. The general aim of this paper, however, is to present a method for a qualitative content analysis of constitutional court's decision.[1]

I define a decision of the FCC as a process of argumentation documented in the published text. Therefore, I will analyze styles of argumentation. In the development of a method to analyze the FCC's decisions, I was influenced by the linguistic studies of Martin Wengeler (2003) and Marcel Eggler (2006). Both analyzed newspaper articles with the purpose of creating an overview of different styles of argumentation.[2]

[1] I developed this method in the framework of my master thesis in which I focused on one possible impact: the depoliticization as sublation of contingency through a FCC's decision.

[2] Marcel Eggler undertakes an in-depth analysis of the argumentation in two articles on the justification of the Gulf War (1991). In contrast, Martin Wengeler analyses a large number of newspaper articles. He intends to find out whether the arguments in the German public discussion on migration have changed in the last forty years.

I favor a text-immanent approach and my central question is: What kinds of arguments do the judges of the FCC use? This led to the question: Which kinds of argumentation appear repeatedly?

Such an approach to the FCC is still rare in German political science.[3] Therefore, the analysis of decisions from a political science perspective is unusual. This stands in sharp contrast to German jurisprudence. Legal scholars constantly analyze the FCC's decisions. The hitherto existing German socio-political research on the decisions has focused either on the explanation and history of a noteworthy exceptional decision[4] or on underlying values.[5] Thus, I propose a method for a qualitative content analysis. In the paper at hand, I describe my conception and first findings.

The paper begins by asking what the German legal method explains about different styles of argumentation. After that, I focus on my central concept: patterns of argumentation. Finally, I describe the findings of my analysis of three coherent decisions of the FCC on the so-called asylum compromise. These decisions are the most important ones in the context of German asylum law. In 1993 the German parliament enacted a major change in asylum politics by implementing the concepts of 'Safe Third Countries' and 'Safe Countries of Origin'. Due to five constitutional complaints, the FCC had to review several distinctive parts of these changes to asylum law.

I. German Legal Method

For an understanding of patterns of argumentation in the FCC's decisions, it is essential to take the legal method into consideration. This is the doctrine of statutory interpretation. Thus, it describes the process by which courts interpret and apply the law. The German legal method designates four criteria of interpretation of German law: grammatical, systematic, teleolological and historical (Zippelius 2006).

In 1960, judges of the FCC characterized these four styles of statutory interpretation as follows (BVerfGE 11, 126 [130]): Grammatical interpretation of a statute means ascertaining the meaning of the words found within a legal text. Systematic interpretation

[3] Most notably, Uwe Kranenpohl (2010) examines the internal decision-making process. He interviewed former and current judges. His focus is on the influence of internal organization, the division of work and the role of the rapporteur.
[4] For example Thomas Henne (2005) on the "Lüth"-Decision.
[5] Here are a few examples: Robert Christian van Ooyen (2005) analyses the underlying idea of the state. Ute Sacksofsky (2009) analyses the underlying depiction of women within the FCC's decisions.

of a statute means ascertaining the meaning in due consideration of its coherence within the logic of the legal system. This is based on the idea of a consistent legal system. Teleological interpretation of a statute means ascertaining the meaning in due consideration of the spirit and purpose of the law. Historical interpretation of a statute means ascertaining the meaning according to the ideas at the time of inception.[6]

Reinhold Zippelius, a German legal scholar, reviews the German legal method as tools for those applying the law to assist in solving legal problems (Zippelius 2006: 13). Moreover, he states that statutory interpretation occurs in „argumentative structures" (Zippelius 2006: 48, translation JE).[7] Therefore, it is a weighting of diverse methods of interpretation and hence a weighting of diverse possible interpretations.

The judges of the FCC use the German legal method as well. The basic principle for the application of this legal method by the FCC is that the intention of the legislative authority is the intention of the statute (BVerfGE 11, 126 [131]). However, adequately ascertaining the intention of a statute is a problem for the application of law. The central question for the judges of the FCC is in this context: How important are documenting materials of the legislative process, such as the minutes of the debate in the Parliament or draft legislations, for the application of law? Again in 1960 the judges stated that these materials should not be used too much (BVerfGE 11, 126 [131]). Further difficulties of the application of law originate from a potential change of meaning of statutes. As a consequence, the judges have to decide whether that statute should be interpreted based on ideas of the present or according to ideas of the time they were adopted (Zippelius 2006: 25). In 1973, the judges of the FCC decided that a contextual consideration of statutes is appropriate. Each law has to be regarded from the perspective of the social circumstances and sociopolitical views it is intended to affect. Thus, the context and meaning of a statute sometimes has to be changed (BVerfGE 34, 269 [288]). Therefore, another question emerges: Who in a constitutional democracy, then, has the authority to decide this and on the basis of what criteria?

Zippelius remarks that the application of law is not a cognitive process, which is determined beforehand by objective criteria (Zippelius 2006: 19). It is an "argumentative

[6] The decisions of the FCC are published in an official compilation. Therein they are designated with the following abbreviation: BVerfGE. The first number indicates the volume in which it is published; the second number quotes the first page of the particular decision. In this paper I will refer to the FCC's decision in the same manner.

[7] „argumentativen Strukturen" (Zippelius 2006: 48).

procedure of selection and decision" (Zippelius 2006: 59, translation JE).[8] In general statutory interpretation is a process of argumentation which results in a compromise between competing interests (Zippelius 2006: 59).

Consideration of the German legal methods leads to two fruitful insights into the methods of argumentation in the FCC's decisions:

1. Four types of argumentations are described by the legal methods: grammatical, systematic, teleological and historical statutory interpretation.

2. The decision-making procedure of the FCC's judges is not only determined by the German legal methods. That is to say, the German legal methods do not capture entirely the argumentation process in the FCC's decision.

I assume that in the decisions of the FCC variations of argumentation appear repeatedly. Thus, I searched for different patterns of argumentation.

II. Patterns of Argumentation

An argument in general is a declarative sentence; meaning, it is a statement offered to support or to disprove another statement. Therefore, an argument always bears relation to another statement (Eggler 2006: 5) and is used for a specific purpose: the creation of persuasiveness (Kopperschmidt 1989: 122). So, what makes an argument persuasive?

The Toulmin Model of Argument[9] assists with the answer to this question, because this model is focused on the justificatory function of argumentation. According to this model, the core components of an argument are a claim, grounds and a warrant. The claim is a controversial statement whose merit must be established. Thus, it is the conclusion. The grounds are uncontested statements which serve as a foundation for the claim. Hence, they are data or evidence. The persuasiveness of the claim is generated by what Toulmin calls warrant (Wengeler 2003: 179). The warrant authorizes the movement from the grounds to the claim. Moreover, the warrant is the link between the grounds and the claim. Simultaneously, the warrant is the justification of the particular relationship between the controversial statement (claim) and the uncontested statement (grounds). To put it more

[8] „argumentativer Auswahl- und Entscheidungsprozess" (Zippelius 2006: 59).
[9] This model is named after the British philosopher Stephen Toulmin. He developed this scheme in his most famous book *The Uses of Argument* (1958).

clearly: the warrant creates the persuasiveness. Therefore, I focus on the warrant in looking at the patterns of argumentation.

Wengeler illustrates the Toulmin Model of Argument by means of the following example: The claim, 'The right of asylum must be changed', can be supported on the grounds, 'Many individuals misuse the right of asylum.' The warrant in this case is the statement, 'When a right is misused by many individuals, then the legal basis should be changed' (Wengeler 2003: 180). This statement bridges the gap between the uncontested statement ('Many individuals misuse the right of asylum') and the controversial statement ('The right of asylum must be changed'). Thus, the warrant helps to legitimize the claim.

A general differentiation has to be made with regard to the content between specified and indefinite style of argumentation. To put it in another way: There are context-dependent and context-independent warrants. The warrant in the example cited is specified. However, I am interested in the latter ones, context-independent warrants, which Eggler calls structural warrants (Eggler 2006: 35). This led me to the following specification of my central research question: Which structural warrants appear repeatedly in the decisions of the FCC?

In summary, these three interrelated components of an argument (claim, grounds, warrant) will shed light on the styles of argumentation in the FCC's decision. The patterns of argumentation vary between the warrants in terms of the different ways of creating persuasiveness.

III. Research Findings: Nine Patterns of Argumentation

Through qualitative content analysis of three decisions of the FCC, I identified nine different patterns of argumentation. The key aspect of the research process was the comparison of the warrants. With these nine patterns, I captured the whole argumentation in the decision. Furthermore, a pattern of argumentation often appears in combination. The following table provides an overview.

Table: Patterns of Argumentation in the FCC's Decision on the Asylum Compromise 1996:

Name	Feature	Warrant	Types
Argument by Analogy	Quotation of (or reference to) another decision of the FCC	Since a similar decision was made in another ruling, we draw this conclusion based on those grounds.	• contextualization • self-evident • consistent court rulings • deviation
Argument by Authority	Quotation of (or reference to) an authority	Since a person, who is regarded as an authority, approved that decision, we draw this conclusion based on those grounds.	• direct • indirect
Argument by Purpose	Reference to the political goal, the purpose of the legal regulation	Since it conforms to the political goal, we draw this conclusion based on those grounds.	• evidenced • self-evident
Argument by Declarative Statement	Statement	Because we say so, we draw this conclusion based on those grounds.	• statutory interpretation • predication • ascertainment • result
Missing Argument	Statement that something is not relevant in this case	--	• legislative body • other decision • n/a
Supporting Argument	Suggestion, discretionary clause	Since this is taken into consideration, we draw this conclusion based on those grounds.	--
European Community Argument[10]	Reference to enactment of an EC body	Since an EC body made that decision, we draw this conclusion based on those grounds.	--
Argument by Experience	Reference to practice	Since it is exercised in this manner, we draw this conclusion based on those grounds.	• practice in Germany • practice in other EC member states
International Law Argument	Reference to International Law	Since International Law sees it in this way, we draw this conclusion based on those grounds.	--

[10] I named it *European Community Argument* because the decisions I analyzed had been made at a time before the existence of the European Union.

With the exception of the *Argument by Experience*, all patterns of argumentation appear in all three decisions. The first five are the most interesting ones; thus, I will describe them in more detail than the other four.

The basic idea of the *Argument by Analogy* is explained by Eggler: The plausibility of the controversial statement will be deduced from an already ratified statement (Eggler 2006: 57). If conformity or similarity is ascertained, the comparison will create persuasiveness.

Thus, the warrant of the *Argument by Analogy* is that, since a similar decision was made in another ruling, we draw this conclusion (claim) based on those grounds (uncontested statement). This pattern of argumentation is commonly used in legal argumentation (Eggler 2006: 56). The FCC only uses analogies to other decisions made by the FCC. As a consequence, the *Argument of Analogy* creates self-referentiality in the FCC and coherence of their decisions.

In general, this method of legal argumentation supports the principles of legal certainty and equal treatment (Zippelius 2006: 81). A deviation from former decisions always needs to be justified (Zippelius 2006: 81).

The *Argument by Analogy* appears in four variations:

- *contextualization*: The conformity or similarity is explained.
- *self-evident*: The conformity or similarity is self-evident and hence not explained.
- *consistent court rulings*: The nomination of a statement in accordance with the consistent court practice increases the persuasiveness of the warrant.
- *deviation*: The conformity or similarity is neglected. This is a reverse of the *Argument by Analogy*.

The *Argument by Authority* consists of a reference to a person who is generally regarded as an authority, as a person with specialized knowledge (Eggler 2006: 42). The persuasiveness derives from the fact that an authority endorses the warrant (Eggler 2006: 42). Thus, the warrant of the *Argument by Analogy* is that, since a person who is regarded as an authority approved that decision, we draw this conclusion (claim) based on those grounds (uncontested statement).

The *Argument by Authority* appears in two variations:

- *direct:* The authority draws the conclusion.
- *indirect*: The conclusion is drawn based on the statement of an authority.

There are different types of authorities to whom they refer. In the decisions I analyzed, the judges referred only to legal scholars and representatives of the United Nations High Commissioner for Refugees and Amnesty International. Moreover, they never explained why a particular person is regarded as an authority. Instead, it is presented as self-evident.

The *Argument by Purpose* emphasizes the intention. Eggler remarks that a reference to a purpose always implies a means to an end, and thus, the instrument appears as the only possible one (Eggler 2006: 52). Frequently, the subtext says if not there will be damages! (Eggler 2006: 53). In this case, the argument points to an inherent necessity. In decisions of the FCC the purpose is always a political goal or even a political interest. Thus, the warrant of the *Argument by Purpose* is that, since it conforms to the political goal, we draw this conclusion (claim) based on those grounds (uncontested statement).

The *Argument by Purpose* appears in two variations:

- *evidenced*: The political goal is proved by an official document of the legislation process.
- *self-evident*: The political goal is not proved; thus, it is regarded as self-evident.

The German legal methods – teleological and historical – are integrated in this pattern of argumentation. The grammatical and systematic statutory interpretations are part of the following pattern of argumentation.

The persuasiveness of the *Argument by Declarative Statement* exists due to the FCC's own authority as the exclusive and obligatory interpreter of the German Constitution. Thus, the warrant of the *Argument by Declarative Statement* is that, since we say so, we draw this conclusion (claim) based on those grounds (uncontested statement).

The *Argument by Declarative Statement* appears in four variations:

- *statutory interpretation* (grammatical or systematic).
- *predication*: The judges do not explain the reasons for their conclusion.
- *ascertainment*: The judges explain the reasons for their conclusion.

- *result*: The conclusion results from previous arguments.

When the judges assert that a particular aspect is not relevant to the specific case and that there is no need for a decision, I call that a *Missing Argument*.

The *Missing Argument* appears in three variations:

- *legislative body*: The decision has to be made by a legislative body.
- *other decision*: This has to be decided in another decision of the FCC.
- *not applicable*: The judges only state that it is not relevant.

Missing Arguments are very interesting in the context of a debate about judicial self-restraint. The *Supporting Argument* may be interesting in this context as well because it is a cautious method of argumentation.

The *Supporting Argument* involves a suggestion. This argument supports a preceding warrant. Thus, the warrant of the *Supporting Argument* is that, since this is taken into consideration, we draw this conclusion (claim) based on those grounds (uncontested statement).

The warrant of the *European Community Argument* is that, since an EC body made that decision, we draw this conclusion (claim) based on those grounds (uncontested statement). European-wide regulations are increasing, thus the reference to decisions of a European institution or body may become more important.

Frequently, the previous application of law has to be considered. Thus, sometimes the judges use an *Argument by Experience*. The warrant of the *Argument by Experience* is that, since it is exercised in this manner, we draw this conclusion (claim) based on those grounds (uncontested statement).

The *Argument by Experience* appears in two variations:

- *Germany:* The judges refer to the previous application of a particular law in Germany.
- *other EC member states:* The judges refer to the application of law in another EC member state.

The persuasiveness of the *International Law Argument* consists in Germany's commitment to fulfill the respective international legal statute. Thus, the warrant of the *International Law*

Argument is that, since International Law sees it this way, we draw this conclusion (claim) based on those grounds (uncontested statement).[11]

IV. Conclusion

In summary, my research reveals that the FCC's decisions include more different methods of argumentation than the ones described by the German legal methods. They are part of the *Argument by Purpose* and the *Argument by Declarative Statement*. Also, the application of the *Argument by Analogy* derives from legal ideas: legal certainty and equal treatment. However, I found nine patterns of argumentation in the decisions on the asylum compromise.

Needless to say, further research is needed to consolidate the patterns of argumentation. These nine variations may be a starting point. The central open questions are the following: Are all the patterns context-independent? Are there more patterns of argumentation?

To mention an additional aspect of further inquiry, I was able to find variations of argumentation in the FCC's decisions; however, I could not ascertain a clear rule as to which pattern is used under which circumstances.

To go back to what I said at the beginning, understanding what judges of constitutional courts do clarifies their role in a democracy and in a transformation process. Judges argue; thus, to understand what they are doing, we need to know how they are arguing and what kinds of argument they are using. With the focus on the persuasiveness of an argument, the presented method helps in understanding the impact a constitutional court can have on public opinion and debates in parliament.

In addition, this content analysis of the constitutional court's decision provides a basis for comparative research on constitutional courts. It enables us to ascertain similarities and differences in their work.

[11] This pattern of argumentation is related to the *Argument by Declarative Statement* in its variation *Statutory Interpretation*. I decided in favor of two separate patterns of argumentation because in the decisions analyzed, the *International Law Argument* had a slightly different connotation: The consideration of the Geneva United Nations Convention Relating to the Status of Refugees differs from the consideration of Article 16 of the German Constitution "Persons persecuted on political grounds shall have the right of asylum").

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