

CONREASON -- Comparative Constitutional Reasoning Project

Questionnaire (Guidelines for the authors of country reports)

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 cases (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). 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. With a view to publication, Country Reports should be no longer than 15,000 words.

As far as possible, questions should be answered in the order given below. The answers, however, 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 is a Table in a separate file in website-format (Appendix 2) which each author should complete in light of his/her analysis of the 40 judgments sample (alternatively, if authors find that easier, they can fill in the Table in an excel-format instead; the excel-format Table is also attached). 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 András Jakab's sample Country Report on the Hungarian Constitutional Court before drafting their Country Report. Should doubt arise regarding the meaning a particular question or about any other matter related to the Comparative Constitutional Reasoning Project, please contact us: conreason@mpil.de.

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A. LEGAL, POLITICAL, INSTITUTIONAL AND ACADEMIC CONTEXT

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; 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 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? By the intended longevity of constitutions, their inclusion of broad, abstract terms, or the difficulty of amending them? Are ordinary courts following the judgments of the constitutional court?

2. The Court and Constitutional Litigation

2.1. What are the relevant competences (e.g. 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?

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)

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 most important judgments of the Court. 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 Table as Appendix 2 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:

- chain-structure: deploying one conclusive argument (or a chain of arguments following from one another)?
- “legs of a chair”: cumulative-parallel arguments, i.e. the arguments support a certain legal interpretation independently; every argument would suffice on its own, but there are more of them; the reasoning thus resembles the legs of a chair?
- dialogic: the opinion presents a range of relevant considerations, none of which is really conclusive, yet taken together they indicate a certain way of solution (discursive or dialogic style; making use of *topoi*)?¹

6. Types of Arguments in Constitutional Reasoning

6.1. Which of the following arguments are used (or explicitly rejected) in the 40 opinions?² Please do not consider those arguments which are used to interpret statutes or regulations (i.e. infra-constitutional norms). Please fill in the summary table of the 40 judgments in Appendix 2 (separate website-format file) on the use of the following arguments (alternatively, if authors find that easier, they can fill in the Table in an excel-format instead; the excel-format Table is also attached):

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

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)?

¹ 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* (forthcoming), available at <http://ssrn.com/abstract=1956657>.

² See above n. 2.

8. Judicial Candour and Judicial Rhetoric

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

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 to be tested: (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 foreign law is to be 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.

Appendix 1: A Sample Judgment

Please attach a typical judgment (possibly one of the forty) in English, which show 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.

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.

Appendix 2: Summary Table of the 40 Most Important Judgments

Please complete the attached Table in excel-format in a separate file. Please do not copy-paste the Table into a doc-format file, because the table will be distorted. If you have any technical difficulties, please let us know, and we will find a technical solution for you.