

Quantifying Constitutional Reasoning

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With their volume on Comparative Constitutional Reasoning, *András Jakab*, *Arthur Dyevre* and *Giulio Itzcovich* make a welcome and highly innovative contribution to the literature on constitutional reasoning. Constitutional reasoning is one of the perennial topics of the academic debate in legal theory and comparative constitutional law. Most of the work is normative in nature. As the editors point out in their introduction, scholarly work on constitutional reasoning fills libraries.¹ In fact, the three main authors (in the following: the authors) have already contributed quite significantly to filling these libraries themselves. Most notably, *Arthur Dyevre* and *András Jakab* curated a special issue of the German Law Journal on *Constitutional Reasoning*.²

One of the innovations of this volume is the methodological approach to constitutional reasoning. The authors do not discuss how courts *should* reason, but they analyze how they actually *do* reason. They describe, instead of engaging in normative argumentation. Certainly, there is a growing empirical literature on the issue. However, most of these studies analyze either a specific issue of constitutional reasoning, focus on one or at best on a handful of countries and/or use qualitative techniques. Comparative Constitutional Reasoning is the first comprehensive study on the issue that tries to identify and compare characteristics of constitutional reasoning as such and that compares not only a couple of jurisdictions, but looks at 18 different courts. Finally, they apply statistical methods to their analysis and illustrate the contribution that these quantitative techniques can make to comparative constitutional law scholarship.

The authors solicited constitutional law scholars from 18 different jurisdictions to provide information about the style of reasoning of their respective apex court in constitutional cases. They asked them to select a canon of 40 landmark cases and to analyze and classify these cases according to a pre-conceived questionnaire. Furthermore, they asked the “country experts” to write a country report on their jurisdiction and explaining the jurisprudence

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¹ *A. Jakab/A. Dyevre/G. Itzcovich*, Introduction: Comparing Constitutional Reasoning with Quantitative and Qualitative Methods, in: *A. Jakab/A. Dyevre/G. Itzcovich* (eds.), *Comparative Constitutional Reasoning*, 2017, 1, 3.

² GLJ 14 (2013), Issue 8.

of the analyzed court with regard to the questions included in the questionnaire. While these country reports are illuminating and a valuable resource to add qualitative information to the quantitative dataset, the main innovation of the book is certainly the last chapter, which is authored by the three editors.³ This chapter highlights certain similarities and differences using quantitative techniques. The following remarks will comment on these findings.

These findings relate to four different categories. First, the authors present some descriptive results showing the variation of the use of certain arguments. They make a distinction between argumentative categories, such as use of analogy, teleological arguments or precedents, and of generic constitutional concepts and doctrines, such as proportionality, rule of law or equality. The reader learns, e.g., that over 80 % of cases in the database involve precedent based arguments,⁴ while roughly 40 % of decisions recur to the proportionality test.⁵ She is also informed about outlier jurisdictions. The French Conseil Constitutionnel is the only court that almost entirely refrains from using precedent-based arguments,⁶ while the Australian High Court makes exceptionally little use of equality arguments.⁷

However, with regard to constitutional concepts, the insights provided by this descriptive analysis are limited. Many of these concepts are issue-specific so that the results displayed in the graph can be driven to a large extent by the selection of the canon of landmark cases. Let me give one example. One of the analyzed generic concepts is the proportionality test, which has become almost ubiquitous in constitutional rights analysis across the world.⁸ However, while proportionality or proportionality elements

³ A. Jakab/A. Dyevre/G. Itzcovich, Conclusion, in: A. Jakab/A. Dyevre/G. Itzcovich (note 1), 761.

⁴ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 763 (figure 1).

⁵ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 765 (figure 2).

⁶ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 763.

⁷ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 765.

⁸ See A. Stone Sweet/J. Mathews, Proportionality Balancing and Global Constitutionalism, *Colum. J. Transnat'l Law* 47 (2008), 73; S.-I. G. Koutmatzis, *Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee*, *Verfassung und Recht in Übersee* 44 (2011), 32; A. Barak, Proportionality – Constitutional Rights and Their Limitations, 2012, 181-210; J. Sauer, Die Globalisierung des Verhältnismäßigkeitsgrundsatzes, *Der Staat* 51 (2012), 3; K. Möller, The Global Model of Constitutional Rights, 2012, 178; V. Perju, Proportionality and Freedom – An Essay on Methods in Constitutional Law, *Global Constitutionalism* 1 (2012), 334; M. Cohen-Eliya/I. Porat, Proportionality and Constitutional Culture, 2013, 10-14; F. Becker, Verhältnismäßigkeit, in: H. Kube/G. Morgenthaler/R. Mellinghoff/U. Palm/T. Puhl/C. Seiler (eds.), *Leitgedanken des Rechts. Paul Kirchhof zum 70. Geburtstag. Band I: Staat und Verfassung*, 2013, 225, paras. 12-27; C. Bernal Pulido, The Migration of Proportionality Across Europe, *New Zealand Journal of Public and*

might sometimes be used in cases concerning federal competencies, it is mainly a tool of constitutional rights analysis. We would thus expect that proportionality is used much more often in constitutional rights cases than in cases concerning the organization of the state. Therefore, the percentage of proportionality cases may partly be driven by the percentage of constitutional rights cases in the canon. We may, for example, have two apex courts which use proportionality in 100 % of their constitutional rights cases. However, in one canon 70 % of the cases are constitutional rights cases, while in the other canon only 40 % of the cases are. We would then find a significant difference in the use of proportionality between these two jurisdictions. But this difference would – in our example – be entirely driven by the composition of the 40-case canon, while there would be no fundamental difference in the use of proportionality.

Note that this critique does not address the issue of canon selection. While there may be disagreement about the 40 most important constitutional cases, the identified issue would even be relevant if all constitutional scholars agreed that the identified cases are indeed the 40 most important cases. However, the frequency of the use of some of the generic concepts might be highly dependent on the exact composition of the canon so that the results might not be robust to alternative reasonable specifications of the canon. As the authors point out, there may be reasonable disagreement with regard to at least parts of the canon.⁹ Probably, there is a core of cases with regard to which all experts agree that they belong to the canon. The *Lüth* judgment in Germany, *Makwanyane* in South Africa, *Marbury v. Madison* and *Brown v. Board of Education* in the US or *van Gend en Loos* and *Costa v. ENEL* in the European Union come to mind. However, at the margins, it might be entirely reasonable to replace some of the chosen cases with alternative, equally relevant cases. This is not to say that the choice of the canon was “wrong”, but that there may be reasonable disagreement with regard to its composition.

For the cross-cutting argumentation structures displayed in figure 1,¹⁰ the exact composition of the canon presumably does not matter. With regard to the constitutional concepts, however, it matters a great deal because many of the concepts are highly issue-dependent. Free-speech arguments are more likely to be found in free-speech cases. Arguments about federalism are

International Law 11 (2013), 483, at 498-503; G. Huscroft/B. W. Miller/G. C. N. Webber, Introduction, in: G. Huscroft/B. W. Miller/G. C. N. Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, 2014, 1.

⁹ See A. Jakab/A. Dyevre/G. Itzcovich (note 1), 27-31.

¹⁰ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 763.

more likely to be found in cases concerning the delimitation of competencies between different levels of a federal state.

Finally, there is a third concern relating to generic constitutional concepts. The same concept may mean different things in different jurisdictions. This may also drive the results of the descriptive analysis. Human dignity is a case in point. In the European Convention on Human Rights (ECHR), dignity is not mentioned as an explicit guarantee. Nevertheless, the European Court of Human Rights (ECtHR) in some cases refers to the concept of dignity in order to underline the severity of the fundamental right restriction.¹¹ Dignity is thus used as a supporting argument. By contrast, in Germany the inviolability of human dignity is an independent constitutional guarantee, which differs in its scope from other constitutional rights. Therefore, the function of the reference to dignity is arguably different in the German jurisprudence than in the case law of the ECtHR. Finally, South Africa combines both approaches. Art. 10 of the Constitution contains an explicit guarantee of human dignity. However, it is also mentioned in Art. 7 as a foundational value of the Bill of Rights and often used in this latter function in the jurisprudence of the South African Constitutional Court. This might also be part of the explanation why South Africa is an outlier in the use of human dignity.¹²

The most interesting finding of the book is certainly the analysis whether there are different “families” of constitutional jurisdictions and whether these correlate with the traditional distinction between common law and civil law. The authors find that there is no statistically significant difference between the use of precedents in common law and in civil law jurisdictions.¹³ However, they observe differences in style: According to the authors, judges in Common Law jurisdictions tend to make greater use of metaphors and are more ready to rely on explicit policy arguments in their reasoning.¹⁴

But the authors do not stop at this simple Common Law/Civil Law comparison. Instead, they perform a cluster analysis in order to examine how close the reasoning styles of different jurisdictions are to each other.¹⁵ The results of this analysis contain a few surprising insights. There is some confirmation for the thesis that Common Law and Civil Law jurisdictions differ significantly. If one divides the analyzed courts into two clusters, al-

¹¹ See, e.g., ECtHR, *Vo v. France* [GC] (8 July 2004), ECHR 2004-VII, para. 84.

¹² See *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 765.

¹³ *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 769-770.

¹⁴ *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 770-773. However, the authors fail to report whether these differences are indeed statistically significant.

¹⁵ *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 776-782.

most all Common Law jurisdictions – with the notable exception of Ireland – are found in the same cluster.¹⁶ However, the division is not clear-cut. Germany, Brazil, the Czech Republic and the ECtHR are found in the same cluster as the majority of Common Law jurisdictions.¹⁷ Indeed, the analysis suggests that the United Kingdom style of constitutional reasoning resembles more closely the German mode of reasoning than the reasoning style in the United States (US).¹⁸ A further interesting finding is that France is an outlier with regard to all other jurisdictions.¹⁹

The analysis is based on the variables regarding argumentative categories. By contrast, the authors do not compare the use of generic constitutional concepts. They argue that the latter are too issue-specific in order to serve as reliable parameters of comparison. Considering the criticism voiced above regarding the limited insight provided by the description of the variation within the use of generic constitutional concepts, this choice is certainly reasonable. However, it also points to a further difficulty: To what extent are the findings due to the specific choice of parameters that are compared. The authors use a reasonable canon of argumentative categories. However, one might be able to come up with reasonable alternatives.²⁰ Furthermore, some of the less issue-specific generic constitutional concepts, such as proportionality, are probably important factors to consider when trying to understand the nature of constitutional reasoning in different jurisdictions. Constitutional jurisdictions using proportionality in their constitutional rights reasoning are arguably closer to each other than to jurisdictions relying on categorical arguments. Consequently, the reader is left wondering how robust the results are with regard to different specifications of the cluster model. To what extent would the results change if we made reasonable additions or subtractions to/of the factors considered in the comparative analysis?

The third block of findings concerns temporal trends. The authors analyze time trends with regard to the use of certain argumentative techniques and constitutional concepts. They find Civil Law jurisdictions converge with Common Law jurisdictions regarding to the use of precedents and show that this convergence is driven by an increase of the use of precedents in Civil Law jurisdictions.²¹ They also show that the importance of funda-

¹⁶ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 779.

¹⁷ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 780.

¹⁸ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 778 (figure 8).

¹⁹ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 779.

²⁰ The authors acknowledge this point themselves, see A. Jakab/A. Dyevre/G. Itzcovich (note 1), 795-796.

²¹ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 783.

mental rights cases increases at the expense of cases concerning the organization of state. Finally, they observe that the use of purposive arguments increases over time at the expense of textualist arguments.²²

However, the aggregate data might be misleading when observing these time trends. They might be dependent on the jurisdictions that are considered. The authors point out themselves that the dataset is temporally skewed.²³ Most of the analyzed jurisdictions do not cover the whole period from 1951 to 2010. Instead the observations for these jurisdictions start somewhere along the way. However, this also means that the observed trends could be due not to changes in the style of constitutional reasoning, but to changes in the underlying composition of the panel. Let me give one example. The authors highlight that the US Supreme Court is the court that displays by far the highest proportion of textualist reasoning of any court.²⁴ However, the Supreme Court is also one of the few courts that cover the whole temporal spectrum. Therefore, the relative weight of the characteristics of the Supreme Court is much greater in the 1950s than in the 2000s. This means that the observed decline of the use of originalist arguments and references to ordinary meaning could, in fact, be due to the decline of the relative weight of the US Supreme Court within the dataset without highlighting any underlying change in the style of reasoning.²⁵

The final finding of the authors relates to the claim of exceptionalism. In particular, the US constitutional order is often considered to be exceptional compared to other constitutional orders. Nevertheless, the authors point out that exceptionalism really depends on the perspective.²⁶ There are certain characteristics of the style of reasoning of the Supreme Court that are exceptional, while the Court is just another member of the field in other respects. By contrast, other constitutional courts are exceptional regarding other issues.

Despite the mentioned quibbles, the analysis of the authors provides a richness of new information on the comparative structure of constitutional reasoning. In addition, the volume proves that quantitative methods can lead to interesting results when analyzing the general structure of constitutional reasoning. In some instances, the results confirm intuitions that have long been held by constitutional law scholars. In other points, some results are rather counter-intuitive. However, it is important to keep in mind that

²² A. Jakab/A. Dyevre/G. Itzcovich (note 1), 787.

²³ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 782.

²⁴ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 792.

²⁵ There are statistical techniques that allow to control for this issue. The authors do not mention whether they make use of them.

²⁶ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 791-794.

the quantitative analysis is not the last word that finally decides debates on constitutional reasoning in comparative constitutional law scholarship. It is rather the opposite: It shows us the whole richness of constitutional reasoning and opens up new ways to compare constitutional jurisdictions and constitutional jurisprudence. In this way, *Comparative Constitutional Reasoning* is a highly illuminating and stimulating book that will certainly contribute to shaping the future discussion on constitutional reasoning and comparative constitutional law in general.

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