УДК: 347.91
ORCID: 0000-0003-0780-2957
E-mail:zub.aleksey.nlu@gmail.com

Oleksiy Y. Zub,
Assistant professor of the Department Civil, Commercial and Financial Law (Poltava Law Institute of the Yaroslav Mudryi National Law University)

Зуб Олексій Юрійович,
асистент кафедри цивільного, господарського і фінансового права (Полтавський юридичний інститут Національного юридичного університету імені Ярослава Мудрого)

ПОРІВНЯЛЬНА СУДОВА АРГУМЕНТАЦІЯ У СУДОВИХ РІШЕННЯХ ВЕРХОВНИХ СУДІВ

COMPARATIVE REASONING IN SUPREME COURTS JUDGMENTS

Анотація. Ця праця присвячена дослідженню проблематики використання аргументації в судових рішеннях верховних судів на прикладі рішень Верховного Суду Сполучених Штатів Америки та Федерального Конституційного Суду Федеративної Республіки Німеччина у площині конституціоналізму, захисту та тлумачення норм основних законів в обраних країнах. У рамках роботи, застосовуючи індуктивний метод, проведено логічний зв'язок від підходів, звичаїв та традицій конкретної правової сім'ї в царині аргументації судових рішень, через дослідження окремих прийомів аргументації судових рішень, до вивчення окремих, випадково обраних, судових рішень у верховних судах двох країн.

З точки зору ідеї наукової праці, вона торкається двох аспектів порівняльних досліджень в царині юридичної аргументації судових рішень: перехресне використання прийомів та технік юридичної аргументації в судових рішеннях верховних судів різних держав, а також дослідження перехресного

застосування та посилання на іноземне законодавство, ідеї та практику, що знайшли відображення в судових рішення верховних судів різних держав.

Окремо зроблено спробу дослідити два судових рішення верховних судів: рішення Верховного Суду США (щодо тлумачення права на носіння зброї в контексті Другої Поправки до Конституції США); рішення Федеративного Конституційного Суду ФРН.

Ключові слова: юридична аргументація, порівняльна судова аргументація, аргументування судових рішень, аргументування судових рішень верховних судів.

Summary. This paper examines the reasoning in supreme courts' decisions on the example of decisions of the Supreme Court of the United States and the Federal Constitutional Court of the Federal Republic of Germany in the field of constitutionalism, protection and interpretation of the constitutions in selected countries. As part of the work, using the inductive method, it is made logical connection from the approaches, customs and traditions of a particular legal family in the field of reasoning of court decisions, through the study of individual methods of reasoning of court decisions, to the study of individual, randomly selected court decisions in two countries supreme courts.

From the point of view of the idea of this work, it concerns two aspects of comparative research in the field of legal reasoning of court decisions: cross-application legal argumentation techniques in court decisions of supreme courts in different states, and cross-application research and references to foreign law, ideas and practice, reflected in the court decisions of the supreme courts in different states.

Separately, an attempt has been made to examine two court decisions of the Supreme Courts: the decision of the US Supreme Court (on the interpretation of the right to bear arms in the context of the Second Amendment to the US Constitution); decision of the Federal Constitutional Court of Germany.

Key words: legal reasoning, comparative judicial reasoning, court decisions' reasoning, judicial reasoning in supreme courts judgments.

An overview of the research issue. There is a strong connection between the Rule of Law and judicial reasoning. As we know, one of the elements of the Rule of Law is a right to fair trial [4, 10], which must embody in an efficient procedure. In this meaning, the judicial irreversible decision is a face and a final stage of a legal proceeding. This document allows to judge, have justice done or not. Moving in this idea's track, it is important to understand not only what the judge comes to in his conclusions, but also how he comes to such conclusions and how she or he gives grounds for them. An analysis of such things gives a lot of empirical data for understanding: a judge's logic, what approaches was used, how they were used, how a judge interpreted legal principles and rules etc. In other words, such an exploration allows to take a look in a judge's subjective background. Moreover, in the eyes of the people *ratio decidendi* is made fair only because of judicial reasoning.

Each state has its own legal tradition and its own styles of judicial reasoning (especially when we speak about a supreme court) that objectively reflects focuses on specific legal traditions (perhaps even on correlation with a particular policy in developing countries), competence and maturity of a court and judges. So, an exploration and a comparison of different styles of judicial reasoning in the highest courts of different states allow to understand deeper the whole legal culture in a resolving a disputable situation *via* judicial reasoning.

The purpose of this paper is to compare different styles of reasoning on examples of two different decisions of supreme courts and to find out reasoning determinations in legal cultures.

A judicial reasoning in supreme courts' adjudication is a core element of the judicial decision that discloses judge's subjective attitude to the case, his or her values, legal culture, applied ideas and approaches, and makes *ratio decidendi* fair.

The analysis of recent publications and research. This paper was written as a theoretically-oriented research. During preparation of this work it was used qualitative methods and different approaches like: generalization, induction, deduction, comparison, theoretical modeling etc.

For preparing this paper two judicial were used decisions in: (1) Federal Constitutional Court of Germany (case about ultra-virus measurement, 5 May, 2020) and (2) Supreme Court of United States of America (District Columbia v. Heller, 26 June, 2008).

Presentation of the material.

1. THE OPEN-MINDEDNESS AND LAW-FAMILY BACKGROUND IN JUDICIAL REASONING

Any formed legal structure that functions and develops in a particular country is constantly under the influence of the legal system in which it functions. This affects not only legal institutions, but also the behavior of state officials who perform the functions of the state. So, judges, to one degree or another, succumb to the influence of the legal system, which is embodied in the personal characteristics of the conduct of cases (not related to the norms for considering specific cases), as well as the style of motivating court decisions.

Even though, "use of foreign inspiration in the interpretation of domestic law is thus hardly new," [2, p. 14] within the framework of the designated research areas, judges are often closed to borrowing or using foreign judicial experience or applying the logic of foreign norms. At the same time, courts around the world from time to time apply foreign norms to resolute a judicial case. Michal Bobek offers the separation of cases when court uses foreign law: (1) mandatory (here we mean situation when a domestic law commands the national court to use specific norms to resolute a case, otherwise, it will be sanctions for a current judge, e.g.: conflict of laws, extradition etc.), (2) non-mandatory (when a domestic law recommends to use foreign law in current case, e.g.: a reference to a parent international law, laws shared with or taken from other states etc.), (3) voluntary (when a domestic law does not exist any

limitations for usage foreign law) [2, p. 20-35]. Moreover, each judge can use not only foreign norms but concepts, ideas, styles in its own reasoning depending on case. Thus, materials of different cases, scholarly works around the world are open for inspiration courts and ready for enrichment different judicial practices.

But law-families have their own traditions in this field too. On the one hand, if we speak about common-law family, judges of this system is traditionally open to any jurisdiction (specially to states from this law-tradition and ready to use good ideas or apply analogy. On the other hand, civil-law family more closed because of orientation on statutory law.

1.1. Germany. This country, obviously, belongs to the civil-law family. And from the first glance, it could seem that this country dictates consistently closed judges' conduct in judicial reasoning and builds the original tradition. This statement is only partially true. Michal Bobek says about Germany as "open to non-mandatory legal inspiration" and assess overall judicial style as a "tolerant legality" [2, p. 120].

Judicial reasoning in Germany has its deep roots in history. This story begins from the works of prominent personalities such as: Friedrich Karl von Savigny, Eugen Ehrlich, Konrad Zweigert etc. Savigny was a founder of a modern method of interpretation in a German legal space, whose approach comprised grammatical, logical, systematic and historical arguments. Ehrlich oriented on purposive interpretation and, among other, it's "must include two key-elements: (1) genuine source of judicial decision-making can never be reduced to mere abstract statutory rules and doctrinal notions; (2) what the judge is supposed to reconstruct is not the original intention of the history legislator" [1, p. 130]. Zweigert announced the comparison of laws as a "universal method of interpretation" [2, p. 123] and popularized inspiration from Swiss Supreme Court. He identified the formula of comparative interpretation: "The foreign *is (sein)* has, however, no overriding impact on a clear national *ought (sollen)*. In other words, foreign models are there to help to fill gaps in cases where there is no national *sollen* or when it is unclear what the national *sollen* actually is" [2, p. 124]. Closer to our days Carl Larenz continued to explore interpretation and defined

it as: a pure interpretation, a development of the law *via* statute, and a development of the law beyond a statute but within legal system [2, p. 131].

Firstly, judicial reasoning in this country based on interpretation of the German Constitution and its status; secondly, EU's acts; and thirdly, ECHR and ECtHR's practice, today. The style of justification is more scholarly. That is why we can meet statements like next: "Reading through similar decisions, one often has the impression that a supreme federal judge is not called to decide a case between two (living) parties, but an abstract dispute between the various scholarly strands in the *Schiftum*" [2, p. 137]. But as aforementioned author highlighted: "The most often invoked inspiration in the case law of Federal Constitutional Court is the legal system of the USA, mostly decisions of the USSC" [2, p. 144].

Basil Markesinis points out on some disadvantage in German legal education in a scope of judicial reasoning:

"For at law school, the aspiring German judge will be taught how to use the codes, learn how to inter-link their various parts (and then combine the Codes with one another) and—to begin at least—to apply the texts he has been taught deductively. In all this, he will be expected to make as logical and as consistent a use as he can of the many concepts that will be drummed into his head during a period of at least seven years. Though references to cases figure increasingly in legal courses, the constant refining and re-defining of earlier case law, with the frequent use of the untested hypothesis, thus seem to be greatly lacking in a legal training which is otherwise both long and very thorough" [7, p. 249-309].

Hence, Germany is a state with general openness of the judicial reasoning but limited to direct argumentative use of foreign authority by the courts. Though judges explore American case law but, it seems, they will not go deeper on this way.

1.2. United States of America. American judicial reasoning has its own history that, anyway, begins from English case law, overcome a lot of problems (like declaratory theory in decision-making) and lives through "black lines." United States of America belongs to common law system where a judicial precedent is widely spread.

It seems that USSC judges make law and embody it in open and discursive decisions. This judicial freedom is due to the influx of American freedom and legal traditions, as well as, of course, the fact that the United States belongs to a family of common law, where the dominant role belongs not to the law, but to judicial precedent. Richard Posner describes such freedom in the introduction to his book using next words:
"Ivan Karamazov said that if God does not exist everything is permitted, and traditional legal thinkers are likely to say that if legalism (legal formalism, orthodox legal reasoning, a 'government of laws not men,' the "rule of law" as celebrated in the loftiest Law Day rhetoric, and so forth) does not exist everything is permitted to judges—so watch out! Legalism does exist, and so not everything is permitted" [8, p. 1].

Historically judicial reasoning in USSC activity has been developing from time to time depending on political, legal, social situation in USA. Of course, the judges had and still have a huge influence on the practice of the court. Therefor we can talk about eras of: Oliver Wendell Holmes Jr., Benjamin Cardozo, Antonin Scalia and many others. But the main advantages for judges were provided by the very judicial system in which they work.

One of the judges of the Supreme Court in Ukraine explained the difference between the judges of the supreme courts of common and civil law in next way (obviously, characterizing how deeply the judges can go in their stated reflections in the court decision and how much can be justified). He compared a continental judge with a train who travels all over the country. While a judge moves along rails everything is fine. However, when there is a specific legal issue that no one faces before (there are no rails for trains)—problems with justification of a decision of this case arise.

A common law judge is like a traveler who has trodden paths throughout the country, to every house. And he or she has every case as individualized as possible, which is reflected in the reasoning of his decisions. But problems arise with the generalization of all positions.

Thus, common-law system creates a lot of advantages for judges to adjudicate reasonable decisions, be open and free in their opinions and ideas. Moreover, it must be said that perhaps an American common law judge bears more responsibility for the validity of his decisions than a continental judge.

2. DEFINING JUDICIAL REASONING IN SUPREME COURTS

In this, almost the main section of this work, we examine the basis for reasoning court decisions, how it is presented. But within the framework of how this section is formulated, it is necessary to comprehensively study three issues that are closely related: what is the function of a judge in a supreme court, what is judicial reasoning, and what are the features of reasoning court decisions of supreme courts.

The role of a judges as it’s define Aharon Barak is "to adjudicate the dispute brought before him. In order to do so, the judge must decide the law according to which the dispute will be decided" [1, p. 306]. This global role of the judge, which is characteristic of all judges in the world, is multiplied by the function of the supreme court, which varies in different countries depending on the legal family.

The supreme court in the countries of continental Europe, as a rule, performs the main function during the review of a particular case in cassation or other order—it ensures the unity and development of judicial practice through the prism of protecting human rights. At the same time, in these countries, a special body of constitutional jurisdiction is created (it does not necessarily bear the name of a court), which deals with the consideration of constitutional complaints, interpretation of the constitution and verification of the compliance of legal norms with the provisions of the constitution. In countries of common law, the aforementioned functions of constitutional continental bodies are performed, as a rule, by the country's supreme court. In this context, we have to say that the judges of the supreme courts actually make legal norms, with restrictions imposed by the legal family. Having briefly examined the function of the Supreme Court, let us move on to understanding reasoning.

Judicial reasoning technically comes from judicial interpretation and, embodying in an act of adjudication, represents the justification of the judgment, through the intellectual processing of legal norms, facts and other circumstances.

Speaking about how reasoning works, Antonin Scalia advised to start from thinking syllogistically then this logic will be emerged on the paper:
"Leaving aside emotional appeals, persuasive is possible only because all human beings are born with capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and hence the most persuasive, is the syllogism" [9, p. 41].

There are different theories and forms of reasoning. Speaking about the various theories that were laid in the basis of one or another judicial reasoning, it is necessary to remember about: Francois Geny's method (subjectively persuasive approach), Gustav Radbruch's formula (derogation from legal provisions), Eugene Ehrlich's free searching of the law, Eugene Kontorovich's free law, Oliver Wendell Holmes's Jr. predictive theory, Roskoe Pound's balancing interest, Benjamin Cardozo's nature of the trial, Richard Posner's imaginary construction, Ronald Dworkin's judge Hercules, Antonin Scalia new textualism, Aharon Barak's persuasive interpretation and proportionality, Robert Alexy's dialectic theory of legal reasoning [11, p. 5] etc. Each of these theories is embodied in judicial acts through judicial reasoning.

There are different forms of reasoning approach: deductive (movement in its conclusions from specific to general), inductive (movement in its conclusions from general to specific), abductive (typically occurs in the sciences when one is designed to explain an observed phenomenon and the hypothesis by experimental or other testing [5, p. 152-179]), comparison, analogy (technique allowing to apply the logic of parallel institutions, procedures, norms) etc.

In our opinion, judicial reasoning is the place where approaches to legal interpretation, philosophical views, psychological characteristics, logical calculations and, of course, creativity converge. All of them tirelessly serve-as a basis for judges of

the supreme courts to consider the most important cases and protect the constitutional rights of people.

3. TWO JUDGMENTS—TWO PATHS: COMPARING REASONING IN JUDICIAL DECISIONS OF TWO SUPREME COURTS

In this section we are going to analyze the judicial decision of Federal Constitutional Court of Germany (BVG) and the decision of Supreme Court of United States of America.

"The German federal judicial structure is characterized by the existence of six distinct federal jurisdictions: The Federal Supreme Court, the Federal Administrative Court, the Federal Tax Court, the Federal Social Welfare Court, the Federal Labor Court. In constitutional terms beyond, but in functional terms above all of these five, institutionally separate jurisdictions, is the Federal Constitutional Court" [2, p. 120]. The Federal Constitutional Court, as mentioned earlier, deals with constitutional complaints, considers cases in accordance with certain acts of the German Constitution. Being in the civil law system, the court is actively studying the practice of the US Supreme Court.

The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America. As a common law court, it combines the functions of reviewing cases in cassation, and also considers cases in the light of the compliance of certain acts, actions and omissions with the US Constitution. As a common law court, it's actively studies the practice of the Federal Constitutional Court of Germany, without quoting them.

3.1. Bundesverfassungsgericht and ultra-virus measurement. The decision in the analyzed case was made on May 5, 2020 and concerned the following circumstances. "With their constitutional complaints, the complainants essentially challenge the Public Sector Asset Purchase Programme (PSPP). The complainants further challenge the Corporate Sector Purchase Programme (CSPP). Both programmes are components of the Expanded Asset Purchase Programme (EAPP) of the European System of Central Banks (ESCB). The complainants contend that the

decisions of the European Central Bank (ECB) on which the programmes are based constitute ultra vires acts. They argue that the programmes violate the prohibition of monetary financing (Art. 123(1) TFEU) and the principle of conferral (Art. 5(1) TEU in conjunction with Art. 119, Art. 127 et seq. TFEU). They also assert a violation of the constitutional identity enshrined in the Basic Law to the extent that the programmes infringe the budgetary powers of the German Bundestag" [3]. As a result of a detailed examination of the arguments of the parties, the court voted 7: 1 against satisfying the constitutional complaints.

The decision itself is structured from five blocks, which reflect the collection of facts and the generalization of the arguments of the complainants, the nature of the expected violated rights, the display of the history of the consideration of the case, the argumentation and position of the court. The court in its decision uses different approaches to reason the court decision.

Among the many applied approaches to reason the decision, it is necessary to name: proportionality (balancing among circumstances, consequences, interests of stakeholders, passage 123), comparison (among different levels of normative regulation: from the domestic statutes to EU’s acts, even direct links to supranational legal regulation, paragraph 102), analogy (transfer of the logic of legal institutions from the level of the European Union to the national, paragraph 209-216), deduction and induction (can be seen through the whole decision in different parts) etc.

In this decision, there are clear causal links between national, supranational norms, the circumstances of the case, and the adopted modeling of various situations by the court itself. It is striking that the court refers only to the legislative acts of Germany and the European Union, only occasionally recalling the European Court of Justice, which considered related cases with those issues that were established in this case.

Thus, the decision of the Federal Constitutional Court of Germany is characterized by structuredness, clarity of presentation, classical logical techniques of justifying the court's decision are used.

3.2. Supreme Court of the United States of America and the Second Amendment protection. The decision in the case *District of Columbia et al. v. Heller* was made on June 26, 2008 and concerned the following circumstances. "District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right" [6]. The analyzed solution is radically different from the German one.

In contrast to the German decision, in the investigated adjudication it can be seen that in the decision wasn't placed the methodological basis. Almost the entire decision is presented as a reflection of the court on the problems that arose during the consideration of the case. During the study of the decision, it is necessary to note two striking circumstances: (1) the court constantly recalls the case-law, including additionally analyzing the history of similar cases; (2) the court more openly (in comparison with the other analyzed decision) sets out the arguments, weighs them, models and interprets legal concepts in certain situations. On the example of this decision, one can objectively see the manifestation of Antonin Scalia's textualism, who also voted for this decision.

In the decision, the court applies such approaches of the reasoning: induction (a study was consistently carried out of the principal legal categories that collectively indicated a violation of the second amendment), comparison (this technique was used in the context of comparing what legal context was put into the second amendment, when it was adopted and what needs to be put into it today, historical comparison), analogy (analysis of legal consequences for related legal categories) etc.

Thus, the decision of the US Supreme Court is more open, judges express their thoughts more freely, constantly appeal not only to their reflections, established concepts, but also to judicial practice.

Conclusion and proposal. Judicial reasoning is the key that allows to make a fair decision, or rather to justify the legal conclusion of the court. This is especially important when it comes to the supreme court of a particular country. As an indicator of further legal development, a supreme court of any country is obliged to make not only balanced and correct decisions, but also reasoned ones that show not only legal conclusions, but also how they came to them.

Within the framework of this work, two decisions of two world-famous courts were theoretically and empirically analyzed. There are the decisions of the Federal Constitutional Court of Germany and the US Supreme Court. These courts were chosen precisely because each of them heads the country's judicial system, considers cases related to the interpretation of the constitution and determines the further fate of not only certain legal norms, but also the fate of the entire system. Each of them is a pointer to the legal movement not only for the region, but for the entire world community. Moreover, the judges of these courts cross-examine each-other case law.

As we saw in the investigated decisions, the courts in the style of judicial reasoning embody certain elements of the legal tradition where they function. Thus, the civil-law court continues to refer to the law, and the common-law court to judicial precedent. At the same time, in the US Supreme Court there is an openness of thinking and their presentation, while the Federal Constitutional Court of Germany is more reserved in its reflections, it is as logical as possible in its statements. Each of the courts

uses comparative knowledge. The Federal Constitutional Court of Germany constantly compares the provisions of national legislation with EU legislation. Moreover, the European integration forces this court to resort to the practice studying of the ECHR and the European Court of Justice. At the same time, the US Supreme Court uses more comparisons in different court precedents. Regardless of the outlined characteristics of the courts, each of them is a model and a cradle of legal culture.

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