*Christ University Law Journal*
2019, Vol. 8, No. 1, 115-121
ISSN 2278-4332X | https://doi.org/10.12728/culj.14.6

# Book Review

# Comparative Constitutional Reasoning

Jayadevan S Nair*

**Andras Jakab, Arthur Dyevre, et. al.** (eds.), *Comparative Constitutional Reasoning,* Cambridge University Press, Cambridge, 2017; ISBN No.: 9781107085589**.**

The book, which is based on the Conreason Project, is a study of mammoth proportions, to give a new shape and direction to the study of comparative constitutional academics. The project with its global scale and ambition does justice to its objective – to unearth the constitutional reasoning trends in constitutional courts.1 At least by its magnitude and nuanced detailing, the project is a brave resolve to decode the behaviour of constitutional courts in select jurisdictions. In doing so, the project has picked on an assortment of apex courts, across the globe, including supra national fora. The project and the ensuing book are the result of an arduous resolve, planning and execution, over a period of around five years(since 2011). The book is a compendium of the project, after it had reached a culmination, with respect to its findings. Comparative constitutional law projects have been attempted before, but most of them had a normative focus and not a quantitative approach. The Conreason project treads differently in this regard.

The authors clarify that the study solely focusses on constitutional courts and not on the constitutional reasoning tendered by the executive and legislative authorities. The focus is on the 'justificatory' reasons articulated (and perhaps in certain

* School of Law, CHRIST (Deemed to be University), Bengaluru, India; jayadevan.nair@christuniversity.in

1 *See* https://jog.tk.mta.hu/uploads/files/mtalwp/2015_09_jakab.pdf accessed on 23-08-2018

circumstances not articulated by the courts) to justify or substantiate their decisions. The focus is on 'judicial actors'- 'a judicial institution explicitly erected as a constitutional court or tribunal or the top most court with the power to review legal rules on constitutional grounds, irrespective of its name or title constitutional law means. According to the authors, the rules enjoying the highest rank in the legal order (having precedence over other rules). To this list there are however three qualified entries – the Highest court of the United Kingdom, the European Court of Justice and European Court of Human rights.

The project team leaders handed over to the contributors, the task of ascertaining 40 leading cases in their jurisdiction and a questionnaire to be answered, based on the legal system and an analysis of the 40 case laws. With a list of 40 cases from each of the 18 jurisdictions,2 the study focusses on certain parameters for the assessment of the performance and behaviour of the constitutional courts. The book does not provide a satisfactory idea as to why the study was confined to these 18 jurisdictions and the rationale underlying the choice of these 40 cases. Amusingly, the world's largest democracy and the busiest constitutional court, in the world by the yardstick of a day's docket list – Supreme Court of India, does not figure in the list of 18 jurisdictions. In fact, South Asia does not find space among the noted constitutional courts in the world. Interestingly, the western constitutionalism, specifically in Europe finds, itself under scrutiny as the major object of study. The rationale underlying the selection of the jurisdictions lacks clarity and convincing logic. The list includes Israel and Taiwan along the

[2] The eighteen jurisdictions include the High Court of Australia , The Austrian Constitutional Court , The Supreme Federal Tribunal of Brazil, The Supreme Court of Canada, The Constitutional Court of the Czech Republic, The European Court of Human Rights, The European Court of Justice ,The French Constitutional Council , The German Federal Constitutional Court, The Constitutional Court of Hungary, The Supreme Court of Ireland, The Israeli Supreme Court, The Constitutional Court of Italy, The Constitutional Court of South Africa, The Spanish Constitutional Court, The Constitutional Court of Taiwan, The Supreme Court (House of Lords) of the United Kingdom, The Supreme Court of the United States.

with the usual constitutional behemoth – the United states of America. The inclusion of United Kingdom without a consolidated written constitution is surprising, considering the absence of judicial review and the recent establishment of the Supreme court in 2010, with no power of judicial review over primary legislation (other than the power of declaring incompatibility).

As admitted by the authors, the selection has an overwhelming European flavour to it – Taiwan, Brazil, Israel and South Africa, being the only exceptions to it. The selection also includes the supra national for a rendering functions akin to constitutional courts – the European court of justice and the European court of human rights. While all continents have been represented, the project menu has an overwhelming European flavour. Out of 18 jurisdictions, whose constitutional courts are under study, 16 are European or erstwhile colonies. The sole Asian representation is from the apex court of Taiwan.

The 18 texts are woven around a questionnaire that seeks to unravel the judicial character and behaviour of 18 constitutional courts respectively. Among the many interesting parameters required to be assessed, is the one pertaining to 'judicial candour and judicial rhetoric'. It seeks to assess the value judgements expressed by the courts and its echo in the judgements. It probes into nuanced aspects of judicial behaviour, by attempting answers to questions, such as the target audience of the reasoning of the judgement, the degree of generalisation and the quantum of rhetoric – the emotional tone apparent in the opinion. The questions seek to uncover the trend in the argumentative recourses by the courts such as the use of analogies, debate using the text of the constitution and ordinary meaning of words in the constitution. The study seeks to analyse the prevalence and application of harmonising arguments, use of precedents, doctrinal analyses of legal concepts or principles. The questionnaire seeks to identify even the arguments of silence in the judicial opinions, besides the recognition of teleological or purposive arguments. It seeks to map the judicial argumentative patterns for instance, the recourse to non-legal materials and sources of scholarship and foreign national laws and precedents. The questionnaire handed over to the investigators in the 18 jurisdictions had to be answered within a

cap of 15000 words. This was ostensibly with an eye on publication at a later point of time. The investigators have produced sufficiently rich research within the bounds of word limit and in certain instances have tried to go beyond the questionnaire as well.

The study throws up surprising patterns in the functioning and attitudes of the constitutional courts. For instance, the constitutional court in Israel – without a written constitution had identified 13 basic laws as its constitutional text, thereby heralding a *suo-motu* induced constitutional revolution in judicial review. In Israel, litigation based on a certain constitutional text is a post 1995 phenomenon, pioneered by the Supreme Court and not through a legislative initiative3. This is a benchmark in the advancement of constitutionalism and a quiet changeover and shift from the stoic doctrine of parliamentary sovereignty. A similar trend can be witnessed in France, post 1970, through the assertiveness of a constitutional review culture, by the Constitutional Council. This evidences the growth of constitutionalism and a culture of judicial review, seeping into the administration of justice, in different corners of the globe; which pointer to growth in judicial trust, globally.

In several jurisdictions, one can discern a change sweeping over the composition of constitutional courts and the widening of the source of expertise on the bench. One can notice the involvement of the legal academia in the working of the courts – the elevation of professors to the bench. Such trends are important lessons for the functioning of the Indian courts, that are still to accommodate legal academia in decision making and administration of justice.

The team has successfully compiled a data set (the CONREASON Dataset4 ), encompassing the argumentative characteristics of 760 landmark decisions. There is a sense of euphoria in being able to make an original contribution through the data set. Through the questionnaire, the idea was to enhance 'comparability' across jurisdictions. The questionnaire reflected the following common

[3] CA6821/93United Mizrahi Bank Ltd. v. Midgal Coperative Village (1995)- the court identified a constitution for Israel

[4] The full dataset based on which the analysis is based on is available at www. cambridge /9781107085589

queries across the jurisdictions under the study - to describe the legal, political, institutional and academic context, the design of the courts and status of constitutional litigation, the number and composition of judges, the relationship between the academia, the bar and the bench, the recourse to academia in case of doubt, the reference to pivotal fundamental principles and doctrines such as the rule of law and separation of powers. The influence of comparative law in adjudication is also an object of the study. A novel attempt has been to define the structure of constitutional arguments, by delineating the arguments into three structures or modes5. The report not only explains, but also brings to the fore, the predilections and shortcomings in argumentative patterns resorted to by the courts. The study maps a certain constitutional behavioural pattern and etches the constitutional culture exuded by these jurisdictions, to provide a dependable predictability to the growing discipline of comparative constitutional law.

Each one of the contributors appear to have borne in mind, the need to steer clear of heavy jargon which brings in a sense of relief, at being able to read and assimilate, without brooding over concepts and language – usually a semantic battle ground. The work tries to rise over these technicalities and communicates the essence of the herculean endeavour. The conclusions segment is marked by inferences from the research applied and is articulated in a reader friendly manner.

It is noteworthy that the project scans cases from different systems- from civil to common law systems- the common strand among them being the fact, that the decisions under scrutiny are all from their apex courts- constitutional courts. The study brings to the fore interesting details in the judicial process and deliberations in these constitutional courts. For instance, in some of the jurisdictions, the reasoning goes beyond the strict morbid application of legal tools, to quips from even songs and poems and *avante garde* literature. Such recourses find resonance in the tools employed by the reasoning of several courts, in arriving at decisions. The study also

[5] The team calls it one-line conclusive argumentation, parallel conclusive arguments and parallel individually in conclusive but together conclusive arguments.

discerns the reference and recourse to non-legal premises of argumentation resorted by the courts – for instance sociological, economic and moral grounds.

Judicial systems adopt divergent approaches to voice a judgement. While separate judgements are accepted from the bench, in the common law and mixed system fold, there is determined attempt to avoid vocalising dissent or divergent opinion in civil law systems. This could be ostensibly to avoid any confusion with respect to ratio emanating from the same bench and to usher in certainty. Thus, the study brings to fore the trend of separate opinions being banned in countries such as France, Italy and Austria and also in international for a such as the European court of Justice. However, it is noteworthy that the European court of Human Rights accommodates providing a venue for separate opinions. The study, other than, bringing to the fore these titbits of information is not judgemental on the acceptability and non-acceptability of these practices. It focuses on constitutional courts of countries that were erstwhile communist states and to their unaltered judicial mindscape, even after the regime change. They still harbour the frosty orthodox approach to adjudication that is hanging onto the formalistic textual approach, undaunted by the change in their constitutional value systems and being restrained in tapping the interpretative possibilities in the constitution which is an evolving organic document. The study though, does not reason out the question, why the textualist approach persists, despite changing over to another set of constitutional values, philosophies and commitments. Some of the reborn republics follow the method of 'comparativism', influenced by the experiences of other mature constitutional systems (for instance the Czech Republic influenced by the experience of German Constitutional Courts). They are also noticed for stepping out of the traditional dogmatic confines. The central European Constitutional courts display a drift away from Kelsian restraints on constitutional interpretation that provides no avenue for an activist judiciary. Concepts such as rule of law and due process can be seen applied frequently in some of these jurisdictions.

The authors are mindful of the likely shortcomings in their ambitious endeavour, particularly, the belief that 40 leading cases

from a particular jurisdiction could be a dependable sample, representing the argumentative patterns of a lifetime of a constitutional court. Would 'leading cases' essentially depict the reasoning patterns or are more 'routine' ones more reliable of proof ? The definition of 'leading cases' is a crucial factor to this purpose. Simply put, the galling question, is how does one identify a 'leading case' that can also be a reliable guide and a specimen, to outline the functioning and patterns of judicial thinking of that constitutional court (rather than be an odd aberration). By leaving it to the respective contributors from the selected jurisdictions, the authors or investigators have not plugged a basic misgiving for the safe realisation of the project objective.

A flip through the appendix reveals the challenges before each of the contributors. Besides an analysis of 40 leading judgements dealt with by their constitutional court, the contributor has to answer a questionnaire and all of that to be summed up in 15000 words! The country reports have to adhere to the strictures of the guidelines prescribed by the conreason project and bring out answers from which comparisons can be made in order to infer, generalise or distinguish.

Despite the anticipated limitations and self-confessed shortcomings (The authors do not claim infallibility!) the work is an unprecedented attempt in scale and coverage and will remain a must read for those connoisseurs and followers of comparative constitutional law. The team leaders (editors) of the work exude a cautious humility that the project may be inaccurate in its generalisations and inferences, but that, in itself is no reason to belittle the significance of the attempt. The project and the resultant book are a blueprint for the future constitutional student to rectify, work and build on.