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REPORT

**“PURPOSE AND FUNCTION
OF CONSTITUTIONAL REASONING”**

by
Mr Arthur DYEVRÉ¹
(Professor of Empirical Jurisprudence, KU Leuven Faculty of Law)

¹ Professor of Empirical Jurisprudence, KU Leuven Faculty of Law. The views expressed here are neither meant to represent nor to bind the Venice Commission of which the author is not a member.

The present contribution draws on empirical and comparative legal research to try and identify how constitutional judges should strive to justify their decisions. My normative recommendations are premised on the assumption that the goal here is to bolster public support for the court exercising constitutional review while enhancing compliance with its decisions.

I suppose that I ought to make clear, at the outset, that I don't believe there is a single correct way to compose a constitutional opinion. The most recent and systematic research reveals considerable variability across the world of constitutional and supreme court practices. As part of the CONREASON Project, together with András Jakab and Giulio Itzcovich, I have systematically analysed more than 700 landmark opinions from 18 of the world's most influential constitutional courts.² While this dataset represents only a fraction of the total population of constitutional cases, it casts light on significant differences in the length, tone, style, readability and structure of constitutional judgments as well as in the range and diversity of the arguments deployed. Some courts write short, cryptic, impersonal opinions which invariably follow the same rigidly formalist structure. Others, meanwhile, are not only significantly longer on average but are also more direct and more colloquial in their tone. Some of these differences reflect the Common Law vs. Civil Law divide, which itself has more to do with differences in self-presentation and self-portrayal than with differences in the intrinsic nature of judicial decision-making. At one end of the spectrum lies the French Constitutional Council. Its churns out opinions which, though they have grown more loquacious over time, remain strikingly brief compared to other constitutional tribunals. Aside from being unintelligible to laypeople, its syllogistically-structured opinions also feature a smaller repertoire of concepts and argument forms. Don't expect discussion of canons of interpretation or precedents there. Nor is there any room for policy arguments in the French form. At the other end of the spectrum lie the opinions of courts like the Israeli Supreme Court. In addition to being wordier, Israeli constitutional opinions are eminently readable and draw on arguments of all sorts, including policy arguments and considerations of foreign legal materials. Between these two extremes are all the other courts whose opinions espouse a template that is neither as rigid as the French Council's nor as loose as the Israeli Supreme Court's. Some courts, such as the ECJ, are closer to the French model. Others, like the US Supreme Court or the Constitutional Court of South Africa, are closer to the Israeli model.

Disparities notwithstanding, comparative law research highlights some global trends, too. One is citation of foreign precedents. Young, less established constitutional courts display a growing tendency to present the decisions of courts elsewhere in the world (with "elsewhere" usually understood as the US Supreme Court, the German Federal Constitutional Court or the ECtHR) as justifications for their own determinations. Another trend in global constitutionalism is to construe rights provisions very broadly. Linked to this evolution is the popularity of proportionality and similar balancing tests.

Now, what can we learn from this research in terms of optimal reasoning strategy for constitutional judges? Let me start by distinguishing the basic functions performed by a high court opinion. For the sake of simplicity, we can break a high court decision into two parts: (1) the case disposition, and (2) the opinion (of which, in the jurisdictions where separate opinions are permitted, there might be more than one). The case disposition—or decision on the merits—settles the dispute at hand, thereby determining which party prevails and which loses. As distinct from the dispositive part of the decision, the opinion then serves two basic functions. The first, and most obvious one, is to provide a rationale for the case disposition. As such it is supposed to set forth the reasons which, according to the judges, determined the outcome of the particular case. Besides this justificatory function, constitutional opinions

² See András Jakab, Arthur Deyevre and Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning*, forthcoming Cambridge University Press.

also perform a policy-making function. Even in Civil Law countries with no explicit doctrine of *stare decisis*, the grounds set forth to justify the decision on the merits are typically interpreted as indicative of how the court intends to handle similar cases in the future. The expectation that like cases will be treated alike thus effectively enables constitutional judges to make rules—or “doctrines” in legal jargon—in the course of settling disputes, even when such disputes have a purely individual character. As the American comparativist Martin Shapiro observed for US courts, the “opinions themselves, not who won or lost...provide the constraining directions to the public and private decision-makers who determine 99 per cent of the conduct that never reaches the courts”³.

How best to fulfill these two functions? As for the policy-function, these perhaps self-evident but judges should strive to provide the addressees of their policy determinations—that is, litigants, lower courts, legislators and government officials—with clear guidance. Compliance studies suggest that specificity makes compliance more likely, whereas vagueness tends to be used as a pretext to evade compliance. So the opinion should indicate what to do in order to behave constitutionally in the future. Often easier said than done. And yes, there are constraints, arising either from the collective nature of judicial decision-making or from uncertainty about the future. Judges sitting on the same court may often find they have different views on the matter at hand and these have to be somehow reconciled in the opinion—often at the price of clarity. Moreover, it is not always possible to anticipate what the implications of a particular policy will be in the future. When you don’t know it’s better to hedge your bets and leave some wiggle room in case unanticipated considerations have to be factored in. Hence the popularity of flexible standards such as proportionality, strict scrutiny and similar balancing tests in twenty-first century global constitutionalism.

Finally, let me conclude with the justificatory function. This is I believe absolutely key for a court that is seeking to establish legitimacy in the context of democratic transition. Writing a constitutional opinion is an exercise in persuasion. Social acceptance is essential to all public decision makers. And so, as with other public decision makers, judges need to persuade their audiences to comply with the choices they have made. Constitutional reasoning is an audience-tailored exercise. As such it requires that opinion-writers select the arguments that best advance their determinations given what members of their audience regard as legitimate judicial behaviour. In that sense, reasoning is about presenting the court’s case disposition and policy determination in the best possible light. You may think of it as a sales-pitch: you want to sell your product in the most effective manner; or you may look at it as a form of story-telling: a good constitutional opinion is an opinion that lines up the legal materials and wraps in persuasive language so as to tell a compelling story. Four recommendations follow from this point:

- First, constitutional judges need to understand their audience, the kind of arguments they are sensitive to and whether they will accept them from a judge. Will appealing to Western human rights and rule of law values work as such? Will citing the decisions of Western constitutional courts cut any ice with the Kyrgyz public? What tone and style are deemed suitable for judges? Some courts go to great pains to make their opinions understandable to laypeople. The Israeli Supreme Court, for one, knows that their decisions will be commented in the mass media and so the judges go to great pains to make their reasoning understandable to the man in the street. They quote writers, philosophers, and even poems and songs. In a case dealing with family reunion, one dissenting opinion imagined members of the Court travelling to Thomas Moore’s Utopia, in a deliberate attempt to demonstrate the impracticability of the majority decision. This may not be quite the voice in which you want your court to speak. But foreign practices can form a great source of inspiration.

³Martin M Shapiro, *The Supreme Court and Administrative Agencies*, vol 2 (Free Press 1968) 39.

- Second, persuading the public presupposes that your arguments are effectively heard. Some courts, Brazil and Mexico, even go as far as broadcasting their deliberations on TV. In Germany, the Federal Constitutional Court has established a courtroom ritual to announce its judgments. The French Constitutional Council has a well-designed website and publishes its own law journal which serves to diffuse constitutional ideas while cultivating the support of the law professoriate.
- Third, constitutional judges must show sensitivity for the concerns of the various communities and constituencies that make up their audience. Nothing is worse for a court's legitimacy than being viewed as biased towards a particular group or political faction. Survey research suggests that a high court builds public support by demonstrating that it can serve the interest of distinct non-overlapping constituencies.
- Last but not least, constitutional opinion-writers must hone and develop their rhetorical skills. I could speak about this for hours. But this is about finding language that is not only normatively appealing but makes criticism of the court difficult. That's what philosophies of judging are about. Take the idea of the living instrument and living tree used, respectively, by the ECtHR and the Canadian Supreme Court. Not everyone may agree with the expansive powers that loose approaches to constitutional interpretation like this confer on judges. Yet whoever criticizes the idea of the "living" constitution risks being perceived as making the case for its opposite, the "dead" constitution. And, of course, if asked to choose, everyone prefers his constitution "alive" rather than dead.