

The Methods and Parameters of Comparative Constitutional Reasoning

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I.

Not much reasoning is needed for congratulating *András Jakab*, *Arthur Deyevre* and *Giulio Itzcovich* on a book that deserves to be counted amongst the best handbooks of comparative constitutional law in recent years. It should be called a handbook because it actually offers such a wealth of information about constitutions, constitutional courts and constitutional interpretation that it touches almost on everything that is at the heart of global constitutionalism. But it is at the same time much more than a mainstream handbook since it avoids a random choice of constitutional topics, whereas it focuses on constitutional reasoning in a, methodically as well as substantively, highly innovative way. According to the editors' basic definition, constitutional reasoning refers to the justifications that decision makers may publicly adduce for their elected course of action. The decision makers alluded to are constitutional courts or other apex courts in systems with integrated judicial review. The editors start from the hypothesis that judges are rhetoricians who seek to persuade one or more audiences to accept their "messages", as resulting from their decisions. Thus, constitutional reasoning is conceived to result from the interaction of the judges' values and preferences over policy and case disposition with the views and representation of the judicial role held by their audiences as well as with their skills and creativity in crafting arguments that reflect their own preferences while remaining attuned to the beliefs and expectations of their audiences.

In order to find out how the judges' constitutional reasoning is carried out, 25 authors compared the constitutional reasoning of 18 different courts across continents, constitutions and systems of judicial review. Apart from other issues, each author was asked to list 40 landmark decisions of the respective court using them to answer a sophisticated set of questions which, *inter alia*, considered the organisational and functional environment of constitutional judges as well as a variety of interpretive methods, style and rhetoric of decisions or argumentative patterns. Details for each system are

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narrated in the highly instructive single country chapters, while the editors' concluding chapter explains the aggregated results, illustrating them by sundry diagrams. Apart from many other relevant insights, it is remarkable that constitutional reasoning in civil law and common law systems does not always coincide with the differences suggested by this typology and that distinct identities inherent in individual legal systems and courts are still visible, albeit there are global trends, e.g. when it comes to the use of certain interpretive methods.

While following a traditional country report system, both the introduction and conclusions, with their richness and profundity of thought and knowledge, could even fill a small monograph on their own. Much praise is due to the choice of authors, to the extreme care and thoughtfulness dedicated to the methodology of the questionnaire and the applied empirical methods.

The complexity of matters treated by this book as well as the intensive use of empirical methods offers ample room for further discussion. This review does not, however, attempt to treat all possible issues arising from the book systematically or exhaustively. Rather, I would like to focus on a few selected points that, in my opinion, deserve particular attention and, perhaps, might lead to some future sequel on constitutional reasoning.

II.

Firstly, some remarks from a more technical point of view seem to be due to a book that heavily relies on a huge mass of data, cluster analysis and the use of diagrams. The editors were, of course, fully aware of the need to base their project on a sound methodology, a careful selection of questions and advanced statistical competence to organise loads of data deriving from the diverse responses. They knew that, for obvious reasons, they could not treat each and every country in the world, nor a majority of them. They also knew that it would not be possible to look at each and every judgement and not even each and every landmark judgement. Even a very subtle questionnaire could not be expected to cover all imaginable questions on the selected case law nor could an adequate picture of constitutional reasoning just consist of diagrams. However, and instead of all these problems, one of the great achievements of this book is that the editors anticipated these possible points of criticism. Almost wherever the reader is on the brink of questioning the applied selection or methods, the editors themselves admit the same restraints, but, what is more, they explain why they nevertheless applied a method or otherwise followed their chosen route. In nearly all cases, the explanation is highly persuasive.

Still, the question remains why exactly 40 judgements per country was the magical figure to be considered. The number may be little in case of older courts, whereas in some cases not even 40 decisions may meet the criterion “landmarkish”. Even though the authors’ choice of cases was submitted to and checked by external experts, every choice is naturally both subjective and selective. Moreover, as the editors freely admit, one may question whether landmark cases really are the most suitable decisions for such a study, since courts might feel obliged to use a different sort of reasoning in landmark cases – to be more thoughtful and convincing, but perhaps, as it may sometimes turn out, to be rather more apodictic and lopsided than in other decisions.

One may also wonder about the selection of 16 countries,¹ which is surely a rather huge number, considering that comparative handbooks often just include some four or five states that are very often the same, such as the United States, Canada, Germany or Australia. The editors’ selection is also a substantively good one since they include countries with “pattern” constitutions from all continents, written and unwritten constitutions, countries with specialised courts and countries with integrated judicial review, younger and older, federal and unitary constitutions. However, the European perspective, including also the two European super courts, is very much prioritised, and we learn nothing about countries with non-Western systems, even though they also have constitutional or other apex courts applying undoubtedly their own reasoning.

The selection of countries does not only determine the outcome, but may be self-fulfilling. If one of the results is that, e.g., federalism is a constitutional principle much less referred to than, e.g., fundamental rights, the result itself is correct. However, the result is path-dependent since half of the selected systems have no federal character and since many constitutional or other apex courts are thus not provided with the power to examine federalist competence issues, whereas they normally all have the power to review rights violations in one or other way.²

But these are only some minor points for reflection most of which could not have been decided differently, given the factual impossibility to consider all countries, all courts or all judgements. Considering the leading role of many of the selected courts, when it comes to the citation of cases or even

¹ Australia, Austria, Brazil, Canada, Czech Republic, France, Germany, Hungary, Ireland, Israel, Italy, South Africa, Spain, Taiwan, the United Kingdom and the United States.

² *T. Ginsburg/Z. Elkins*, Ancillary Powers of Constitutional Courts, *Tex. L. Rev.* 87 (2008), 1431 (1434 et seq.); *A. Stone Sweet*, Constitutional Courts, in: M. Rosenfeld/A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, 816 et seq.; *E. F. Delaney/R. Dixon* (eds.), *Comparative Judicial Review*, 2018.

the migration of constitutional ideas,³ it is hardly arbitrary to draw some, perhaps not global but at least more generic conclusions from their case law.

III.

The more interesting questions obviously relate to the substantial concept of the book. The editors explain (probably too) modestly that the book is not about a normative concept of constitutional reasoning, but rather follows an empirical-comparative approach. The reasons for this choice are convincing, since normative concepts of constitutional reasoning very closely touch upon the question of constitutional interpretation, and it is true, of course, that there is a plethora of theoretical literature of any kind on that topic.⁴ It is one of the excellencies of this book, however, that the editors, both in the introduction and conclusions, offer at least numerous hints for such a theory. They do not just present statistical results, but try to explain them by offering a wealth of profound arguments that, once they are put in context, could be seen as the prolegomena of such a theory at least.

There is a couple of more theoretical issues that, in my opinion, deserve some deeper reflection. Firstly, I would like to argue that constitutional reasoning depends more on the constitution itself than the book concedes. According to the editors, judges seem to use the constitutional text as a principal source for justifying their decisions, but not unfrequently in a superficial, outward way, whereas it is suggested that judges are often influenced by other factors, such as ideology, public policy, expectations of audiences etc., which they nevertheless want to hide by formally clinging to the constitution.

The editors are surely right in their opinion that there are many other factors apart from constitutional law in the narrow sense that may have impact on constitutional reasoning. The critical candour in which the book handles issues such as judicial activism or constitutional interpretation by judges is refreshing, since it avoids mainstream appraisals of heroic judges that save the liberal world by, as it often happens in fact, rather a mistreatment of a constitutional text, its genesis and original intentions that are replaced by their own ideological views (which is not quite the same as an objective-teleological evolutive interpretation).

³ See, with more detail, *T. Groppi/M.-C. Ponthoreau*, The Use of Foreign Precedents by Constitutional Judges, 2013; *V. Perju*, Constitutional Transplants, Borrowing, and Migrations, in: M. Rosenfeld/A. Sajó (note 2), 1304 et seq.; *G. Halmai*, The Use of Foreign Law in Constitutional Interpretation, in: M. Rosenfeld/A. Sajó (note 2), 1328 et seq.

⁴ See, in particular, the literature quoted by the editors on p. 3 et seq.

Still, the constitution surely is not only a minor factor for constitutional reasoning; nor does it seem likely that apex judges quote a constitution mostly for reasons of formalism in order to satisfy their audiences. The constitution itself as a principal factor for constitutional reasoning is not ignored, but to some extent eclipsed in the book. It would have been valuable if, e.g., several questions in the template had contained a subquestion on whether a certain condition or element related to constitutional reasoning was explicitly or implicitly prescribed by the constitution or not.

To start with, the very fact that judges do at all care about constitutional reasoning is a value derived from liberal constitutions. A range of cosmopolitan constitutional principles demand constitutional reasoning even and particularly from constitutional or other apex court judges. It would not be consistent with the rule of law, the equality principle or democracy, if judges were allowed to decide without reasoning.

But also the substance of constitutional reasoning is very much based on the respective constitution. This does, of course, not mean that decisions need to quote constitutional provisions or that judges are restricted to apply a literal meaning of the constitution. When the editors argue that constitutions are often just quoted for formalistic reasons or in order to vest a decision with some pseudo-legitimacy, they perhaps mean a literal meaning of the constitutional text. There are surely many instances where the constitutional text is not sufficient or where judges do not stick to it anyway. However, if they nevertheless quote the constitution, this need not be just formalism either. The gap between the constitutional text and “mere” formalism is, I think, very wide. But there is something in between, and this is constitutional interpretation. Even if a literal interpretation is not deemed to be sufficient by judges in many cases, this does not mean that constitutional reasoning “in truth” happens outside the constitution. It often is a grey zone, of course, how far constitutional interpretation reaches or where judge-made law – not just the individual decision, but new constitutional law – emerges. Where it emerges, the counter-majoritarian difficulty arises to formidable extent. The question of democratic legitimacy of judges becomes more contested, and constitutional reasoning will be the test bench for proving that legitimacy.

The constitutional question behind constitutional reasoning is, in fact, how far constitutions may determine constitutional reasoning – according to the book, obviously only to limited extent, which may be linked to the assumption that constitutional interpretation is a field mainly left to the decision of judges. However, a not inconsiderable number of constitutions entrenches explicit rules on the methods of constitutional interpretation –

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but these are mostly systems not included in the volume (except Canada,⁵ Hungary,⁶ South Africa⁷ and Spain⁸).⁹ Such rules have a very heterogeneous design: the perhaps largest group consists of those rules that demand to interpret a constitution consistently with public international law or selected pieces of public international law.¹⁰ Very few constitutions entrench such rules with regard to foreign constitutional law.¹¹ Many constitutions include legal definitions which, in a way, are like concretised interpretive rules in a very limited context.¹² There are also cases where constitutions explicitly prescribe “classical” interpretation methods such as purposeful, consistent or originalist interpretation,¹³ or that the constitution “is always speaking” or “speaks from time to time” which amounts to evolutive interpretation.¹⁴

Admittedly, interpretative rules may encounter two problems in this context, (i) that these rules are actually not heeded by judges or (ii) that the rules themselves are unclear and need some interpretation. In both cases, this may have direct impact on constitutional reasoning. In the first case, judges act unconstitutionally: indirectly, a sanction could be that the constitutional law-maker overrules the decision; or that judges will not be prolonged after a limited period of term; or that an impeachment will follow, even though liberal constitutions allow this only under exceptional circumstances; or that the public, media and/or academia criticise such decisions. The second problem refers to a theoretical paradox, namely that every rule needs to be interpreted which entails that also an entrenched interpretive rule needs to be interpreted. However, this problem is resolvable inasmuch as an interpretive rule that is applicable to all pieces of a constitution is also

⁵ Sec. 25-27 of the Canadian Charter of Rights and Freedoms.

⁶ Art. R para. 3 of the Hungarian Constitution.

⁷ Sec. 39 para. 1 of the South African Constitution.

⁸ Sec. 10 para. 2 of the Spanish Constitution.

⁹ A. Gamper, *Regeln der Verfassungsinterpretation*, 2012; A. Gamper, “Explicit” Interpretation in Comparative Constitutional Law, in: L. Melica/L. Mezzetti/V. Piergigli (eds.), *Studi in Onore di Giuseppe de Vergottini*, Vol. 1, 2015, 417 et seq.

¹⁰ See, for a survey, A. Gamper, *Regeln ...* (note 9), 7 et seq.

¹¹ See Sec. 11 para. 2 subpara. c of the Constitution of Malawi, Sec. 3 para. 1 of the Constitution of the Marshall Islands, Sec. 39 para. 1 subpara. c of the South African Constitution, Sec. 46 para. 1 subpara. e of the Constitution of Zimbabwe.

¹² See, for a survey, A. Gamper, *Regeln ...* (note 9), 35 et seq.

¹³ See, with many examples, A. Gamper, *Regeln ...* (note 9), 57 et seq. Among the constitutions considered in the reviewed volume, Art. R para. 3 of the Hungarian Constitution entrenches primarily purposeful interpretation, Sec. 25-27 of the Canadian Charter of Rights and Freedoms purposeful interpretation, Sec. 39 para. 1 of the South African Constitution purposeful and consistent interpretation and Sec. 10 para. 2 of the Spanish Constitution consistent interpretation; in the second and third case, the purposes are limited to specific values.

¹⁴ See, e.g., Schedule 1.4 to the Constitution of Papua New Guinea, Art. 259 of the Constitution of Kenya, Schedule 2 para. 8 subpara. c to the Constitution of the Seychelles.

self-referentially applicable to itself. Moreover, it is not likely in practice that interpretative rules are formulated in such an unclear manner that judges do not at all know how to understand them.

Certainly, written interpretative rules could not resolve all possible estrangements of judges from a constitutional text. But I point them out as an example that it would be well within the space of a constitutional lawmaker to give constitutional reasoning an explicit basis to neglect which would produce an open contradiction of the constitution which judges would normally not be likely to risk.

Let me demonstrate this with two recent cases concerning same-sex marriage. Both the US Supreme Court¹⁵ in 2015 and the Austrian Constitutional Court¹⁶ in 2017 held it as unconstitutional to allow only heterosexual couples to marry. Both courts used a non-originalist approach and mainly founded their reasoning on a dynamic and evolutive interpretation of certain fundamental rights.¹⁷ Neither the US nor the Austrian Constitution entrench explicit rules on constitutional interpretation. But how – just for the sake of the argument – would the respective decision have turned out if the US or Austrian Constitution had contained a written clause such as: “The constitution must by all means be interpreted in conformity with the constitution maker’s intentions at the time when the constitution was enacted.” or “Judges are not allowed to interpret the constitution as a living instrument.” Most probably, both judgements would have used other sets of reasons and finally arrived at a different decision.

But there may be other elements in constitutions, too, that have much impact on constitutional reasoning. The book mentions two elements that can be roughly affiliated with the division between common law and civil law systems. One is the possibility of a separate vote which is more usual in common law countries; and the other the binding character of precedents which is even more linked to common law countries. If a constitution provides these elements, this will surely have much impact on constitutional reasoning in different ways.

Concurring or dissenting judges will be likely to strive to give the “better” arguments than the majority decision, and the majority will try to avoid embarrassments stemming from a public opinion that the minority opinion was more convincing than the reasons given by the majority.

¹⁵ *Obergefell v. Hodges*, 576 U.S. (2015).

¹⁶ VfSlg. 20.225/2017.

¹⁷ While Austrian constitutional justices are generally not allowed to deliver a separate vote, the dissenting justices of the US Supreme Court elaborated on the limits of evolutive constitutional interpretation from their originalist perspective (see *Obergefell v. Hodges* (note 15), dissenting opinions by *Roberts*, *Scalia*, *Thomas* and *Alito*).

Also, if judges are bound to obey precedents, this may influence their reasoning immensely because they will normally not be able to deviate from former decisions, while on the other hand their reasoning will be easier if they may rely on well-established case law. There are examples, such as in the Hungarian¹⁸ and, similarly, Polish¹⁹ context, where constitutions at least to some extent invalidate case law that had been enacted in a former constitutional era. But even without explicit constitutional rules on this issue, constitutional reasoning seems to be set between two opposing values, namely the importance of the continuity and uniformity of standing case law, which is in line with constitutional values such as legal certainty, legitimate expectations and equality, on the one hand, and the need for dynamic and evolutive interpretation on the other.²⁰ The more a decision deviates from previous case law, the more reasoning it will need in order to make it compatible with the aforementioned principles. Also the type of decision may influence constitutional reasoning here, e.g. if it is a final and authoritative decision²¹ where a constitutional or other apex court delivers an interpretation of the constitution that is binding on all other courts.

One final thought should be given to the hypothesis that judges rely on the constitutional text rather formally. Obviously, *Montesquieu's* view that judges merely are the *bouche qui prononce les paroles de la loi*²² is hardly compatible with this view. And even though judges whose rhetoric does not just rely on constitutional law, but considers many other factors may not exactly constitute “the least dangerous branch”,²³ the book suggests one other benefit: if constitutional reasoning is, indeed, so much varied, dependent on so many factors outside the mere constitution, we may trust that constitutional judges cannot be adequately replaced by robots or other radical forms of legal technology. What the book reveals as important factors of constitutional reasoning is ultimately rooted in the very humanity of judges and their audiences. The humanity of judges and their reasoning may be

¹⁸ Sec. 5 of the Closing and Miscellaneous Provisions of the Hungarian Constitution provides that the decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed, although this shall be without prejudice to the legal effects produced by those decisions. While the Court is not prevented from deciding in the same manner, it cannot formally refer to a binding precedent.

¹⁹ Art. 239 of the Polish Constitution.

²⁰ See already A. Gamper, Legal Certainty, in: W. Schroeder (ed.), *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*, 2016, 80 (88 et seq.).

²¹ See, for a survey, A. Gamper, *Verfassungsgerichtsbarkeit und Gewaltverbindung*, 2016, 177 et seq.

²² *Montesquieu*, *De l'Esprit des Lois* 1748, Book XI, Chapter VI.

²³ *Federalist Papers* No. 78.

their weakest and most contestable spot, but at the same time vest them with unicity that at least cannot be substituted by computers.

IV.

The study underlying this volume focused on positive constitutional reasoning, but the question could be expanded on what judges do normally *not* do when it comes to constitutional reasoning or on the existence and quality of “hidden” constitutional reasoning. Some questions of the template alluded to this: e.g., to what extent do judges enter into dialogue with counter-arguments that are not brought by one of the parties? Do they, e.g., quote academic literature that does not support their decision? Do they in fact venture out into a constitutional discussion beyond a concrete case in order to innovate discussion with academia or other courts? The answer to these questions will be linked to many factors explored in the book, such as the general use of academic language by judges, their professional backgrounds, the setting of the decision (e.g., concrete or abstract judicial review), the legal culture and professional language used by judges, and the workload they have. At metalevel, some research might be interesting as to whether judges develop some sort of dialogue on constitutional reasoning itself. So, e.g., if a decision was publicly criticised for its weak reasoning, will judges – of the same court or another court – directly or indirectly respond to that criticism? Will they perhaps apply more convincing arguments in the next case in order to overcome their previous failure? Will other courts react when one court changes its reasoning, and, if so, will they lead this “reasoning dialogue” in future cases?

A multitude of constitutional questions found some or other treatment in this masterly volume, and yet the world of constitutional reasoning is still explorable. It is to be hoped that this research is continued – and it would be most desirable to make also constitutional or other apex courts around the globe aware of it.

