BOOK REVIEW

Methods of constitutional reasoning in six CEE countries

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The comparative approach to constitutional interpretation and reasoning has seen considerable developments over the last decade. While earlier comparative studies within the field mostly focused on concepts and institutions, and generally adopted a normative perspective, the launching of the CONREASON project (cf. Jakab, Dyevre & Itzcovich, eds., 2017) in 2011 has been an important step towards a both more descriptive and methodologically better founded examination of constitutional argumentation. The project has since found several followers (see Kelemen, 2019, n. 1, for references), including those focusing on specific regions (CORE Latam, cf. Fröhlich, 2020, and Nordic CONREASON). This volume is a further addition to this growing body of scholarship. The main question of the comparative study presented here is whether there are any specificities in the reasoning and constitutional interpretation of Central and Eastern European constitutional courts. The reader finds many valuable insights and lessons on the way to an essentially negative answer.

The structure of the volume is far from being intricate: a substantial introductory chapter (by Zoltán J. Tóth) is followed by country studies analysing samples of judgments from the Slovenian (Benjamin Flander), Hungarian (Adél Köblös), Czech (David Sehnálek), Slovak (Katarína Šmigová), Serbian (Slobodan Orlović) and Polish (Piotr Mostowik) constitutional courts. The selection criteria are explained in the introduction: the authors of each study have selected thirty judgments dealing with fundamental rights issues from the period 2011–2020, which contain references to the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The authors take stock of the interpretive methods used by the respective courts and identify the types of arguments used in the reasoning of the judgments, as well as the weight attributed to single types. As a next step, they do the same with the ECtHR and CJEU judgments cited. That makes it possible to characterise the jurisprudence of national constitutional courts, and also to compare it with that of the European courts, albeit with certain limitations.

Most of the limits have, of course, been taken into account by the researchers, and the analytical methods have been adapted to these to some extent. One example is the choice of cases: the judgments delivered in the five-year period (2016–2020) initially envisaged did not contain a sufficient number of references to European case law, and it was therefore necessary to consider the courts' jurisprudence over a longer period. Another

example is the limitation of the number of references examined: the authors selected one ECtHR or CJEU judgment from the references of each judgment, which they considered to be of decisive importance for the reasoning, to reconstruct European case law. That latter has been ultimately limited to the characterisation of the ECtHR case law, since national constitutional courts, at least in the cases examined, very rarely refer to CJEU decisions.

However, two important limitations of the comparison remain unreflected in both the introductory chapter and the individual studies.[1] One of these is temporal, the other is perhaps best termed spatial. As regards the former, the problem is caused by the greater temporal dispersion of ECtHR judgments: while the selection of the jurisprudence of some constitutional courts is limited to the 2010s, some of the European decisions cited here are, quite naturally, from previous decades, in some cases even from the 1970s. That may distort the observation in terms of the content and doctrinal background of the decisions, and the interpretive and argumentative technique, which is of primary importance for this research, is presumably even more exposed to changes from one period to another. To put that into context, one would need an analysis of the ECtHR judgments independent of those citing them. The reason for the selection seems clear: the juxtaposition of judgments related in their substance makes it easier to take account of the specificities of the reasoning. It is important to note, however, that ECtHR jurisprudence, as it emerges from the studies, is not 'identical' to itself in the same way as that of the individual constitutional courts.

The other, more important limitation is the use of European case law itself as a basis for comparison, since the ECtHR and, to a lesser extent, the CJEU judgments are presented in the research as representing 'Western European fundamental rights jurisprudence,' which is used to highlight the characteristics of 'Central and Eastern European fundamental rights jurisprudence.' Here again, the reasons for this choice are quite obvious: beyond the manageability of the material, there seems to be no doubt that the European courts are more representative of a common (Western) European fundamental rights thinking than national constitutional courts. However, the extent and nature of that representativeness could (and perhaps should) also be the subject of a separate analysis.[2] It is much less clear that the *style* of Western European constitutional case law can be summarised in any way.

But what can we say about Central and Eastern Europe? Are there common features in the reasoning and interpretative practices of the constitutional courts examined here? According to the editor's summary, the most common one is citing the courts' own decisions, with the Serbian sample as the single exception, only the lesser part (14 judgments) of which contained such references. Other methods of reasoning are much more varied, perhaps only contextual interpretation (broadly understood) being clearly common in the jurisprudence of most constitutional courts. However, a look at the ECtHR decisions cited makes it clear that there, too, both the predominant use of case law and the frequent use of contextual interpretation can be observed. The summary further points to the similarity of the proportionality tests used to assess fundamental rights restrictions, as well as the primacy of the rule of law and the fundamental values of democracy in the jurisprudence

[1] Apart from the less than complete coverage of CEE countries. Further editions, it is hoped, can expand the list of national courts examined. See, e.g., Sinani (2022) for a recent survey of North Macedonian jurisprudence.

[2] See Molnár (2022) on the impact of ECtHR jurisprudence on the interpretive practice of the CJEU.

of both national constitutional courts and the ECtHR. Whether all that can be described as 'methodological convergence' is perhaps debatable, but it seems certain that in the field of reasoning with human rights and constitutional interpretation, Central and Eastern European constitutional jurisprudence is not separated.

Finally, two important, albeit less pronounced, merits of the volume deserve mention. The first is the theoretical and methodological overview in the editorial introduction, which, despite its brevity, stands out for its thoughtfulness and its extensive overview of relevant scholarship. This makes it suitable both for educational purposes and a starting point for further analysis. The second is, paradoxically, the very subject of the research: the examination of the reception of ECtHR case law in Central and Eastern Europe. In the presentation of the results, it necessarily remains in the background, since being the criterion of selection, references to it cannot be regarded as a common feature. That notwithstanding, the observations concerning it are significant and could be the basis for further research, especially if one wishes to examine such references by national constitutional courts from a diachronic perspective, focusing on possible directions of change – as it appears in some of the chapters.

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