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CONREASON – The Comparative Constitutional Reasoning Project. Methodological Dilemmas and Project Design

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1. Purpose and Research Questions of the CONREASON Project

The primary purpose of the CONREASON project is to develop the most comprehensive and most systematic analysis of constitutional reasoning that has ever been produced. Secondary purposes are to promote the use of more rigorous (social science) methods in legal scholarship and to inform normative debates on constitutional reasoning. The focus of the project is thus not on constitutional law itself, but on the language of constitutional law.

Following the global spread of constitutional review over the past sixty years, the judiciary has been called on to decide questions of ever greater political significance. In democratic societies in particular, justifying judicial pronouncements on what are often hotly debated and socially divisive issues poses a formidable challenge for unelected judges, as the legitimacy of constitutional court rulings, and thus the legitimacy of constitutional review in general, appears to rest crucially on the reasons that support them.

Judicial decisions are expected both to be socially acceptable and to follow the (sometimes very rigid) rules of legal discourse. Constitutional adjudication is largely shaped by the value judgments and personal (even political) preferences of the sitting judges. Moreover, constitutional courts are collegial bodies whose decisions must accommodate the perspectives of judges with distinct judicial philosophies. Yet public discourse largely equates judicial legitimacy with neutrality and objectivity, requiring that constitutional decisions be free of ideological bias and grounded solely in legal analysis with no regard whatsoever for political considerations. References to the plain meaning of the constitution, to the framers' intent, to precedents, or in some countries even to foreign constitutional material are ways to signal that the courts conform to this conception of the judicial function. Yet, as courts assume a more active role as protectors of fundamental rights, legalistic arguments may give way to more explicitly moral or economic justifications. In writing their opinions, constitutional judges may thus have to weigh many potentially conflicting requirements and expectations depending on the outcome they want to justify and the evolution of the court's broader political environment. The desire to emphasise objectivity and neutrality may stretch textualist arguments beyond the limits of plausibility, while candour may expose the court to the charge of judicial activism. The skills and rhetorical imagination of judicial writers and the capacity of legal scholarship to develop new argumentative frameworks responding to "the felt necessities of the time" may in turn influence the ability of courts to navigate these constraints.

While there is no dearth of theoretical and normative writing on constitutional interpretation or the opinion style of a particular court, there have been few attempts to map and compare the argumentative practices of constitutional courts in a systematic fashion. A cursory look at opinion-writing suggests there are important differences as well as commonalities in the form, style and language judges rely on to justify their decisions. Likewise, over time constitutional reasoning seems to exhibit both elements of change and elements of continuity. In what measure is this really the case? What factors could explain such variations or the lack thereof? What are the dominant interpretive regimes in judicial discourse? What patterns of argumentation can be identified? To what extent do constitutional judges borrow from a common set of key concepts, such as democracy or the rule of law, to structure their constitutional reasoning? To what degree is constitutional reasoning a rhetorical rather than analytical exercise? In what measure do courts acknowledge or deny making value judgments? Are there any family resemblances (in the sense of Wittgenstein) which could organise the different countries into families of constitutional reasoning. Is a convergence in the style of constitutional reasoning; and if yes,

why? How far the actual constitutional norm text influences the key concepts and the style of reasoning?[1]

Studies that concentrate explicitly on reasoning differ from the present project insofar as they look only at one court;[2] are merely analytical or normative without the comparative and/or empirical perspective;[3] do not focus on constitutional issues;[4] or construct fictitious judgments of different legal systems on key constitutional issues and then compare their style with traditional lawyerly methods.[5]

There are only a few studies on legal reasoning which use quantitative methods, and most of them concentrate on US courts.[6] Those which have been applied to European courts mostly concentrate on just one legal system and on very specific narrow questions.[7] Tania Groppi's and Marie-Claire Ponthoreau's *The Use of Foreign Precedents by Constitutional Judges* (2013) was a geographically wide and well-designed project which combined qualitative and quantitative elements, but it only concentrated on a very narrow research question as shown by the title of their book. It was revolutionary in the sense that it combined doctrinal analysis and quantitative analysis: normally these exclude each other in comparative law, lawyers mostly do only the former, and political scientists mostly do only the latter.[8] Also the selection of constitutional/supreme courts was wide (sixteen countries from all around the world) even though it did not include the ECtHR and the ECJ. Only with the help of hard data about what is *actually* happening could they make such bold statements that the number of references to foreign law (as opposed to commonplace in legal academia) is actually shrinking, because references to international law take over their role in constitutional court judgments.[9] An equally instructive but, again, very narrowly focused comparative quantitative study on the citation practices of European supreme courts by Gelter and Siems should also be mentioned.[10]

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[1] For a quantitative classification of the philosophy of constitutional texts (as to their typical fundamental rights contents or the lack of some of those rights) see David S. Law and Mila Versteeg, The Evolution and Ideology of Global Constitutionalism, *Washington University in St. Louis School of Law, Legal Studies Research Paper Series* (2011) Paper No. 10-10-01. SSRN: http://ssrn.com/abstract=1643628. As a possible future research, also a correlation of the data by Law and Versteeg with our data may be revealing as to the influence of a text on the practice of reasoning based on it.

[2] Joxerammon Bengoetxea, *Legal Reasoning of the European Court of Justice* (OUP 1993).

[3] Robert Alexy, *Theorie der Grundrechte* (2nd edn. Suhrkamp 1994).

[4] Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes. A Comparative Study* (Aldershot 1991) and *Interpreting Precedents. A Comparative Analysis* (Ashgate 1997); Mitchel De S.-O.-l'E Lasser, *Judicial deliberations. A comparative analysis of judicial transparency and legitimacy* (2004).

[5] Michel Troper (ed), *Interventionnisme économique et pouvoir local en Europe*, Paris, Economica 2000; Michel Troper (ed), *Comment décident les juges. Le constitition, les collectivités et l'éducation,* Paris, Economica 2008; 'Justices at Work' Special Issue of the *Cardozo Law Review* (1997) 1609 ff.

[6] Frank B Cross, *Decision Making in the US Courts of Appeals* (Stanford University Press 2007); Jeffrey A Segal, An Original Look at Originalism, 36 *Law & Society Review* 2002, 113-138; Michael Evans e.a., Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research, *Journal of Empirical Legal Studies* 2007, 1007–1039.

[7] Urska Sadl and Sigrid Hink, Precedent in the Sui Generis Legal Order: A Mine Run Approach, (20) *European Law Journal* 2014, 544-567.

[8] For an impressive database of supreme/constitutional court judgments for political science (with a very minimal element of legal-doctrinal analysis) questions (esp. judicial independence and policy influence), see The CompLaw Database, available at http://complaw.wustl.edu/.

[9] For a detailed book review see András Jakab, Tania Groppi's and Marie-Claire Ponthoreau's The Use of Foreign Precedents by Constitutional Judges, *Acta Juridica Hungarica* 2014/3. 296-298.

[10] On one-way influences and networks through quantitative analysis of citations of foreign courts see Martin Gelter and Mathias Siems, Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts, *Maastricht European Private Law Institute (M-EPLI) Working Paper* No. 2011/03. SSRN: http://ssrn.com/abstract=1722721.

Jeffrey Goldsworthy's edited volume *Interpreting Constitutions. A Comparative Study* (2006) certainly comes closest to addressing the research question at the heart of the present project. However, its focus is primarily on a handful of countries (mostly common law countries) and its research methods are less rigorous (its questionnaire is much less detailed and it also lacks the quantitative elements).

Our ambition was to deliver an analysis which (1) includes a large number of constitutional/supreme courts, including the ECJ and the ECtHR, (2) uses a very detailed questionnaire (with a rather strict structure) in order to make the country reports as comparable as possible, (3) and applies quantitative social science methodology in order to have falsifiable data on what is actually happening in the reasoning.

We would like to see our role also as part of an empirical turn in legal scholarship: we have talked much too often about trends without actually checking them empirically (legal academics mostly mention just examples, which in the best case serve as anecdotal evidence, in worse cases they are the results of cherry-picking).[11] We would like to show that legal scholarship can and should develop in its methods, methods informed by social sciences are not simply for legal sociologists, but such data can also inform hardcore doctrinal debates. For this purpose, the CONREASON Project aims at producing a systematic and comprehensive picture of constitutional reasoning "in action". The core of the Project consists in the preparation and assemblage of expert-produced country reports. The studies of 25-35 pages a piece, written in English language, by offering an in-depth analysis of the courts' most important judgments ('leading judgments' or 'canon') will permit meaningful comparisons among constitutional jurisdictions. These are supplemented by Excel Tables which analyse the 40 Leading Judgments and by a Sample Judgment from each legal system.

2. Methodology: Quantitative and Qualitative Methods

2.1 Terminology

The terminology of this project (incl. a comprehensive typology of constitutional arguments) has formerly been laid out by the Principal Investigator in a larger article.[12] This was meant to ensure that the authors of the country reports operated within the same conceptual framework.

In this project, we are interested in constitutional reasoning by constitutional courts. By constitutional court we mean "the highest court of a legal order, whatever name they bear, which has as one of its tasks the adjudication of the validity of norms by reference to the constitution".[13] By constitution, we mean "a norm or a group of norms which are of the highest rank in a legal order in the sense that the validity of all other norms is measured on them."[14] We asked the authors to use this formal definition of the constitution as far as possible. If it did not apply to their respective country (e.g., the U.K.), then they were supposed to use a material (substantive or small 'c') definition (possibly the most widely accepted definition of their legal system), but they were also asked to explain this at the beginning of their report.

[11] Besides the works quoted in FN 10 and 1, for a further nice exception see also Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (CUP 2009).
[12] András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, (14) *German Law Journal* 2013/8 1215-1275.
[13] Ibid. 1217.
[14] Ibid. 1216.

2.2 Selection of Legal Systems

Like in most major projects of comparative law, the selection of countries was influenced by tradition (Germany, the UK, the US, France), by specific research questions (whether there is a European style of constitutional reasoning, whether there are significant differences between common law and civil law countries), by geographical ambition (possibly one country from every continent) and by available authors (despite our efforts, we were unable to identify an author who could have written a chapter on Turkey or Egypt, having the local knowledge *and* speaking the language of Western constitutional theory).

During the preparation of the project, the Hungarian constitutional system changed enormously, which consigned the original sample chapter on Hungary largely to legal history, so we decided to analyse and compare the two samples (1990-2010 and 2011-2012) in one single chapter. In the statistical analysis we treated 'Hungary 1990-2010' and 'Hungary 2011-2012' as two different countries (which was then confirmed by many of the results of the comparison between the two). We wrote more about the details of these changes and their relevance in the respective chapter.

We consider this project as a pilot study, so everybody is welcome to analyse further legal systems with the present methods and to put his/her legal system on this map of constitutional reasoning that we are currently trying to discover.

2.3 Selection of 40 Leading Judgments

The authors of the country reports were asked to analyse the 40 leading judgments of their respective countries.[15] We wanted to limit the number of analysed judgments in order to be able to require the authors to deliver an in-depth analysis of the judgments. A number much higher than 40 would have been very difficult to adopt, as in many countries judgments are lengthy and we could not expect our authors to spend a full year with reading judgments for us. A number smaller would have been too small even for a statement only about the leading judgments of a court. We considered different methods for selecting the 40 judgments.

A *randomised sample* was not suitable, as randomised samples make sense only if their results can be generalised to the whole original group (in our case: to all judgments of that court). But the number 40 is statistically too small (as compared to total numbers of tens of thousands of judgments which was the case in many of the countries) to make such generalisations. The results could only be generalised for the whole population if the results in all 40 judgments of the given legal order were homogenous. But we expected them not to be homogenous, so a randomised sample would not make sense under these circumstances. In non-homogenous samples, we would have needed considerably larger samples.[16]

We also considered the application of *stratified samples*. It would have meant, e.g., to have a weighted selection of rejected cases and approved cases mirroring the general success rate at the court. Beyond that we could also have tried to balance samples to reflect the proportion of litigant types or the issue area. I.e. we could have had a small sample of 40, which mirrors in all its relevant features the proportions of the whole population of

[15] Instead of the term 'leading case', we use 'leading judgment', as the latter expresses better our focus on the reasoning instead of the actual legal issue.

[16] For a population of 10.000 judgments we would have needed 264 analyses (!) if we had aimed for a margin of error on an acceptable level (5%). In Hungary, 27.000 cases are in the interval 1990-2010, i.e., around 700 judgments should have been analysed, which was not doable.

judgments. If we had managed that then we could have generalised our results to 'constitutional reasoning in general'. Unfortunately, however, it was not possible. Public opinion polls do use this technique and they can indeed have good predictions on the whole population based only on relatively very small samples. They use, however, also formerly collected data sets which we did not possess. They know that e.g. education, religion, sex, geographic location and age are relevant for party political affiliation (but colour of hair or height is not relevant). They know what the 'relevant' features are that should be measured in the small sample. We do not know that because we have not measured whether there is any correlation between the constitutional reasoning and some external features of the judgments (panel decisions vs. single judge decisions). We do not really know whether an institutional or legal feature of a court is relevant ('religion') or irrelevant ('hair colour') for constitutional reasoning. So we could not use stratified samples for this project.

We were thus not able to model the whole population of judgments (i.e., all judgments) of any court in the sample of 40. Thus we decided to focus on *the 40 leading judgments* of the constitutional courts. The results of the country reports were therefore *only about the reasoning of the 40 leading judgments and not about the reasoning of the constitutional courts in general.*

We were considering different methods how to select these '40 leading judgments'. The number of self-quotes was, unfortunately, not applicable in some countries. (1) In France, e.g., the Constitutional Council hardly ever refers to its own former judgments. (2) In another country where we tested this method, in 'Hungary 1990-2010', the results were shockingly surprising. A short software was written (courtesy of Opten Ltd) to find the 40 most quoted judgments. From the 40-list 35 were unknown to the scholarly community. The reason for that was a huge number of petty 'copy-paste' cases which distorted the results.[17] (3) Besides that we would have technical difficulties in many countries, as the databases are electronically not easily accessible and we should have ordered specific software for every single country to find this list which did not seem possible (both for financial and for organisational reasons). These three reasons seemed compelling to give up the idea of self-quotes as a criterion of importance in this project.

Another option was to count the number of quotes in scholarly literature. Unfortunately, we could not apply this method either. (1) In some countries there are no major electronic legal databases in which we could run the searches. Consequently, the search should have been done manually, for which we did not have the resources. (2) In some other countries you do have electronic databases, but sometimes there is more than one database. Moreover, we could not simply add the results from the different databases, but in some cases we would have had to clean the data, as the databases sometimes overlap. Consequently, this method seemed technically complicated, and (even more importantly) not universally applicable in every country.

Therefore we used a third method in order to select the 40 leading judgments, often applied in social sciences: expert opinion (also called 'judgment sample'). We asked the authors of the country reports to choose the 'leading judgments' of their systems, which is normally the 'canon of cases' that they teach at the university.[18] The authors were supposed

[17] This problem can be rectified, if we do not simply count the number of judments which quote our 'quoted' judgment, but if we also weigh the 'quoting' judgments: if the 'quoting' judgments are often quoted themselves by third judgments, then a quote in them is worth more than a quote by an unimportant everyday judgment. For the application of such a method in order to determine whether a judgment is a leading one or not, see Urska Sadl and Yannis Panagis, What is Leading Case in EU Law? An Empirical Analysis, *European Law Review* 2015, 15-34.

[18] Some of the authors also used collections for law students. For such collections see, e.g., Louis Favoreu and Philip Loïc (eds), *Les grandes décisions du Conseil constitutionnel* (15th ed. Dalloz 2009), Dieter Grimm – Paul Kirchhof and Michael Eichberger (eds), *Entscheidungen des Bundesverfassungsgerichts. Studienauswahl* (3rd

to guess about the general scholarly opinion *(herrschende Meinung)* on the list of 40 leading judgments. The primary audience of the project are academics all around the world, so the academics of their legal order possibly had to agree with their choices.

Authors had to choose cases from one specific court (their constitutional court or supreme court—otherwise we could not have analysed the connection between the specific institutional setting of a court and the style of reasoning in its leading judgments). For the same reason, we exluded non-judicial bodies from the analysis. After long consideration, authors were *not* given a time frame (e.g. only cases after WWII). Even though a specific time frame seemed first a compelling idea in order to make the results more comparable, any such time frame would have been highly artificial and for some legal orders (e.g. the U.K.), as it would have excludeed some very important cases. Consequently, the age of the case was not a factor to exclude any case. We asked the authors to consider the leading nature of a judgment as of today (and not at the time or directly after they were made). Authors had to give their 40-item list that they thought forms the canon of leading judgments in their legal system. Even overruled decisions (like Dredd Scott in the US) could be on the list.

When selecting the 40, we asked the authors to *disregard* the fact whether a case is a human rights or a state organisation case. We considered it also important information whether a list of 40 consists of human rights cases or of state organisation cases. In the 40 judgments Excel Table, there is a box where authors had to specify the nature of the cases, so we have this information.

2.4 The 5 Experts

We asked the authors not to make extravagant choices, but to guess about the dominant scholarly opinion.[19] In order to have an idea whether authors fulfil this requirement, we had *five further Experts* checking on the 40-list. This is a usual method in social sciences in order to ensure intersubjective validity of data which cannot be measured mechanically (for reasons we just stated above).

We had in mind 5 constitutional law professors (or other legal academics), possibly prestigious ones who represent the mainstream in their systems. The audience of the project are academics, this also explains our preference for academics. Besides this, what the 'canon

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ed. Mohr Siebeck 2007); Benjamin Davy (ed), *Rechtssprechung des Verfassungsgerichtshofes. Eine Studienauswahl* (Manz 1985). Others used information by the respective court concerning the importance of a judgment: certain courts list their most important judgments on their website under a separate heading. The actual decision about the list of 40 Leading Judgments, however, remained always in the hands of the authors.

[19] We did not analyse the question *why* the scholarly community considers a decision to be canonical. For different explanations see, e.g., Pascale Gonod, À propos des Grands arrêts de la jurisprudence administrative, in: *Mélanges en l'honneur de Daniel Labetoulle* (Dalloz 2007) 441-458 (arguing that leading cases simplify and represent a complex case law, and they also express the values to be followed by judges); András Jakab, Application of the EU Charter by National Courts in Purely Domestic Cases, in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP forthcoming) http://ssrn.com/abstract=2512865 8-9 (arguing that leading cases are often *contra legem* at the time when they are decided, but they conform with the *Zeitgeist*); Jean-Claude Venezia, Petite note sur les Grands arrêts, in: *Mélanges l'honneur de Louis Dubois* (Dalloz 2002) 221-228 (arguing that the context jurisprudential development makes a case into a leading one, i.e. it shows the direction of the changes of case law). For the dilemma whether the legal significance, or the social and historical relevance makes a case into a leading one, see Rt Hon Sir Ivor Richardson, What Makes a "Leading" Case, 41 *Victoria University Wellington Law Review* (2010) 317-338 (arguing for the latter). With our focus on the generally supposed scholarly opinion, we tried to avoid the above substantive questions on the nature of leading cases. *Cf*. JM Balkin and Sanford Levinson, The Canons of Constitutional Law, 111 *Harvard Law Review* 1997-1998, 963-1024, 979: "Canonicity is not simply a matter of what one thinks important; it is also a matter of what one thinks *others* think important."

of 40 leading judgments' is is often determined by the scholarly debates, as the question of canon is unlikely to come up in this form outside legal academia. If the idea of concentrating on academics seemed very strange to the author of a country report, we left him/her the possibility open to ask judges, but we specifically advised our authors *not* to ask politicians.

The purpose was to have 5 prestigious *mainstream* constitutional law Experts on board. If there was no 'mainstream' in the given country, then the selection had to reflect the different schools. (This is a similar advice to what we said about the selection of the 40 judgments: they should not reflect any extreme idea, but they should possibly reflect the mainstream scholarly opinion or *herrschende Meinung*.) If either the authors or we thought afterwards that the selection of the 5 Experts was biased, then we left the option open to ask some additional Experts later (in order to have more than 5 opinions, thus a more comprehensive picture), but we possibly tried to avoid this option. So we asked the authors to exercise self-restraint when choosing the 5 Experts.

The opinion of the 5 Experts did not change the list of 40 Leading Judgments: Once the authors chose their 40, it was final. We needed the 5 Experts only to have an idea whether their selection was debated or not (we call this 'measure of uncertainty' in social sciences). The fact that we did not change the 40 list had several reasons: (1) For a new list we should have asked the 5 Experts again which seemed like an endless exercise. We could have avoided this issue if we had asked the 5 Experts not just to give a list of 40 Leading Judgments, but to put the judgments into four categories, i.e., ten most influential judgments, second ten most influential judgments and so on. This would have made the aggregation of the results both easier (the probability of having many judgments with equal votes) and more sophisticated (as the importance is weighed). So this was not the decisive reason why we did not change the list in light of the Expert opinions. (2) Possibly some of the high profile authors would not have liked if they had to work with a list with which they did not agree. Whereas we do not want to underestimate this problem (academics are a proud species), the main reason why we kept the list of 40 frozen, after the authors established it, was the time-frame of the project. (3) It was unclear how fast we would be able to acquire the opinions of the 5 Experts (as a matter of fact, in certain cases it took us a very long time) which would have delayed the project.

The 5 Experts were mostly asked by the authors themselves, but if the authors asked us to do so, then we sent official invitation letters to the 5 Experts.

2.5 Questionnaire, Excel Table, Sample Judgment

The project applies mixed (partly qualitative, partly quantitative) methods. For the traditional (lawyerly) qualitative analysis, a detailed questionnaire was developed on the basis of the above (2.1) mentioned conceptual typology. The questionnaire covered institutional issues (e.g., composition of the court, competences, workload, structure of the opinions), arguments in constitutional reasoning (e.g., types of arguments, weight of arguments, degree of judicial candour and rhetoric, key concepts of constitutional argumentation, characteristic ways of framing the constitutional issues), the context of constitutional reasoning (attitudes of legal scholarship towards the constitutional court, legal and political culture, international context), and the authors' evaluation and criticism of the constitutional courts' argumentative practices. Our questions, of course, reflected certain presuppositions (e.g. the choice of substantive arguments that we were looking for), like most questions do, but we tried to keep the coverage as wide as possible.

We also developed an Excel Table where the authors could provide an in-depth analysis of all the 40 judgments (37 questions per judgment), mainly giving 'yes' or 'no' as

answers (e.g., 'is there a reference to foreign law in this judgment?' – yes or no). The Excel Table made us possible to do the statistical analysis that is one of the main novelties of this project. Even though we know that coding (i.e., deciding whether to put a 'yes' or a 'no' into the Excel Table cells) is not an exact science, but an interpretive act,[20] we still think that such results are more easily falsifiable and consequently more useful for the scholarly discourse. We did not have any specific hypotheses before we began the quantitative research, but a genuine curiosity drove us about the actual constitutional reasoning in different countries. We were also hoping that the data will lead us to new conceptualisations which can refresh the international discourse on comparative constitutional law – in the sense of what we call 'grounded theory method' in social sciences.

And finally, we asked the authors to identify a typical judgment, which they sent us (in English) with a short case note (directed by pre-determined short questions).

[20] Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (Sage 2009) 4.

Appendix

A. Questionnaire for the Country Reports[21]

Each Country Report is meant to provide a description of the argumentative practices of the court under consideration on the basis of an in-depth analysis of the court's 40 leading judgments (the 'canon' of the court that is normally considered to be the most important, e.g. because it is the core teaching material in university courses on constitutional law). Authors can refer to cases outside of the 40 leading judgments, if this seems necessary in order to explain the wider context or to show contrasts. The present Guidelines are there to ensure comparability across the Country Reports. Hence it is crucial for the comparative analysis and the validity of the research results that the authors read the Guidelines carefully and follow them strictly in writing their Country Report.

The answers should form a full-text, self-contained essay. Care should be taken to avoid repetitions and to present the answers in the order that appears most relevant and appropriate. Accompanying the Guidelines, a Table is a separate file in Excel format which each author should complete in light of his/her analysis of the 40 judgments sample. One of the functions of the Table is to "relieve" the texts of the Country Reports of too many details (i.e., to store some of the details in the Table instead of in the actual text) in order to make the texts easier to read. We strongly recommend that authors read the sample Country Report on the Hungarian Constitutional Court before drafting their Country Report.

As far as possible, questions should be answered in the order given below. Authors may change the structure of the questionnaire and alter the order of sections and paragraphs, but only to the extent that is necessary to improve the readability and logical coherence of the reports. While new paragraphs and subparagraphs can certainly be added, please do not change the titles of the sections and paragraphs of the questionnaire, unless absolutely necessary, as consistency in the use of the titles facilitates comparison.

Please remember that with a view to publication, Country Reports should not be in excess of 15,000 words. Unfortunately this is an external and non-negotiable constraint. Given the research question and design of our project, providing examples of constitutional reasoning is, of course, fully apposite. However, long literal quotations and detailed case discussions are likely to result in reports exceeding the word limit. Please bear in mind that the priority is to ensure maximum comparability across the reports. This means that the priority is to answer the questions listed in the Guidelines. Finally, note that while the "Comparative Perspective" and "the Evaluation, Pathology and Criticism" sections are to be included in the 15,000 words limit, the latter is optional.

Should doubt arise regarding the meaning of a particular question or about any other matter related to the Comparative Constitutional Reasoning Project, please contact us: conreason@mpil.de.[22]

A. Legal, Political, Institutional and Academic Context

The exposition of the institutional context should not be overly detailed and should be limited to those general aspects or characteristic features that allow for a meaningful comparison with other experiences. With regard to those legal systems where a clear-cut distinction between ordinary statutory law and constitutional provisions is missing and where the identification of the constitution cannot be made with reference to well-established, uncontroversial criteria, the authors of the reports should justify the choices they have made to identify the constitution and/or the criteria they followed in selecting the cases – the first section, "Legal, Political, Institutional and Academic Context", is the place where this can be done.

1. Legal and Political Culture as Context for Constitutional Reasoning

1.1. The prevailing legal and political culture, including traditional conceptions of the nature of law and the proper role of courts; the attitudes and reactions of the other branches of government towards perceived judicial 'activism'; and the extent to which judges have felt compelled to 'stretch' their constitutional authority in order to deal with problems such as corruption, oppression, and injustice. What are the typical implied political

[21] Updated and edited version for the purposes of the present publication. The original questionnaire and codebook have been amended in light of the results of the Heidelberg Workshop (15 February 2013) and the Budapest Workshop (7-8 February 2014).

[22] For further details about the present terminology and conceptual-doctrinal frame see the study András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, *German Law Journal* 2013/8. 1215-1278.

philosophical presuppositions (the existence of a pre-legal state or human rights as natural rights)? What are the usual spoken or unspoken premises about the purpose of the political community and of its constitution?
1.2. Are methods of legal reasoning different in ordinary courts? How far do the literature of your system and the judgments themselves consider the extent to which constitutions differ from statutes, and require different methods of interpretation? If there are such differences in practice and/or they are analysed in the literature, how are these differences explained? Is it by the intended longevity of constitutions, their inclusion of broad, abstract terms, or the difficulty of amending them? Do ordinary courts follow the judgments of the constitutional court?

2. The Court and Constitutional Litigation
2.1. What are the relevant competences (e.g. *a priori* or *a posteriori* abstract review, individual complaint etc.) of the court? Who has standing (MPs, ombudsman, ordinary courts, individuals…) to bring a case and under what circumstances can the court choose among the cases brought? Does the court have any discretionary power to refuse to review a case? In every report it should be clear what kind of decision the constitutional court can make, i.e., whether it can strike down legislation, refuse the application of laws *in concreto*, issue declaratory judgements and if so what kind of declarations.
2.2. Do other courts have the competence to annul statutes?
2.3. Are cases (always, frequently, never) orally argued? Who are the parties to the procedure?
2.4. Are there any specific (constitutional/statutory) rules about the admissibility of proof/argument in the court? How often are they used? Please provide examples.
2.5. What is the workload of the court (number of cases decided per year, incl. a limine rejections for formal reasons or for being obviously unfounded)? How has it varied throughout the years? Are all of decided cases published (what is the percentage of published vs. unpublished cases)?
2.6. What kind of judgments does the court adopt as to their legal nature? Is there a commonly accepted typology of constitutional judgments? (e.g., judgments on admissibility / on the merits, "interpretative judgments", "warning decisions", etc)

3. The Judges
3.1. How many members does the court have? How are the judges selected? Are they elected/appointed for life or for a shorter period?
3.2. Are the judges academics, politicians, judges or other practitioners? Has the ratio of these four groups changed significantly over time?

4. Legal Scholarship and Constitutional Reasoning
4.1. Is legal scholarship critical/deferential towards the court? Are the works of law professors (who are not sitting on the court) perceived to have an impact on the way the court argues or on the court's jurisprudence?
4.2. How do you see the prestige of a constitutional court judge compared to that of a constitutional law professor in your system? Can you compare the salaries?
4.3 Are there any generally (or at least widely) accepted theories about constitutional reasoning, constitutional interpretation or legal interpretation (including the ranking of interpretive methods) in general in the country under consideration? If yes, please outline them (2 pages max.). Are these theories explicitly mentioned in the judgments?

B. Arguments in Constitutional Reasoning
For this part of the Country Report the authors are required to base their analysis on the 40 Leading Judgments of the Court.[23] Each author should strive to identify the 40 judgments that are perceived, in the legal community broadly defined (i.e. encompassing judges, law professors and practitioners), as being the Court's most influential ever (both in the scholarly discourse and in legal practice). Authors should also include the separate (dissenting and concurring) opinions of the judgments in the analysis. Note that the Excel Table as Appendix is attached in a separate file.

5. The Structure of Constitutional Arguments
What is the usual structure of arguments? What is your assessment of the frequency of use of the following argumentative structures in judicial opinions on constitutional matters:[24]

[23] Authors can, of course, refer to cases outside of the 40 leading judgments, if this seems necessary in order to explain the wider context or to show contrasts.
[24] In the early stage of the project, based on Jakab (n. 22), we used the terms "chain structure", "legs of a chair structure" and "dialogic (discoursive) structure", but in order to have terms which cannot be misunderstood, we decided to use the above different terminology. Abreviations in the Excel Table (C, L, D) are based on the old terminology.

• "one-line conclusive arguments": We mean a self-standing structure, in which every premise is presented as a necessary component of the argument.
• "parallel conclusive arguments": We mean a cumulative parallel structure, in which distinct, autonomous considerations lead to the same conclusion.
• "parallel, individually inconclusive, but together conclusive arguments": The various considerations brought up by the opinion are neither presented as necessary nor as sufficient to entail the conclusion, but as elements bearing, at least, some relevance for the issue at hand.

Note that results can change depending on the level of generality. The three types of structure are in a more-or-less relationship as to their structural clarity, i.e., the "one-line conclusive arguments" is the clearest structure and the "parallel, individually inconclusive, but together conclusive arguments" is the most opaque one. Consequently, if several of them turn up in the same judgment then you should tick the box according to the most complicated one. I.e., if you find both a chain (one-line conclusive argument) structure (which is most likely to be in every judgment) and a legs-of-a-chair (parallel conclusive) argument, then you should only tick the box in the Excel Table for the latter one.

6. Types of Arguments in Constitutional Reasoning

6.1. Which of the following arguments are used (or explicitly rejected) in the 40 opinions?[25] Please do not consider those arguments which are used to interpret statutes or regulations (i.e. infra-constitutional norms). Please fill in the Excel Table of the 40 Leading Judgments on the use of the following arguments:

Analogies,
Establishing/Debating the text of the Constitution,
Applicability of the Constitution (e.g., political question doctrine, primacy of EU law against the Constitution, state-centred arguments in a state of emergency),
Ordinary meaning of the words of the Constitution or reference to the 'wording of the Constitution' in general,
Harmonising arguments (separate domestic harmonising and international/EU harmonising arguments)
Precedents (former own cases),
Doctrinal analysis of legal concepts or principles,
Arguments from silence,
Teleological/purposive arguments referring to the purpose of the text,
Teleological/purposive arguments referring to the purpose of the Constitution-maker (incl. *travaux préparatoires*),
Non-legal (moral, sociological, economic) arguments,
References to scholarly works,
References to foreign (national) law,
Other methods/arguments (explain in the text especially these arguments).

Please also mark those judgments with 'yes' where a certain argument was considered but eventually rejected (e.g. if the opinion distinguishes the case at hand from former precedents, it does count as an 'argument from precedent'). However, do not mark 'yes' if the argument type is rejected altogether as irrelevant or inappropriate (e.g. the argument 'we do not consider here moral arguments because it is a court of law' does not count as a non-legal argument).

6.2. What are the typical situations in which these arguments are resorted to?

6.3. Is there any self-reference in the Constitution about how to interpret its provisions?

7. The Weight of Arguments

The rate at which an argument type recurs in the case law of a court tells us relatively little about its function in given opinions. Just as widely used expressions may prove operatively inert, routine references to past rulings do not necessarily imply that the court is bound by its prior decisions. Consequently, authors should use their written reports to correct the misrepresentation that may possibly arise from the strictly quantitative method employed in the Excel Tables.

7.1. Are there any specific doctrines on the relative weight of the above arguments (methods)? If yes, please give illustrations.

7.2. Is it possible to categorise arguments as auxiliary/secondary (offering only a backup or additional argument for the result which has already been derived from another argument) as opposed to main or primary arguments? Does the weight of a specific argument (e.g., literal, purposive argument or reference to precedents) differ depending on the specific area of constitutional law (human rights vs. allocation of authority among governmental institutions)?

[25] See above Jakab (n. 22).

8. Judicial Candour and Judicial Rhetoric

The question here pertains to the difference you are able to discern between the reasons the judges publicly adduce for their decisions and their real motives. Authors should indicate in their written reports to what extent they believe the judges to be straightforward about the factors affecting the court's decision-making process. Authors should also indicate the extent to which judges acknowledge internal disagreement within the Court.

8.1. Judges make value judgments in the course of adjudicating cases, but to what extent are these value judgements acknowledged in their opinions? Do you see a correlation between opinion length and the judges' degree of candour?

8.2 Do the opinions deal with possible counter-arguments (and/or the arguments of the parties, if there are parties to the procedure; and/or from legal scholars, even if not referring to them explicitly)?

8.3 How technical is the language used by the opinion writers? Is it understandable for non-lawyers and/or for lawyers not specialised in constitutional law?

8.4 Who are the target audience of the reasoning of the judgment? Courts? Parties in the proceedings? Lawyers? Politicians? General public? Law students? Academic constitutional lawyers? Judges of the same court? Foreign or international courts (aiming at judicial dialogue)? Please weigh the relevance of the audiences.

8.5 What is the degree of generalisation? Do judgments concentrate on the very specific issue to be decided or are they trying to develop a general conceptual frame and/or principles for future cases?

8.6 What is the degree of rhetoric? Do you find (legally irrelevant) political and/or emotional language in the text of judgments?

9. Length, dissenting and concurring opinions

9.1. Does the length of the opinions show any correlation with the topic? Has it been growing by time or not? Are there any other factors influencing it (e.g. changes in political power, changes in constitutional text, changes in the personnel of the court)?

9.2. Is it possible to submit dissenting or concurring opinions? If yes, then how often does this happen? On what does it depend, whether there are dissenting and concurring opinions to a judgments? Are there any factors (the nature of the topic, changes in political power, changes in constitutional text, changes in the personnel of the court) that make it more it likely?

10. Framing of Constitutional Issues

Framing is fundamentally about the language or phraseology used to characterise an issue. One question is whether constitutional cases are primarily framed (or conceptualised) as being about fundamental rights or, rather, about separation of powers, federalism or legislative procedure. This may, of course, depend in part on the arguments raised by the parties to the case. But litigants themselves may be tuning their rhetoric to the predilection the Court has shown for certain frames in previous rulings.

10.1 Can you see any typical ways of characterising constitutional issues (e.g. as competence conflict rather than as fundamental rights issue)?

10.2 Have there been changes over time in the way constitutional cases are conceptualised?

11. Key Concepts

11.1. Taking a broader look at the Court's jurisprudence and argumentative practices, how frequently, if ever, does it make use of the following concepts (please give a definition only where a constitutional lawyer with a general basic knowledge of comparative law might be surprised: the purpose is not to analyse any concept, but only to avoid misunderstandings when comparing with other countries):

- 'the rule of law' (incl. 'separation of powers', 'primacy of the constitution' or 'legal certainty'; does it include moral justice and access to justice?),
- 'democracy' (incl. sovereignty of the people; does it include local democracy?),
- 'sovereignty' ('international independence', 'state' or 'statehood', do sub-state entities have sovereignty?),
- state form ('republic' or 'monarchy'),
- form of government (presidential or parliamentary)
- 'secularism' (or the separation of state and church),
- 'nation' (civic, ethnic or a mixture?),
- 'federalism' (or 'regionalism', 'autonomous regions', 'devolution', 'autonomy of local governments', 'subsidiarity)),
- proportionality (test),
- *Wesensgehalt* (of competences or of fundamental rights),
- 'human dignity',
- 'equality' (or non-discrimination),

- procedural basic rights (incl. 'due process' and 'presumption of innocence', but excl. procedure of law making),
- 'freedom of expression',
- 'privacy' (right to privacy, data protection),
- further fundamental rights.

11.2. Are there any further key concepts widely used by the Court? If yes, which ones and how are they defined? Are there are other peculiarities in constitutional terminology which could be surprising to foreign constitutional lawyers (max. 1 page)?
11.3. Are the key constitutional concepts spelled out in the constitutional text(s) (respectively in the text of the founding treaty)? Are the key concepts somehow derived from higher ranked constitutional provisions (*Ewigkeitsklausel* or alike)?
11.4. Are they used in an operative manner in the sense of triggering specific legal consequences, or are they essentially deployed as rhetorical device? Has the frequency of use of any of these concepts changed throughout the years? If yes, what would be the most plausible explanation?

C. Comparative Perspective
12. Constitutional Reasoning from a Comparative Perspective
Authors should write this part after having read the first drafts of the other country reports, thus after our February 2014 Heidelberg workshop.
1. Can you see any major differences in the applied key concepts, typical arguments etc. as compared to the other countries as seen in the country reports? How can this be explained?
2. Please also consider: (1) the possible correlation between procedural aspects of constitutional review and the style of reasoning, (2) differences in political theory in the countries (relative roles of courts and legislature), (3) differences in legal culture, including legal theory, (4) differences in personnel (including training and background) for explaining the differences in constitutional reasoning.
3. Hypotheses that could be tested (examples): (1) 'Without a full posterior constitutional review and a great amount of cases, the conceptual sophistication in constitutional law (*Verfassungsdogmatik*) remains underdeveloped' (2) 'The bigger and/or economically stronger the country, the more likely is the rejection of the use of foreign law' (3) 'The older the Constitution is and the more difficult it is to amend it, the more likely the judges are to use purposive arguments instead of literal arguments' (4) 'The more academics are sitting in a court, the longer and more detailed the judgments / the more abstract the judgments / the more references to academic literature'
4. As a conclusion, list a handful of important general unwritten premises (implied presuppositions) that you think a foreign lawyer needs to know in order to understand a judgment of your constitutional court. E.g. 'the Constitution says something about every single legal case', 'constitutional law should only be considered, if it is an important political issue'.

D. Optional Questions: Evaluation, Pathology and Criticism
13. Evaluation, Pathology and Criticism
13.1. What features of the argumentative practices of the constitutional court in your country do you consider to be pathological? Highly subject to criticism? For example, do judges manipulate constitutional language? Do they make bad arguments of a given type? What else? Or the opposite: do you see any exemplary elements which other countries should consider to borrow? How common are these?
13.2. The authors are invited to conclude their chapters with some overall critical observations, on issues such as whether the courts have been either too legalistic or too creative, and the contribution they have made to their societies.

B. Explanations of the 40 Leading Judgments Excel Table (Codebook)

The present codebook should be read together with the questionnaire of the country reports. The Excel Tables will not be printed in the book, but they will be placed on a companion website of Cambridge University Press with the purpose that (1) our research results can be verified, (2) the results can also be used by other scholars throughout the world.

Please also mark those judgments with 'yes' where a certain argument was considered but eventually rejected (e.g. if the opinion distinguishes the case at hand from former precedents, it does count as an "argument from precedent"). However, do not mark 'yes' if the argument type is rejected altogether as irrelevant or inappropriate (e.g. the argument "we do not consider here moral arguments because it is a court of law" does not count as a non-legal argument).

You should only consider *constitutional* interpretation. As a first step we would suggest that in those legal orders where there is no formal constitution (the UK), the textual analysis of 'constitutional' ('cardinal',

'basic', 'fundamental') statutes should be seen as textual arguments. But authors can contact us, if this conceptualisation is problematic in their system for some reason. If a case brought before a constitutional (or supreme) court deals exclusively with the interpretation of ordinary legislation, then these arguments are not relevant—or, at least, not directly relevant—for this Project. As regards the interpretation of a statute in light of the constitution, we are only interested in the arguments establishing the meaning of the constitution, as opposed to how these arguments bear on the meaning of ordinary legislation.

Please try to classify the arguments as one from our list. If—despite your efforts—it does not seem possible, then there is a special box in the 40-judgments table (Q22), and you can explain in your report why it did not fit into any of our categories.

We would like to minimise missing values (or 'not applicable', 'na' values). We would like to have uniform data (with one exception: 'not applicable' is used for one type of question, if—because of the nature of the procedure—it does not make sense to inquire what the case disposition was, i.e. whether the state won or not). Beyond that, the questions are 'is there an argument of type-x in this judgment?', and the answer is either 'yes' or 'no' (whether the 'no' can be explained by the fact that it was not even possible to have such an argument for some reason, can be explained in the report itself, but in the schedule we just want a 'yes' or 'no'). Otherwise we might run into very difficult problems of deciding whether we deal with a 'no' or with a 'not applicable'.

You should equally consider majority and minority (dissenting or concurring) opinions: it does not matter whether the argument turned up in the majority or in the minority opinion. We only consider whether a type of argument came up in the reasoning, not how many times it did. Because of repetitions and half-repetitions it would be difficult and very time-consuming to quantify the frequency within the judgments.

If we consider an argument as borderline between two types of arguments, then we shall make a mark for both categories. If a judgment quoted an argument from another judgment, then the quoted argument also qualified on its own (and not just as a "precedent-argument").

Q1: Reference of the decision?

> Please give the official reference of the decision in original language, except for languages using non-Latin alphabet, in which case reference in English should be provided.

Q2: Year?

> Specify year the decision was rendered.

Q3: Dissenting or concurring opinion in the case?

> Please indicate Yes or No. If irrelevant (separate opinions not allowed), leave blank.

Q4: Case disposition?

> Please indicate (Yes or No) whether the Court found (at least partially) against the law/decision/act (of the government) challenged. If the judgment is prescribes a binding interpretation (of a statute or of the Constitution), then the box should be left blank. If the Court establishes an "unconstitutional omission" (if that is possible in your legal order), then it counts as a "Yes". Admissibility decisions can also be categorised as "yes" (admissibility granted) or as "no" (admissibility denied). If the case is only about an interim relief, then an interim relief against the law/decision/act also qualifies as a yes.

Q5: General topic?

> Please specify: Fundamental Rights (F), State Organisation (S), or Other (O). You can also indicate a combination of the general topics, if there were several in one single judgments, e.g. "F, S", "F, S, O".

Q6: Concrete issue?

> Please characterise the issue at hand, using your own words.

Q7: Structure of argument?

Please specify: "one-line conclusive arguments" (C), Also "one-line conclusive arguments" (L), "parallel conclusive arguments" (D).[26]

• "one-line conclusive arguments" (C): We mean a self-standing structure, in which every premise is presented as a necessary component of the argument.

• "parallel conclusive arguments" (L): We mean a cumulative parallel structure, in which distinct, autonomous considerations lead to the same conclusion.

• "parallel, individually inconclusive, but together conclusive arguments" (D): The various considerations brought up by the opinion are neither presented as necessary nor as sufficient to entail the conclusion, but as elements bearing, at least, some relevance for the issue at hand.

If both C and L structures are present in the same judgment, then mark it as L. If you notice a D structure, then mark the judgment with D even if there are also L and C structures. The structure of a judgment that contains only one argument (or which just simply states the interpretation without explaining why the court chose it) is a C.

Q8: Establishing or discussing the text of the constitution?

Please indicate (Yes or No) whether the opinion explicitly discusses what counts as constitutional text. Establishing the text is different from establishing the content of the constitution. The latter refers to the meaning and interpretation of what is already identified as a *constitutional* text. Prior to that is the question of what counts as a constitutional text. This is the question the present category is intended to capture. It includes all segments of an opinion in which the constitutional status of legal sources is considered (e.g. what is considered to be a standard of review).

Q9: Is the applicability of constitutional law discussed?

Please indicate (Yes or No) whether the opinion explicitly considers whether constitutional law can be applied by the Court to the case at hand (e.g. because/despite political question doctrine). Does the opinion consider the applicability of constitutional law to the case at hand? This question may notably arise in connection with political question doctrines and state of emergency situations or, in EU member states, in relation to the primacy of EU law over domestic constitutional law, or when the Court holds that the case is not governed by the constitution, but by some other legal source. Deferential arguments, stating that no constitutional answer can be found to the question, should also be noted here. This category covers considerations as to the applicability *ratione materiae* of the constitution, the binding force, as well as to the enforceability and justiciability of the constitution. Illustrations are statements such as "the case at hand has no constitutional relevance", "the case falls within the discretion of the legislator [or other non-judicial institution]", "a Constitution has to bind all state organs", etc.

Q10: Analogy?

Please indicate whether the opinion features any instance(s) of analogical reasoning. For the purposes of our research, analogy is an argument that is presented as filling a gap (lacuna) in the constitution and is used to solve a case that is not explicitly regulated by the constitution by using a constitutional provision that regulates similar cases. If the court categorically says that "analogy as such is always an invalid argument" then you should *not* count it. But if the court simply rejects the use of analogy in a certain case without rejecting the genre of this argument in general, then you should count it.

Q11: Ordinary meaning of words?

Please indicate (Yes or No) whether the opinion explicitly considers the ordinary meaning of the text of the constitution.

Q12: Domestic harmonising arguments?

Please indicate (Yes or No) whether the opinion seeks to conciliate different constitutional requirements with one another. In case harmonising involves international law, it shold be categorised under Q13 (with the separation of Q12 and Q13, we aimed at acquiring information also about the

[26] The abreviations C, L and D stem from a former terminology of the project. See above the remarks to Point 5 of the Questionnaire.

openness towards international law). Please do not consider interpretation of statutes in light of the constitution *(verfassungskonforme Auslegung),* as that is not about the interpretation of the constitution but about the interpretation of statues which we are not dealing with.

Q13: Harmonising with international law requirements?

Please indicate (Yes or No) whether the opinion seeks to interpret constitutional law in light of international law (including EU law, if applicable).

Q14: Precedent-based arguments?

Please indicate (Yes or No) whether the opinion considers previous rulings of the court. Please also mark it with "Yes" if the court distinguished the present case from the former one, and therefore they did not apply it.

Q15: Invokes concept or principle not mentioned in the text of the constitution?

Please indicate Yes or No. The application of concepts and principles (incl. different constitutional tests for fundamental rights restrictions) developed by courts or by legal scholars.

Q16: Arguments from silence?

Please indicate (Yes or No) whether the opinion considers argument from silence.

Q17: Teleological (textual) arguments?

Indicate (Yes or No) whether the opinion invokes or considers the supposed purpose of the constitutional text or part thereof. This kind of teleological argument (often called "objective teleological argument") refers to the purpose of the text rather than to the purpose of its authors.

Q18: Teleological (historical-intentional) arguments?

Indicate (Yes or No) whether the opinion invokes or considers the purpose of the constitution-makers. This type of teleological argument (often called "subjective teleological argument") equates the purpose of a constitutional provision with the purpose pursued by the constitution-makers. It may take the form of a reference to the travaux préparatoires.

Q19: Non-legal arguments?

Please indicate (Yes or No) whether the opinion explicitly considers economic, sociological or moral arguments. The present project does not want to contribute to the endless debate about the concept of law, so we are using a rather practical and simple test on what counts as "non legal". For the purposes of the present research, non-legal arguments are explicitly moral, economic and sociological arguments (i.e. arguments that are explictly grounded on considerations external to the law) about the interpretation of the constitution.

There is a significant degree of overlap between legal and other forms of discourse. This fact is particularly evident in the realm of constitutional law and with terms such as "sovereignty", "human dignity", "democracy", etc. Generally speaking, though, the fact that an expression is also used in moral or political discourse does not automatically make it non-legal. Though explicit mention in the constitutional text is not a necessary condition for legalness, it should in principle be sufficient. So if a specific constitutional rule mentions "public morality" or "budgetary stability" then the explanation of these concepts is legal. Also, the explanation of the facts of a case does not qualify as a non-legal argument: we are looking only for arguments which justify a certain interpretation of a constitutional rule.

We also remind you that the court should not be regarded as having recourse to a non-legal argument when a non-legal argument is rejected as invalid, irrelevant or inappropriate. If, for example, the court observes "we do not consider here moral arguments because it is a court of law", this does not count as a non-legal argument.

The proportionality analysis is an interesting issue because it explicitly requires courts to balance rights against public morals or safety etc. We would still suggest that this should not be categorised as a non-

legal argument. Because if we say that this is a non-legal argument we will end up including too much in the 'non-legal' category. Similarly, many constitutions explicitly refer to public morals and safety and health or 'human dignity' and therefore require the courts to interpret them and protect them. But again, if we included these concepts which are commonly contained in written constitutions, the category of non-legal arguments would become too broad and it would be misleading.

Q20: Reference to scholarly work?

Please indicate (Yes or No) whether the opinion explicitly mentions academic literature. Unnamed, generic references to the "dominant doctrine", "authoritative doctrine", etc., should also be qualified as references to scholarly works. On the other hand, the use of concepts and theories known to have scholarly origins should not count as "references to scholarly works" if no explicit references to legal scholarship are made. Nuances in the use of scholarly arguments that are not captured by the Table can, and should, be discussed in your written report.

Q21: Reference to foreign legal material?

Please indicate Yes or No. A vague reference to "foreign laws" or an expression such as "after having analysed the results of comparative law" does qualify as a comparative law argument in the Excel Table. By contrast, simply quoting a foreign concept (even if it is used in a foreign language, e.g. German words like *Drittwirkung* in a Spanish judgment) should not count as a reference to foreign law. Nuances in the use of both foreign law arguments that are not captured by the Table can, and should, be discussed in your written report.

Q22: Other types of argument or method?

Please indicate Yes or No. Including references to domestic legal history, if you cannot qualify it as some kind of teleological argument.

Q23: The rule of law invoked as argument?

Please indicate (Yes or No) whether the opinion invokes the rule of law or a similar concept. This refers to the rule of law (or similar concept such as "Rechtsstaat", "Etat de droit"...) and includes principles the concept is generally taken to imply: the separation of powers, the supremacy of the constitution, access to justice and legal certainty (if these are considered to be part of the rule of law in the legal order you are analysing).

Q24: Democracy?

Please indicate (Yes or No) whether the opinion invokes democracy. Reference to the concept of democracy may also come in the form of phrases such as "sovereignty of the people" or "government of the people".

Q25: Sovereignty?

Please indicate (Yes or No) whether the opinion invokes sovereignty.

Q26: State form?

Please indicate (Yes or No) whether the opinion invokes arguments related to the form of the state (republic, monarchy.).

Q27: Government form?

Please indicate (Yes or No) whether the opinion invokes arguments related to the government form (parliamentary, presidential).

Q28: Secularism?

Please indicate (Yes or No) whether the opinion invokes arguments related to the separation of state and religion. This includes references to "secularism", the separation of church and state and state neutrality in religious affairs.

Q29: Nation?

Please indicate (Yes or No) whether the opinion invokes the concept of nation.

Q30: Federalism?

Please indicate (Yes or No) whether the opinion invokes federalism (including 'regionalism', 'autonomous regions', 'devolution', 'autonomy of local governments', 'subsidiarity').

Q31: Proportionality?

Please indicate (Yes or No) whether the opinion invokes proportionality or similar means-end test.

Q32: Core of constitutional rights or competences?

Please indicate (Yes or No) whether the opinion considers doctrines referring to the core content *(Wesensgehalt)* of either fundamental rights or of competences.

Q33: Human dignity?

Please indicate (Yes or No) whether the opinion explicitly invokes the concept of human dignity.

Q34: Equality?

Please indicate (Yes or No) whether the opinion invokes equality. This includes references to non-discrimination.

Q35: Basic procedural rights?

Please indicate (Yes or No) whether the opinion invokes basic procedural rights. This includes references to procedural due process, right to effective judicial review, adversarial principle, rights of the defence, right to be heard, ne bis in idem, principle of the legality of criminal offences and penalties, presumption of innocence, but excludes references to the legislative process and parliamentary procedures.

Q36: Freedom of expression?

Please indicate (Yes or No) whether the opinion invokes freedom of expression rights. This includes reference to freedom of speech and freedom of the press.

Q37: Privacy rights?

Please indicate (Yes or No) whether the opinion invokes the right to privacy. This includes references to data protection.

C. Sample Judgment Questions

Please attach a typical judgment (possibly one of the 40) in English, which shows the typical length (incl. dissenting or concurring opinions) and the typical arguments. If the judgments of your court are not available in English and if you are unable to acquire the translation of a fitting judgment, we can provide for translation.

The the Sample Judgments will not be printed in the book, but they will be placed on a companion website of Cambridge University Press with the purpose that (1) our research results can be verified, (2) the results can also be used by other scholars throughout the world.

On the basis of your judgment, explain also the usual structure and elements in a note following the judgment. What do the published judgments contain? Describe shortly:

(a) Case name and any other identification?
(b) Name of the deciding court? Name of the judges? A reference to in whose name the judgment is declared ("In the name of the Republic", "In the name of the law", etc.)?
(c) The final decision, concrete order/decision and the *ratio decidendi* (holding) of the judgment?
(d) Statement of facts (how detailed, approximately what portion of a judgment)?
(e) Discussion of procedural background (incl. prior decisions of lower courts) in this very case?
(f) General statement of legal issue or issues?
(i) Reason or reasons for the ruling?
(j) Dissenting or concurring opinions?
(k) Summary of arguments by counsel/petitioner?
(l) Opinion by legal officials other than judges, e.g., secretary of court?

If the published judgment does not contain one or more of the above, are these generally discoverable from other sources? Explain.

Note on the Classification of Certain Arguments from US Constitutional Case Law[27]

1. How do I classify arguments used by American-style originalism (the meaning of terms must be understood as they were understood at the time of enactment)?

American originalism has three sub-types:

1.1 Textualism or original understanding: words mean today what they meant in everyday language at the time of enactment. This would be qualified in our terminology as "The Ordinary or (Legal or Non-Legal) Technical Meaning of the Words".

1.2 Original intent: words mean what the drafters of the Constitution wanted them to mean. This would be qualified in our terminology as "Relying on the Intention of the Constitution-Maker (Subjective Teleological Arguments)". A typical example of this is where a judge appeals to Madison writing in the Federalist Papers.

1.3 Original legal understanding: This looks to original legal/technical meanings, based on references to statutes, common law principles, and past English practices. This is particularly common in the early cases – so in Fletcher v. Peck (1810) it was the meaning of "contract", in Calder v. Bull (1798) it was the meaning of "ex post facto", and in Chisholm v. Georgia (1793) it was the traditional understanding of sovereign immunity. The sources referred to included Blackstone's Commentaries, common law principles, Charles II's debt problems in English courts, and citations to Coke's commentaries and old English cases...none of which are exactly the same as either the intent of the authors or the common understanding. So these are appeals to earlier legal authorities to define a constitutionally relevant term, not to either the presumed intentions of the drafters or to ordinary language. This happens in modern cases as well, although not as frequently. These could be classified as follows:

1.3.1 If the original legal understanding is determined by statutes that were in force in the US at the time of the enactment of the Constitution, then it is a "domestic harmonising argument", similar to the Austrian *Versteinerungstheorie* (if the statutes were not in force in the US, but only in the UK, then it was foreign law, thus it is a "comparative law" argument). No English statutes could be in force in the US at the time of ratification, so we would have to be talking about a separately adopted American piece of legislation. Any appeal to an English statute would clearly be a case of foreign legal authority.
1.3.2 If the original legal understanding is determined by judicial decisions or by references to "common law": see the answer below at 2.
1.3.3 Blackstone's Commentaries and Coke's commentaries: scholarly works.

2. How do I classify references to old English cases (i.e. cases from the time before US independence) and references to "common law"? Here are five (made up) examples in order to answer this question and

[27] We are grateful to Howard Schweber for bringing up the questions and for suggesting the majority of the answers to them.

similar ones: (a) "The phrase 'ex post facto' in the Constitution will be understood as it is explained in the English case of Smith v. Jones (1750)." (b) "The phrase 'ex post facto' in the Constitution will be understood as it is explained in the American case of Smith v. Jones (1795) which was not specifically about the interpretation of the Constitution". (c) "The phrase 'ex post facto' in the Constitution will be understood as it is explained in the American case of Smith v. Jones (1830) which already interpreted these words of the Constitution". (d) "The phrase 'ex post facto' in the Constitution will be understood as it is understood in common law cases in our jurisdictions". (e) "The ideas of fundamental fairness are to be understood in terms of 'traditional common law principles'."

(a) Smith v. Jones (1750 UK) – foreign law ("comparative law argument")
References to old English cases seem to be references to foreign law (i.e. "comparative law" argument and not "precedent" argument), because by the time of ratification (i.e. after the independence) American courts considered themselves in practice no longer to be bound to by English precedents. A counterargument against this approach could be that the States all had reception statutes that said that English common law remained in force unless and until replaced by legislation, thus – so the counterargument – the 1750 English case in example (a) appears to be a binding precedent. But in practice, from early on American courts (state and federal) demonstrated a willingness to innovate, meaning that in practice English precedents were only used as starting points and/or persuasive precedents. The American judges knew perfectly well that they were appealing to precedents from a nation not their own.

(b) Smith v. Jones (1795 US, not specifically on the interpretation of the Constitution) – "domestic harmonising argument"
American common law is a separate and potentially divergent system from American constitutional law, so by appealing to an American common law precedent the Court is ensuring that the two systems remain consistent.

(c) Smith v. Jones (1830 US, interpreting the US Constitution) – "precedent"
Straightforward case.

(d) common law specific rule, no case cited – "domestic harmonising argument"
The reason is that the citation of common law deals with fixing the definition of a specific legal term. Again, just like in example (b), the goal is to ensure that the use of the term in a constitutional setting will not diverge from established usage in a different legal source, thus extending the idea of *ejusdem generis* across the two sets of legal rules. Although there is no citation to a specific case, there is citation to a very specific "rule" defining an equally specific concept. It would be the same if the Court said "understood as it is understood in our statutes" without citing a particular statute. We are particularly inclined toward this interpretation because in the lawyers' briefs there were always numerous citations to cases and/or statutes – these briefs were appended to the case reports in the early years, so it may be that the justices' failure to cite specific reference was based on the assumption that anyone who was curious could go back a few paragraphs. This is also consistent with a tradition in American constitutional law of treating common law rules as "the law of the land" (e.g. Hurtado v. California 1884). That is, common law is a species of "law" no less than statutory law.

(e) common law general principle, whether or not cases are cited – "concept or principle outside the constitution"
Even if the justices (or lawyers) have cited cases, the appeal is to a broad concept ("fundamental fairness") rather than to a specific definition or rule in the Constitution. If there were no cases cited, only a reference to a general principle of common law in order to interpret the Constitution, also then it is a "concept or principle outside the Constitution".

3. If an interpretation is justified on the grounds that it accords with "the law of nations", then it is an argument "harmonising with international law". Is this correct?

Yes, this is correct.

4. One form of argument that turns up with some regularity is one that goes "we have been doing this for a long time without controversy, so it must be okay". How would you classify this?

It might be "precedent", "silence" or "principle outside the Constitution", depending on the exact formulation in the judgment. If none of these categories fit to the concrete judgment, then – as a last resort – you can use the "other type of argument" (Q22), but please try to use this category as sparingly as possible.

5. "Establishing or discussing the text": In American cases, every case starts with the text. I know that's not necessarily true in others – is this just an artefact of the American system that every case will be checked "yes" for that one, or should I be applying a more discriminating understanding of the term in this context?

We meant this category for (probably very rare) cases where the actual text of the Constitution could not easily be established, because e.g. there were so many modifications (maybe not explicit ones). We are aware of only one Hungarian case where the constitutional amendment determined about itself that it will be in force only for 4 years and then it "deletes itself", but they drafted it so poorly that some scholars thought that the section in question was still in force after 8 years. At the end of the day, the Constitutional Court had to decide what the actual text of the Constitution is.

The mere statement of the text of the Constitution does not suffice for this category of argument.

How do I categorise an argument which states that "you have to follow a precedent because of the *stare decisis* principle, no matter whether you agree with the precedent or not"?

This is actually not an argument about the interpretation of the Constitution. It is only about which method should be used to interpret the Constitution, thus it remains on a meta-level of interpretation (an argument about the use of arguments, but not about the actual interpretation). This argument, consequently, remains outside of the scope of the categories in the Excel Table, and you should not tick any of the boxes in the table. You can mention the use of this argument in the essay part of the country report.

How do I categorise an argument which states that "it is wiser for the Court to take this position to preserve its legitimacy or to avoid getting involved in a messy situation"?

This seems to be a non-legal argument (Q19).

How do I categorise arguments referring to the "fundamental principles of sovereignty" and to the "republican principle"? Are these non-legal arguments?

If the judgment contains political philosophical, moral or anthropological explanations, then these should be categorised as non-legal arguments. But a mere reference to a concept which also has political philosophical, moral or anthropological components (e.g., democracy, the rule of law) does not qualify as a non-legal argument. If these concepts are mentioned in the Constitution and they are used in order to interpret other articles of the Constitution, then it is a "domestic harmonising argument". In any case, these concepts should be noted in the table in Q23–Q26, respectively.

Note on the Classification of Certain Arguments from Israeli Constitutional Case Law

"Security reasons / considerations" or military reasons arise in numerous Israeli cases being a country with different security problem, with a continuous need for measures to fight terrorism etc. How would you categorise these arguments?

(a) If the argument goes as follows: "This article of the Constitution has to be interpreted in light of such and such security considerations" then it is a case of Q19 (non-legal argument).
(b) If the argument goes as follows: "The constitution does not apply (notwithstanding any explicit provisions) because common sense says that we do not bind ourselves in the fight against terrorism" then it is a case of Q9 ("applicability of the constitution").

"Concepts and principles outside the Constitution" would refer to legal arguments that are not mentioned in the text of a Constitution (e.g. "separation of powers" was not mentioned in the Hungarian Constitution, but the Constitutional Court regularly referred to it). In your case it does not apply.

We try to avoid categorising anything as "other type (Q22)" argument, this is rather just a last resort if all else fails.

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