Dilemmas about the Conceptual Frame for Comparing Constitutional Reasoning

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I. Foreword

Comparative Constitutional Reasoning (CCR) represents a major achievement, and a precious *livre de chevet*, for any scholar (and, I would dare say, any lay person) interested in the worldwide phenomenon of (mostly human-rights-geared) judicial review we are used to call "global constitutionalism".[1]

The book is the output of a complex and powerful inquiry-machine on global constitutional reasoning that its editors – *András Jakab*, *Arthur Dyevre* and *Giulio Itzcovich* – have built up in a wilful, and successful, attempt to overcome mainstream, narrow-scoped, methodologically naïf, comparative investigations.[2]

To appease the curiosity of any prospective reader, the main features of the inquiry-machine can be summarised as follows:

(1) It aims at the descriptive, social science, goal of providing "a systematic", comparative, "account of how constitutional judges *do actually justify* their decisions",[3] while avoiding at the same time any piece of normative constitutional theory;

(2) It makes the aimed-at description to depend on 18 distinct lines of research concerning the constitutional reasoning of 16 constitutional tribunals from the five Continents, plus the reasoning of two "quasi-constitutional"[4] supranational European courts (i.e., the European Court of Human Rights and the Court of Justice of the European Union);[5]

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[1] *A. Jakab/A. Dyevre/G. Itzcovich* (eds.), Comparative Constitutional Reasoning, 2017. In the following, I will refer to the book by the acronym CCR, followed, in footnotes, by the relevant page number(s).

[2] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 7 et seq.

[3] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 4 et seq., emphasis added.

[4] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 13, 26.

[5] The inquiry concerns the constitutional courts of Australia, Austria, Brazil, Canada, the Czech Republic, France, Germany, Hungary, Ireland, Israel, Italy, South Africa, Spain, Taiwan, the United Kingdom, and the United States. The reasoning of the Hungarian Constitu-

(3) It requires each line of research to analyse a sample of forty "leading cases" from the judicial body considered, so that the total sum of analysed judicial opinions in the project amounts to the considerable number of 760 items[6];

(4) It makes the outputs of each line of research apt to comparison and joint elaboration by imposing to each research unit the adoption of a uniform, 37 questions, "Questionnaire".[7]

The (descriptive) goal, the (qualitative and quantitative) structure, and the terminological and conceptual frame of the inquiry are set forth in the "Introduction" and "Appendix" to the book, and, so far as the "methods of interpretation" are concerned, also in an essay by *András Jakab*, Judicial Reasoning in Constitutional Courts, which all the participants in the project were instructed to use as "reference point", and "follow".[8] The "Conclusion", following to the 18 chapters dedicated to as many national or supranational tribunals, offers a reasoned exposition of the main results of the inquiry.[9]

CCR is the sort of book that, due to its very high quality and strictly informative character, makes the task of commentators very hard. Besides warmly recommending its reading, in the following I will make a few comments concerning: (1) the distinction between "motivating reasoning" and "justificatory reasoning"; (2) the conceptual and terminological frame adopted to cope with the phenomenon of constitutional interpretation; (3) a few of the conclusions which the inquiry apparently leads to.

The first two groups of comments are about the conceptual and terminological frame of the inquiry. As we shall see in a moment, I will suggest that, perhaps, a different frame would have further enhanced what might be seen as the *therapeutic virtue* of the inquiry: namely, its ability of curing jurists' "bad" conceptual habits, by conveying to them – either as participants in the project, or as readers of the book – a less conventional, and clearer, theoretical and methodological basis.

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tional Court has been the subject of a double inquiry, reflecting the divide wedged by a 2011 constitutional reform. See *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 30, 394 et seq.

6 In order to promote reliability, the selection of the forty "leading cases" required each research unit to write down a list and submit it to the review of five experts: *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 28 et seq. The total amount is 760 since leading cases from two Hungarian Constitutional Courts have been analysed. See footnote 5 above.

7 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 809 et seq.

8 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 1 et seq., 798 et seq.; "One of us developed a conceptual map fleshing out the abovementioned argumentative categories", *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 34, referring in footnote 99 to *A. Jakab*, Judicial Reasoning in Constitutional Courts: A European Perspective, in: GLJ 14 (2013), 1215 et seq.

9 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 761 et seq.

II. Explanatory Motives v. Justificatory Reasons

To be sure, I must avow, this first commentary of mine concerns a marginal point as regards to the immense edifice of CCR. Nonetheless, as we all know, details are Old Nick's earthly paradise. That is why they are always worthwhile inquiring.

Let's come to the point. In their way to a clear notion of "reasoning", the editors of CCR proceed as follows.

In the first place, the editors notice that the word "reasoning" is being used in two quite different acceptations. On the one hand, "reasoning" stands for "the motives and mental processes that lead a decision maker to choose a particular course of action";[10] in other words, the word stands for "explanatory" or "motivating reasoning" and refers, jointly, both to the causal factors affecting the decision in favour of a certain course of action, and to the mental process in which those factors show up and play a role. On the other hand, "reasoning" stands for "the justifications that the decision maker may publicly adduce for her elected course of action";[11] in other words, the word stands for "justificatory reasoning", and refers to a set of reasons or arguments making up a discourse meant to present a certain decision as being correct, valid, just, fair, lawful, legitimate, etc.

In the second place, the editors notice that the two sorts of reasoning, i.e., motivating reasoning and justificatory reasoning, are "independent". Indeed, they claim:

> "Provided her motives are honourable enough, a decision maker may publicly offer them as justifications for her course of action. But it needs not always be so. Occasionally, a decision maker will refrain from revealing her true motives and will, instead, put forth reasons that she believes others are more likely to regard as valid and legitimate."[12]

In the third, and final, place, the editors make clear that CCR is about the justificatory reasoning of constitutional (or quasi-constitutional) judges – though, as they make clear, they do not rule out the usefulness of inquiries that also take into account the psychological side of constitutional adjudication, i.e., judges' motivating reasonings.

I am puzzled by the fact that the editors, not only do notice that "reasoning" goes around in two different acceptations, which is a sound remark, but also seem to accept the idea that "motives" are *congeners* to "reasons":

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[10] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 10 et seq.
[11] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 11.
[12] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 11.

so that, as they say in the passage just quoted, if the "motives" of some decision maker are "honourable", they may be "offered publicly" as "*justifications*" for her course of action.

I think that, for the sake of having a clear(er) conceptual and terminological apparatus, a sharp distinction between "motives" and "reasons" is to be drawn: one emphasising that motives and reasons are *heterogeneous* entities. With reference to the present context, the distinction can be drawn, for instance, and very roughly, along the following lines:

A "motive" is a mental fact, a mental attitude, working as a causal factor that, alone or together with other factors, causally affects (moves somebody to) a certain decision or course of action.

A "reason" is, contrariwise, a standard, principle, maxim, rule or norm, which can be used to justify a certain decision or course of action, once it has been made or carried out: i.e., that can be used to present a decision or course of action as "right", "correct", "lawful", "legitimate", etc., usually by providing the normative premise from which, together with some other premise, the normative conclusion (that decides a case or prescribes a course of action) can be derived.

In the mental process leading to a decision or course of action, an agent may decide to adopt, accept, endorse a certain reason (i.e., a certain rule, principle, maxim, norm, standard of behaviour) as worthwhile to be abided by, invoked, applied, put to work, put into effect, carried out in the external world, etc. In such a case, notice, that reason (that standard, norm, principle, etc.) is not, in itself, a motive, a motivating factor: the motive, the motivating factor, is the mental fact, the mental attitude, of acceptance, endorsement, adoption of that reason as valuable in the decision making process. Why (for which motives) did agent A decide to do *f*? Because A accepted, adopted, endorsed the maxim M as paramount, and M prescribes or permits to do *f*.

Notice that, if we adopt the foregoing stipulations, the sentence: "Provided her motives are honourable enough, a decision maker may publicly offer them as justifications for her course of action" looks like a piece of transposed mode of speech (as *Rudolph Carnap* would have said). Indeed, what the sentence is about, really, are not the agent's *motives*, but the agent's *reasons*: what the decision maker may "publicly offer as *justifications*" are not, really, her "honourable motives", which can work at most as *explanations* for her decision; it is, rather, the reasons (the standards, principles, maxims, norms) that the decision maker has adopted at the decision making stage (in "the context of discovery"), and such an adoption works as an honourable motive for her conduct because sincerely acting on those reasons is (regard-

ed as) honourable. We select some reason for some motive; but what properly speaking "justifies" our actions – what makes them just, correct, right, fair, lawful, legitimate – are not the motives, what *moved us* to select *that* reason, but the reason itself.

III. Constitutional Interpretation

I find a second occasion for puzzlement in the terminological and conceptual apparatus ("frame") that the editors – jointly in CCR and through the essay by *András Jakab* I mentioned before – use to cope with the phenomenon of constitutional interpretation.

To begin with, let's have a quick look at their view.

1. In their constitutional (or quasi-constitutional) reasonings, constitutional (or quasi-constitutional) judges may face four sorts of problems, namely:

(a) problems concerning the ascertainment of what counts as constitutional text;

(b) problems concerning the applicability of constitutional law to a case at hand;

(c) problems concerning constitutional gaps;

(d) problems of constitutional interpretation.[13]

2. Constitutional interpretation is the determination of the content of a constitutional "text",[14] a constitutional "norm",[15] a constitutional "provision",[16] or a constitutional "rule".[17]

3. Constitutional interpretations – i.e., the determinations of the content of constitutional texts, norms, provisions, or rules – can be argued for, or against, with the help of "arguments" corresponding to some "type", any type of argument being "traditionally called 'a method of interpretation'".[18]

4. Several methods of constitutional interpretation are available in contemporary constitutional cultures. These methods make up four distinct groups:

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[13] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 810 et seq. See also *A. Jakab* (note 8), 1220.

[14] *A. Jakab* (note 8), 1219 et seq., 1229, 1232.

[15] *A. Jakab* (note 8), 1224; ("The methods of interpretation are norms themselves: Norms about how norms ought to be interpreted.") 1227; ("Arguments referring to the grammatical interpretation presume that the norms, in our case, the constitutional provisions, have been drafted without errors."), 1232 et seq.

[16] *A. Jakab* (note 8), 1232 et seq. ("the text of a legal provision").

[17] *A. Jakab* (note 8), 1233.

[18] *A. Jakab* (note 8), 1220.

(a) Arguments from "the ordinary or (legal or non-legal) technical meaning of the words";[19]

(b) Methods of systemic interpretation, or (types of) "arguments from the legal context", which encompass, in turn, (b1) arguments from domestic coherence, (b2) arguments from coherence with international law, (b3) precedent-based arguments, (b4) arguments from juristic implicit concept and principles, and, finally, (b5) arguments from silence ("linguistic-logical formulae based on silence"),[20]

(c) "Evaluative arguments", that include (c1) the method of objective teleological interpretation, (c2) the method of subjective teleological interpretation, and (c3) the method of substantive, "non-legal" ("moral, sociological, economic") interpretations,[21]

(d) "Further arguments", including (d1) arguments "referring to scholarly works" and (d2) arguments from "foreign legal materials" or "comparative law".[22]

Now, to make my position more precise, I find the frame above puzzling on nine counts. These counts concern: (I) the distinction between interpretative and non-interpretative problems; (II) the distinction between constitutional text (or constitutional sentence) and constitutional norm; (III) the category of arguments from silence and the meaning of "constitutional interpretation"; (IV) the theory concerning the ambiguity of constitutional sentences; (V) the relationship between interpretation and argumentation; (VI) the distinction between interpretive arguments and interpretive rules; (VII) the category of "evaluative arguments"; (VIII) the distinction between "binding arguments" and "persuasive arguments"; (IX) the (no-)theory of antinomies or normative conflicts.

1. *The distinction between interpretative and non-interpretative problems*. The four-legs typology of the problems that constitutional (or quasi-constitutional) judges may face is grounded on a sharp divide between (properly) interpretive problems, the problems of constitutional interpretation, which require using "interpretative arguments", on the one hand, and non-interpretive problems, i.e., the other three sorts of problems, "where arguments are non-interpretative in their nature", on the other hand.[23]

Now, the sharp divide appears to be dubious.

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19 *A. Jakab* (note 8), 1231 et seq.
20 *A. Jakab* (note 8), 1233 et seq.
21 *A. Jakab* (note 8), 1241 et seq.
22 *A. Jakab* (note 8), 1251 et seq.
23 *A. Jakab* (note 8), 1220.

Consider the problems about establishing the text of the constitution (for brevity's sake: text-problems). Here, three remarks are in order.

First, text-problems are interpretive problems too. To be sure, in the different, but juristically relevant, sense of "interpretation" as *ascription of (institutional) value to some cultural object*. Establishing, say, that "Sentence S in document Z *counts as* a piece of constitutional text" is precisely a piece of interpretation-as-qualification, as opposed, to be sure, to interpretation as meaning-content determination, or interpretation-as-translation.

Second, it cannot be affirmed *a priori* that the resolution of text-problems never depends on the use of interpretative arguments. The solution may indeed be "found" in the meaning of some piece of constitutional text.

Third, the dependence of the solution to a text-problem on the use of interpretative arguments seems to be an even more likely event, if, as the editors do, we consider arguments from the silence of constitutional texts ("linguistic-logical formulae based on silence") as *interpretative arguments* (on this issue I will come back soon).

Consider now the second kind of problems that, according to the editors, would not be fit for interpretative arguments: i.e., the problems concerning the applicability of the constitution (for brevity's sake: applicability problems). Where do the judges find, for instance, that the "political nature of the issue", its belonging to the sphere of "legislative discretion", its being connected to a "state of emergency", do make the constitution not applicable? Again, lest their reasoning appear arbitrary or non-legal, the judges cannot but "find" the answer in the constitution itself: they cannot but derive it, somehow, from the constitutional text – for instance, from the form or frame of government it establishes.

Consider, finally, the third kind of non-interpretive problems: the problems of constitutional gaps. Here, to be sure, the filling-up of whatever gap a judge esteems to exist within the constitution requires resorting to integration arguments (like, as the editors correctly point out, analogical arguments). However, this correct remark should not induce us to think that problems of gaps are, so to speak, interpretation-immune. Most of the time, gaps are gaps at the level of the norms that represent the meaning content of constitutional texts. Different interpretive methods may project different meanings on constitutional texts. Some of those meanings may be such that no gap shows up. Gaps are, most of the time, the dependent variable of interpretation and interpretative methods. Every problem of constitutional gap presupposes a certain interpretation of the relevant constitutional provisions. Furthermore, at certain conditions, gaps can also be cured (eliminat-

ed) by way of (extensive) interpretation, as the editors themselves do know.[24]

2. *The distinction between constitutional text and constitutional norm*. There is a distinction that runs through the whole conceptual frame of CCR, but, unfortunately, is never made adequately explicit: never given the pride of place it deserves, by means of an apposite terminology (and indeed it is sometimes even obscured by unfortunate language or classification).

This is the distinction between three sorts of entities: constitutional-sentences, constitutional-explicit norms, and constitutional-implicit norms.

Constitutional-sentences (constitutional-texts, constitutional provision in a strict sense) are sentences making up the constitutional document(s) of a certain legal order. They are the product of acts of enactment by some competent body (a constitutional assembly, the parliament following a special procedure), are identified by means of constitutional interpretation-as-qualification, and are the matter of constitutional interpretation-as-translation (or, following the editors of CCR, of interpretation as determination of meaning content).

Constitutional-explicit norms are norms (usually, prescriptive sentences) that represent the explicit meaning content of constitutional-sentences, what constitutional-sentences "say". Their identification depends on the use of some *translation rule*: i.e., in the conventional terminology adopted by the editors of CCR, on the use of some methods of interpretation.[25]

Constitutional-implicit norms, finally, are norms (usually, prescriptive sentences) that do not represent the meaning content of any definite constitutional-sentence, but are identified by means of integration argument from analogy, the nature or structure of the constitution, the true constitutionalised background morality, etc. They correspond to "what" constitutional explicit norms "imply".

I think the adoption of this terminology would have been advantageous on four counts.

First, it would have provided a clearer and more sophisticated conceptual and terminological basis to the theory of interpretive methods the editors provided to the research units.

Second, it would have contributed to a greater awareness in analysing judicial opinions and the methodological operations performed inside of them.

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[24] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 1218 et seq.

[25] I deal with "translation rules", as the cornerstones of "interpretive codes", *P. Chiassoni*, Interpretive Games Revisited, in: P. Chiassoni/P. Comanducci/G. B. Ratti (eds.), L'arte della distinzione. Studi per Riccardo Guastini, 2018.

Third, it would have contributed to a greater perspicuity in the formulation of the results of the analyses.

Fourth, it would have passed on jurists a terminological and conceptual grid, at the same time easy and powerful for better understanding the mechanics of legal reasoning. On the whole, one may venture to say that a great occasion has been missed, somehow, for making a real progress in the global constitutional culture.

3. *The category of arguments from silence and the meaning of "constitutional interpretation".* From the standpoint of a clear-cut distinction between constitutional-sentences, constitutional-explicit norms, and constitutional-implicit norms, the idea that arguments from silence are systemic interpretive arguments ("from the legal context"), and are, accordingly, different in kind from analogical reasoning (which is fit instead for coping with gaps), is questionable.

In this regard, it is worthwhile considering a passage from *A. Jakab's* essay:

> "Real lawyerly reasoning makes use of not only the text, but also of the lack thereof in order to interpret the constitution. Characteristic forms of this include principles like *expressio unius est exclusio alterius* (expressing the one means excluding the other), *qui de uno dicit, de altero negat* (stating the one means rejecting the other), *argumentum a contrario* (stating something about "A" may be denying the same about "non-A"), or *enumeratio ergo limitatio* (an enumeration is presumed to be exhaustive).
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> A similar way of reasoning is used by the two forms of *argumentum a fortiori*: *Argumentum a maiori ad minus* and its inverse, *argumentum a minori ad maius*. The former argument holds, e.g., that if the constitution-maker has *explicitly* allowed something, some other action [less important, ndr] is also allowed – although it is *not mentioned explicitly*. The latter holds, e.g., that if the constitution-maker has *explicitly* forbidden something, then another, more grave action – although not mentioned explicitly – is also forbidden."[26]

The passage is troublesome.

As we have seen, the editors define "constitutional interpretation" as the determination of the content of a constitutional text (norm, provision, rule), and, on the basis of such a definition, distinguish interpretative arguments from analogical reasoning ("analogies"), which is used in case of gaps, "to solve *a problem not covered by the text of the constitution*".[27]

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[26] *A. Jakab* (note 8), 1240.
[27] *A. Jakab* (note 8), 1219 et seq.

In the passage just quoted, however, we read that "Real lawyerly reasoning *makes use of not only the text*, but *also of the lack thereof* in order *to interpret the constitution*" (emphasis added). Furthermore, when the two versions of the argument *a fortiori* are explained, it is apparent that both versions are used to cope with *constitutional gaps*: the constitution-maker explicitly allows a certain sort of behaviour; the judge, by way of an *a maiori* reasoning, comes to the conclusion that *another* sort of behaviour, "*not mentioned explicitly*" by the constitution-maker, is also allowed; and the same pattern applies when *a minori* reasonings are being used.

Apparently, the editors are employing the phrase "constitutional interpretation" in two different, and incompatible, ways.

On the one end, they seem to claim that "constitutional interpretation" is the determination of the meaning content *expressed* by a constitutional text (what the text *says*). Therefore, if there is no text, if the text "is lacking", there is by definition no room for interpretation, but only for the different activity of gaps filling.

On the other hand, they seem to claim that "constitutional interpretation" is the determination of the *full communicative content* conveyed by a constitutional text (what the text *communicates*). Therefore, even if there is no constitutional text in relation to a certain issue, even if the text "is lacking", provided there is *some* text, there is by definition room for interpretation.

Now, the editors of CCR apparently face a dilemma.

On the one hand, they may accept the first, narrow, meaning of "constitutional interpretation". In such a case, however, they have to modify their theory of the methods of interpretation. All the arguments "from silence" (*inclusio unius*, *qui de uno dicit*, *a contrario*, *a fortiori*, *a minori*, *a maiori*, etc.) must be put together with analogical arguments: i.e., they must be included in the class of the non-interpretative arguments to be used to cope with problems of constitutional gaps.

On the other hand, they may accept the second, broad, meaning of "constitutional interpretation". In such a case, however, they have to give up the distinction between "interpretative" and "non-interpretative arguments". Indeed, from the standpoint of the broad notion of "constitutional interpretation", *all* the arguments they have considered are *interpretative*.

4. *The theory concerning the ambiguity of constitutional-sentences*. In another passage of *A. Jakab's* essay, which, as we know, represents the methodological reference point for the whole project, we read that:

"Legal norms in general, and the constitution, due to the abstract nature of its text, in particular, mostly allow for different interpretations."[28]

The passage can be read as advancing three theses. First, constitutional sentences ("norms") are *for the most part* ambiguous. Second, constitutional sentences are, at least for a minor part, un-ambiguous. Third, ambiguity is a matter of language: it is a linguistic flaw, depending on the way constitutional sentences are formulated – depending, in particular, from their "abstract nature".

Now if, for argument's sake, we adopt a realistic standpoint, the three claims amount to a partial, and gross, misrepresentation of the phenomenon.

First, it is misleading to present the ambiguity of constitutional sentences as being tantamount to a *linguistic*, and, more specifically, a *semantic*, phenomenon. Indeed, a constitutional sentence can prove to be ambiguous also from a *syntactic* point of view (*syntactic ambiguity*), and, what is more relevant, even from a *pragmatic* point of view, i.e. from the standpoint of users and interpreters (*pragmatic ambiguity*). Concerning constitutional reasoning, pragmatic ambiguity can be of two main sorts. On the one hand, it can be *methodological ambiguity*: i.e., different interpretations of the same constitutional sentence can be set forth on the basis of the different interpretive methods available. On the other hand, it can be *ideological ambiguity*: i.e., different interpretations of the same constitutional sentence can be set forth on the basis of different normative visions of the constitution.

Second, once we take into account the different forms of ambiguity I have just recalled, the conclusion about the ambiguity of constitutional sentences must be reformulated, for instance, along the following line. Linguistic (semantic or syntactic) ambiguity and ideological ambiguity are *local* phenomena: usually, constitutional sentences are not linguistically or ideologically ambiguous all the time. Contrariwise, methodological ambiguity is *universal*: *every* constitutional sentence is ambiguous, so far as the rules and methods of constitutional interpretation are concerned.

5. *The relationship between interpretation and argumentation*. Which is the relationship between interpretation and argumentation?

According to the editors of CCR, speaking through *Jakab's* essay, it can be either a relationship where argumentation *precedes* interpretation, or a relationship where argumentation *follows* interpretation:

"One may argue *before* the actual decision, i.e., searching open-mindedly for the best interpretation; but also *after* the decision is made, i.e., trying to persuade

[28] *A. Jakab* (note 8), 1218; the passage goes on with a quotation from *N. MacCormick*.

> others about one's decision, providing arguments supporting the decision already made."[29]

A couple of remarks seem in order – always in the cooperative spirit of bringing to the fore aspects of the conceptual frame of CCR that could be refined in view of further research.

First, it seems odd talking of "arguing" *for* an interpretation (-output), *before* the interpretation self has been established.

Second, perhaps a clearer way to approach the issue consists in inquiring upon the relationship(s) between interpretation and methods of interpretation. From this vantage point, it may be useful distinguishing between a *heuristic* and a *justificatory* use of interpretive methods. They are used *heuristically*, when an interpreter makes use of them *to get to* some interpretation of a certain constitutional-sentence. They are used in a *justificatory function*, contrariwise, when an interpreter makes use of them in order to build up an argumentative discourse in favour of an interpretation she has previously decided to set forth.[30]

6. *The distinction between interpretive arguments and interpretive rules.* The research units were required to identify the interpretative arguments used by judges in their opinions. More precisely, they were required to identify argument-tokens, i.e., concrete instances of argument-types. In view of this task, the editors of CCR have provided them, as we have seen, with a list of argument-types or methods of interpretation.

As *A. Jakab* makes clear, argument-types, or methods of interpretation, are "norms":

> "Norms about how norms ought to be interpreted".[31]

That statement, however, remains, so to speak, floating in the air. In view of providing research units with a more sophisticated frame, however, the idea of methods of interpretation as "norms" ("rules" or "directives") could have been put to work. This would have suggested, for instance, drawing the distinction between *interpretive rule*, *interpretive argument-type*, and *interpretive argument-token*.

An interpretive rule is a prescription concerning the interpretation of constitutional sentences (e.g.: "Constitutional-sentences ought to be interpreted according to the original semantic meaning of their words").

An interpretive argument-type is an abstract pattern of interpretive reasoning corresponding to an interpretive rule (e.g.: 1. Constitutional-

[29] *A. Jakab* (note 8), 1219.
[30] *P. Chiassoni*, Técnicas de interpretación jurídica. Breviario para juristas, 2011, Ch. II.
[31] *A. Jakab* (note 8), 1227.

sentences ought to be interpreted according to the original semantic meaning of their words; 2. *x* is a constitutional-sentence; 3. *y* is the meaning of *x* according to the original semantic meaning of *x*'s words; 4. *x* ought to be interpreted to express the meaning *y*).

An interpretive argument-token, finally, is an actual piece of interpretive reasoning corresponding to an interpretive argument-type (e.g.: 1. Constitutional-sentences ought to be interpreted according to the original semantic meaning of their words; 2. *a* is a constitutional-sentence; 3. *b* is the meaning of *a* according to the original semantic meaning of *a*'s words; 4. *a* ought to be interpreted to express the meaning *b*).[32]

7. *The category of "evaluative arguments"*. As we have seen, the editors of CCR set forth a typology of methods of interpretation where "evaluative arguments" are opposed to arguments from the ordinary or technical meaning of words, systemic arguments or arguments from the legal context, and other arguments (from juristic opinions and foreign law materials). Evaluative arguments include, as we have seen, the method of objective teleological interpretation, the method of subjective teleological interpretation, and, furthermore, non-legal arguments appealing to moral values, social needs, or economic "laws".[33]

Now, from a realistic vantage point, the label "evaluative argument" is misleading. It is so, in particular, because it suggests, by way of implicature, that the other arguments are *not* evaluative. Consider, however, the arguments from the legal context. Now, these arguments would be non-evaluative if, but only if, the (*Savignyan*) picture of objective systemic relationships between "norms" were true; only if domestic or international harmonisation, and the appeal to implicit juristic concept or principle, were operations like making an algebraic sum or drawing the correct logical inferences from sets of *given* premises. But, as we all know (including the editors of CCR), that idyllic picture of systemic interpretation is false. Like considerations hold for the other interpretive arguments. Accordingly, every method of interpretation is, to some extent, *evaluative*.

8. *The distinction between "binding arguments" and "persuasive arguments"*. The editors of CCR distinguish between "binding" and "persuasive" interpretive arguments.[34] The former correspond to the first three groups of arguments (linguistic, systemic, teleological and substantive, non-

[32] I am using "*x*" and "*y*" as symbols for individual variables, while "*a*" and "*b*" stand for determinate individuals.

[33] *A. Jakab* (note 8), 1241 et seq.

[34] *A. Jakab* (note 8), 1254.

legal, arguments). The latter correspond, contrariwise, to arguments from juristic opinions and from foreign law materials.

The puzzling aspect with the present distinction is that, apparently, no criterion has been provided for it. Which sort of "bindingness" is at stake here? Is it a legal "binding force" or, rather, a cultural or sociological "binding force"?

9. *The (no-)theory of antinomies or normative conflict*. The last puzzle of mines I wish to mention, always for the sake of argument, runs as follows. The basic concern of constitutional (and quasi-constitutional) adjudication has to do with the identification and elimination of any antinomy, or conflict, between constitutional (quasi-constitutional) norms, on the one hand, and sub-constitutional (e.g., legislative) norms, on the other. Accordingly, a full-fledged theory of antinomies would have been in order, as a tool for analysing judicial reasonings and bring to the fore the sorts of conflict dealt with and the ways out adopted. Apparently, however, no such a theory is provided in CCR, but for the reference to the principle (and technique) of proportionality.

IV. A Few Queries about a Few Conclusions

In the final chapter of CCR, the editors offer, as I said, an elaborate exposition of the main results of the inquiry.

Among the conclusions they draw, three seem particularly relevant, being apt at capturing the spirit of worldwide contemporary constitutional reasoning. They run as follows:

1. *Glocalism*: Constitutional reasoning is a "glocal" phenomenon: i.e., it is a combination of "global evolutions with local particularities", "the intersection of global trends with local, particularising tendencies";[35]

2. *Judicial Self-Empowerment*: Constitutional reasoning is characterised by a steady trend of "judicial self-empowerment";[36]

3. *Formalism*: Constitutional reasoning displays the overall predominance of a formalistic style of reasoning, which works as the mask and the shield

[35] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 791 et seq., where they talk of "Glocalization" and "Glocalism"; "At the global level, human rights treaties, supranational courts, transnational human rights NGOs and transjudicial networks favour convergence towards common approaches and generic standards. But at the domestic level, many combinations of idiosyncratic constitutional provisions, hostile judges and unsympathetic audiences may hamper the adoption of argumentation frameworks and modes of judicial communication developed elsewhere.", *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 794.

[36] *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 778, 782 et seq.

to an actually realistic, unavoidably policy-making, constitutional (or quasi-constitutional) adjudication.[37]

Other conclusions are less instructive.

1. Constitutional reasoning, the editors of CCR claim,

> "does not always obey a systematic judicial philosophy but relies on a good deal of cherry-picking. Rather than rigidly observing the commands of a particular theory of interpretation, constitutional opinion-writers often simply pick the argument or set of arguments that best suits the result they want to achieve and ignore or play down considerations pointing in the opposite direction. In other words, *constitutional argumentation*, at least as far as actual practices of the courts are concerned, *is not an exercise in scientific exposition but a distinctively rhetorical enterprise*".[38]

Now, the alternative the editors pose at the end of the passage, between "scientific exposition" and "rhetorics", is misleading. So far as judges are concerned (even though we deal with academic judges), the real alternative would always be within the domain of rhetorical argumentation; it will be between the adoption of a "methodology of method" or the adoption of a "methodology of result".[39] The most we can expect from constitutional judges is their adoption of a methodology of method: i.e., the diachronically stable use of the same interpretive code, i.e., of the same set of translation rules played according to the same set of meta-rules concerning their use and the priority.

2. The editors of CCR notice that, contrary to the received wisdom about the common law/civil law divide concerning the use of precedent-based arguments, the research has brought to the fore that "precedent-based arguments represent […] a very common argument form in Civil Law jurisdictions – at least in landmark constitutional cases".[40]

The fact they point to is surely the case. What seems to be missing from their conclusion, however, is the quotation of another fact, endowed with explanatory power as to the phenomenon considered. This is the fact that the argument from judicial precedents, under the name of *argumentum ab exemplo*, has always been one of the major argumentative tools in Civil Law countries, one plainly recognised even by the representatives of the French Exegetical School.

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37 "Formalism remains the official model of judicial decision-making, and this seems to hold true irrespective of stylistic divergences in other respects.", *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 775 et seq.

38 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 767, emphasis added.

39 See *L. Lombardi Vallauri*, Corso di filosofia del diritto, 2nd ed. 2012.

40 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 774.

3. The editors of CCR notice that, contrary to the received wisdom about the common law/civil law divide concerning the use of linguistic arguments, the resort to "literalist", "textualist", "strict constructionist", or "original understanding" approaches in common-law constitutional courts' opinions is, paradoxically, more frequent than in civil law constitutional courts' opinions.[41]

Again, the fact they point to is surely the case. What seems to be missing from their conclusion, however, is, again, the quotation of another fact, endowed with explanatory power as to the phenomenon considered. This is the fact that, so far as the application of statutory law is concerned, common-law judges have traditionally given pride of place to the literal rule, which they considered defeasible if, but only if, there was sound reason for applying, instead, the golden or the mischief rules. Accordingly, the "paradoxical conclusion" seems to follow from a bad view of the received wisdom about the civil law/common law divide.

41 *A. Jakab/A. Dyevre/G. Itzcovich* (note 1), 774 et seq. and figure 7.