

History of Justification

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This Article reviews the ways in which judicial decisions use and narrate history. Although judicial practice does not necessarily distinguish between them, the Article highlights the differences between various types of judicial reference to history: between decisions that make general reference to history and decisions that refer to historical documents; between decisions concerning factual controversies that are important from a historical perspective and decisions that take judicial notice of historical facts.

The Article then goes on to argue that judicial reference to history may be connected to the justification of normative choices made by the court. These normative choices, in turn, can usually be distinguished into two types: decisions that refer to history for the sake of justifying continuity with the past, and decisions that refer to history as a “warning” that dictates change. The Article then points to the existence of a middle path between these approaches – court decisions that rely on history but offer new interpretations of its implications and lessons in a way that eventually leads to reform.