GENERAL EXPLANATORY NOTE

Prepared after the Budapest CONREASON Workshop (7-8 February 2014)

This note addresses some of the general issues that came up during the reading of the draft reports or that emerged during the workshop in Budapest. More detailed notes, specifically tailored to the individual reports, will be sent soon to each author.

* Deadline

The final drafts of the papers along with the Excel Tables and the opinions of the 5 experts on the 40 judgments samples (Great Cases) must be submitted by the **end of April.** It is necessary that we receive these (esp. the Excel Tables) on time, as statistical counting is only possible if we have all of the documents.

* Structure of the report.

According to the questionnaire guidelines, "As far as possible, questions should be answered in the order given below". This means that 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].

* Length of the report, references to the case law and missing sections

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 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.

* New cases not to be included in the Great Cases sample

The 40 cases list cannot be modified unless the author of the report is ready to repeat the five experts' assessment procedure. Given the constrained timeframe of our project, we do not recommend it. Note, though, that authors are free to quote and even discuss new as well as older cases that are not included in the Great Cases sample.

* Legal, Political, Institutional and Academic Contexts

The analysis of these contexts cannot replace the analysis of the arguments used in constitutional reasoning: in particular 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.

However, some of the reports did not answer the questions on the workload and the composition of the court. These reports should be completed to include these pieces of information as they are clearly relevant for the analysis of constitutional reasoning.

*** The Court and Constitutional Litigation**

It would be helpful to know upfront in every country report what type of review the court can exercise (i.e., whether abstract or concrete etc, *ex post* or *a posteriori;* if abstract, who can refer the case etc). 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.

*** Constitutional reasoning**

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.

*** The structure of constitutional argument**

At this stage of the project, we must clarify our triadic classification

- Chain structure: We mean a self-standing structure, in which every premise is presented as a necessary component of the argument. In order to use a clearer term, we suggest that in the future the following expression should be used: **"one-line conclusive arguments"**
- "Legs-of-a-chair": We mean a cumulative parallel structure, in which distinct, autonomous considerations lead to the same conclusion. In order to use a clearer term, we suggest that in the future the following expression should be used: **"parallel conclusive arguments"**
- Dialogical structure (which was meant to be synonymous with the "discursive" structure): 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. In order to use a clearer term, we suggest that in the future the following lengthy, but more straightforward expression should be used: **"parallel, individually inconclusive, but together conclusive arguments"**.

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.

It is not necessary to change the heading in your Excel Table as we will do this for you.

*** Establishing the text of the constitution**

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).

*** Applicability of the constitution**

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.

*** Analogy**

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.

*** Scholarly Works and Comparative Law**

In the Excel Table, 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.

A similar approach is to be followed with respect to references to foreign law. A vague reference to "foreign laws" or an expression such as "after having analysed the results of comparative law" do qualify as comparative law arguments 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 and scholarly arguments that are not captured by the Table can, and should, be discussed in your written report.

*** Non legal-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.

*** 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.

Judicial candour

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.

*** 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.

*** Arguments about statutory interpretation**

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.

*** Excel Table and sample judgment**

The Excel Tables and 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. We have a specific clause in our contract with CUP regarding this aspect of the Project.