Results of the 15 February 2013 CONREASON project meeting (Heidelberg)

Some of the questions did actually come up during the project meeting (either in the discussion or during coffee brakes), others were 'fabricated' after the meeting because they seemed to lurk behind the discussion.

A. General

1. What is the purpose of the CONREASON project?

The primary purpose 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.

B. The 40 judgments

2. How do we choose the 40 most important judgments? What does 'important' mean?

You should choose the 'leading cases' of your system, which is normally the 'canon of cases' that you teach at the university. Basically, you should guess about the general scholarly opinion *(herrschende Meinung)* on the list of 40 cases. The primary audience of the project are academics all around the world, so the academics of your legal order should possibly agree with your choice.

This applies, however, with a strong limitation: you should only have cases from one specific court (your constitutional court or supreme court—otherwise we cannot analyse the correlation between the specific institutional setting of a court and the style of reasoning in its leading cases).

3. You also mentioned sometimes 'influential' cases? Is this the same as 'important'?

Yes, they are the same; in former versions of the project documentation we also used the word 'influential', but in the updated one we only use 'important'. Please substitute (in your mind) any references to '40 most influential cases' with references to '40 most important cases'.

4. Why do we work with the 40 most important judgments? Why not 40 randomly selected cases?

The whole population of judgments in most legal systems that we analyse is over 10.000. No matter how you choose 40 judgments, they are not representative of the whole population. (The results could only predict the features of the whole population if the results in all 40 judgments of the given legal order are homogenous. But we expect them not to be homogenous, so a randomised sample would not make sense under these circumstances.)

5. But the leading cases are normally 'special cases'. They are not typical ('great cases make bad law'), so we will not have much general information on constitutional reasoning of the given legal order.

This is true: our results will be about 'constitutional reasoning in the leading cases of xy-constitutional-court' (and then we can aggregate the country results into results on 'leading cases of some/many constitutional courts of the world'). We will have to be aware of this limitation of the result. But at least we clarify it, and we do not pretend to be able to generalise from a few judgments to the general features of constitutional reasoning. Generalisable results on constitutional reasoning can be produced through automated content analyses and electronic survey questionnaires which are also part of the major CONREASON project, but which do not have to concern you at this point. In the country report part of the project, we chose to analyse only the 40 most important ('leading cases') of a given court.

6. Why do we choose exactly 40 (and why not 10 or 100)?

A number much higher than 40 would be very difficult to adopt, as in many countries judgments are lengthy and we cannot expect our authors to spend a full year with reading judgments for us. A number smaller would be too small even for a statement only about the leading cases of a court. Moreover, statistical counting becomes easier over 30 (for reasons which are difficult to explain without being too mathematical), and we would like to be able to make statements at least about the 'leading cases' of a given (constitutional/supreme) court.

7. Should we have a time frame, e.g. only cases after WWII should be chosen?

Whereas this seems first a compelling idea in order to make the results more comparable, any such time frame would be highly artificial and for some legal orders (e.g. U.K.) it would exclude some very important cases. Consequently, you should not have any specific time frame, just go for your 40, no matter how old the cases are.

8. In many constitutional orders also non-judicial bodies use constitutional reasoning. Should we include their decisions in our 40-selection?

No. If we want to have a thorough analysis, we have to limit the scope of our enquiry. You can talk about the institutional and political context of your court decisions in your country report (there are specific questions on this), but our research design concentrates on the '40 leading cases of a constitutional/supreme' court.

9. In my legal order, some cases go to supranational/international (ECtHR) or foreign (Privy Council) courts rather than to my constitutional/supreme court. Can I include cases from these courts?

No. Please concentrate on your own constitutional/supreme court. When explaining your specific results and their context, you can of course refer to these other courts, but their decisions cannot be part of the 40, otherwise we cannot make the correlation between the specific institutional setting of a court and the style of reasoning in its leading cases).

10. In my legal order there is no constitution in the formal sense. How do I define constitutional reasoning and constitutional cases, i.e. how do I define 'constitution' for my country (e.g. U.K.)?

If you can, please use the formal definition of the constitution (as contained in András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, *German Law Journal* (forthcoming), available at http://ssrn.com/abstract=1956657). If it does not apply to your country, then use a material (substantive or small 'c') definition, but please explain this at the beginning of your report. If you use a material definition, then please go for the most widely accepted definition of your legal system, so you can choose the 40 accordingly.

11. Should I try to have a balance of human rights cases and state organisation cases when choosing the 40?

No. Just go for the canon of 40. It is also an important information whether your 40 consists of human rights cases or of state organisation cases. In the 40-judgments-table, there is a box anyway where you have to specify the nature of the cases, so we will have this information.

12. When should we consider the importance of the cases? When they were decided or today?

Today. Please give the list, that you think today makes out the canon of leading cases in your legal system. Also overruled decisions (like Dredd Scott in the US) can be on the list.

13. My court classifies its own decisions as 'important' and 'less important'. Does this count for my selection of the 40 cases?

No, or at least not directly. We would like to have your opinion about what the leading cases are (your opinion might of course be influenced by the opinion of the court itself, but our direct question is about your—and other legal academics'—opinion).

14. Why don't we apply stratified samples? E.g. we could have a weighted selection of rejected cases and approved cases mirroring the general success rate at the court. Beyond that we could also try to balance our sample to reflect the proportion of litigant types or the issue area. I.e. we could have a small sample of 40 which mirrors in all its relevant features the proportions of the whole population of judgments. If we manage that then we could generalise our results to 'constitutional reasoning in general'. Would that be possible?

Unfortunately, it is not possible. Public opinion polls use this technique and they can indeed have good predictions on the whole population based only relatively very small samples. They are using, however, former data. They know that e.g. education, religion, sex, geographic location and age are relevant for party political affiliation (but the colour of hair or the height are not relevant). They know what are the 'relevant' features 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 know whether a feature is 'religion' or 'hair colour' for constitutional reasoning. So we cannot make stratified samples now.

15. Why not selecting the 40 on the basis of self-quotes? If a court quotes itself many times, then it selects itself the 'important' cases. This would be a quantifiable, objective and scientific method.

The number of self-quotes is, unfortunately, not applicable in some countries. (1) In France, e.g., the Constitutional Council does not really refer to its own former judgments. (2) In another country where we tested this method, in Hungary, the results were shockingly surprising. A short software was written (a courtesy of Opten Kft) to find the 40 most quoted judgments. From the 40-list 35 were literally unknown to the scholarly community. The reason for that was a hug number of petty 'copy-paste' cases which distorted the results. (3) Besides that we would have technical difficulties in many countries, as the databases are electronically not easily accessible and we should order specific software for every single country to find this list which does not seem possible (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.

16. Why not selecting the 40 on the basis of quotes in the scholarly literature? This seems to be an objective and universal method that could be applied in every country.

(1) In some countries there are no major electronic legal databases in which we could run the searches. Consequently, the search should be done manually, for which we do not have the resources. (2) In other countries you do have electronic databases, but sometimes there are more than one databases. Moreover we should not simply add the results from the different databases, but in some cases we would have to clean the data, as the databases are sometimes overlapping.

      Consequently, this method seemed technically complicated, and (even more importantly) not universally applicable in every country.

17. The choice by the author is highly subjective. How can you make sure that his/her opinion mirrors the general scholarly opinion about what are the 'leading cases'?

We ask the authors not to make extravagant choices, but to guess about the dominant scholarly opinion. In order to have an idea whether authors fulfil this requirement, we will have 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). This method excludes cherry-picking or anecdotal evidence which are usual methodological problems in legal scholarship. We are returning to the issue of the 5 experts below more in detail.

C. The analysis of the judgments and the questionnaire ('Guidelines')

18. When analysing the judgments, do I only consider the majority opinion? What if there is no clear majority opinion?

You equally consider majority and minority (dissenting or concurring) opinions. Consequently, it does not matter whether it is clear or not which judge actually belongs to the majority.

19. Sometimes you have non-legal arguments in judicial opinions. What do I do?

Non-legal arguments are also classified in the 40-judgments-table. So tick the box there please (write a 'yes' in the appropriate box).

20. Could we change the order of questions in the questionnaire? The context (now Part C) seems to be more logical at the beginning.

Yes, we are changing the questionnaire (new version is attached).

21. Could we add a new question to the questionnaire? We should also analyse, when talking about institutional issues of the court, the different types of decisions (e.g. decision on admissibility vs. decision on the merits).

Yes, we are changing the questionnaire (new version is attached).

22. Should we also analyse statutory interpretation done by the constitutional court (in the 40 cases) or only constitutional interpretation?

Only constitutional interpretation. As a first step we would suggest that in those legal orders where there is no formal constitution (UK), the textual analysis of 'constitutional' ('cardinal', 'basic', 'fundamental') statutes should be seen as a textual argument. But authors can contact us, if this conceptualisation is problematic in their system for some reason.

23. What if I find an argument that is not in the 40-judgments-table?

Please try to classify the arguments as one from our list (as found in András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, *German Law Journal* (forthcoming), available at http://ssrn.com/abstract=1956657). 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.

24. Sometimes an argument is just not possible. Can I apply besides 'yes' or 'no' also 'not applicable'?

No. 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'.

25. A very concrete question: how should I qualify 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 it a 'chain'?

Yes, a chain with one sole ring.

26. What if I face a problem in the questionnaire? What if I cannot answer a question or I do not understand a question?

We are more than happy to help you any time. Please contact us at conreason@mpil.de.

D. The 5 experts

27. Who are the '5 experts', what is their task and how should we select them?

We basically have in mind 5 constitutional law professors (or other legal academics), possibly prestigious ones who represent the mainstream in your system. The audience of the project are academics, this also explains our preference for academics. Besides this, what the 'canon of 40 leading cases' 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 still seems very strange to you, you can also ask judges, but please do not ask politicians; and please let us know what the profession of the experts is.

28. I belong to a specific school of thought in my legal order. Can I ask all the 5 experts from the same school?

No, you should possibly avoid that. The purpose would be to have 5 prestigious mainstream constitutional law experts on board. If there is no 'mainstream' in your country, then the selection should 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 you or we think afterwards that the selection of the 5 experts was biased, then we can always ask some additional experts later (in order to have more than 5 opinions, thus a more comprehensive picture), but we should possibly avoid this option (we would do so only after having consulted you, of course). So we would ask you to exercise self-restraint when choosing the 5 experts.

29. Does the opinion of the 5 experts change my 40-list?

No. Once you chose your 40, it is final. We need the 5 experts only to have an idea whether your selection is debated or not (we call this 'measure of uncertainty' in social sciences).

30. Shall I wait for the opinion of the 5 experts before I can analyse my 40 judgments?

No. As their opinion does not change the list, you can begin to write your report.

31. Could we have a form letter that we can send to the five experts?

Sure. Here you are (please change where you think it is appropriate to change):

      Dear xy,

a few months ago I was invited to participate in the CONREASON Project at the Max Planck Institute in Heidelberg, Germany. The Project investigates constitutional reasoning in comparative perspective and the organisers (András Jakab, Arthur Dyevre and Giulio Itzcovich) asked me to identify the 40 leading cases of *xxxxxxxxx [court under consideration]*.

An important step in the completion of the Project is to obtain a measure of the extent to which my opinion as to what the 40 leading judgment of court *xxxxxxxxxxxx* are is accepted in the legal community. To that end, I am requested to identify 5 eminent experts from my own legal system and ask them to what extent they agree with my selection of 40 leading cases. I thought you are one of these five eminent experts in my community. I have also asked *xxxxxxx*.

Attached is my 40 leading judgments list. Note that the order is not meant to reflect any internal ranking (in that sense #1 is exactly as 'leading' as #40).

I would be most grateful if you could check the list and send a list back to me by 1 July 2013, specifying which cases you would drop from the list and which ones you would add instead. Owing to comparability requirements across jurisdictions, the list must contain exactly 40 judgments (no less, no more). So if you add one judgment, you must indicate which one you drop. Conversely, when you would drop a judgment, you must propose a new one.

Please note that this will not serve to produce an aggregated 40 judgments list. Rather, it will serve as a measure of agreement in the legal community. The final version of the report, which will appear in an edited volume, will include your expert opinion as an indicator of the degree of agreement amongst leading constitutional law experts on what are the Court's 40 most important decisions. It will also be possible to know which cases are consensual and which ones are less so and how you and the other four experts diverge from my own list and among themselves.

Myself and the CONREASON team are most grateful for you help.

Best regards,

xxxxxxxxxxx

32. Could you ask the five experts? It seems more official if they receive an email from the Max Planck Institute.

Yes, but we need the information from you on who we should contact. We are happy to write to the experts if you think that in this way they take the task more seriously. This is, however, just a service we offer to you. If you want to contact your experts yourself, you can also do so. Just let us know what is happening and how we can help you.

E. Practical Issues

33. What are the deadlines?

(1) Please select you 40 judgments by **mid-April 2013**, and send us the list (conreason@mpil.de). You can begin to write immediately after this, there is no need to wait for the opinion of the 5 experts.

(2) Please choose the 5 experts by the **end of May 2013**. The 5 experts should return their opinion by **1 July 2013** (to you or to us; if you received it, please forward it us to conreason@mpil.de).

(3) The first draft of your country report should be sent us by the end of this year (**31 December 2013**).

(4) The second project meeting is going to be **7 February 2014** (Friday) where we are discussing problems that came up while writing the reports. Please save the date, and please try to come (all travel and accommodation costs are covered by the CONREASON budget), because the common discussion is important to have the results we aim for.

(5) We expect the final versions of the country reports by the **end of July 2014**.

34. Any other advice?

Before you begin to write your report, please read not just the updated questionnaire ('Guidelines') very carefully, but also the study on the conceptual bases of the project (András Jakab, Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts, *German Law Journal* -- forthcoming -- available at http://ssrn.com/abstract=1956657). It is essential that we are using the same conceptual frame.

Reading the sample country report on Hungary and on the ECJ (the latter is oversize, but its methodology is what we aim at) are also very useful to achieve comparability of the results. We updated the studies for that purpose according to the changes agreed on at the 15 February 2013 project meeting (they are attached).

35. I am getting confused about which version of the questionnaire and which version of the other documentation I should use. Could you send me the whole package in an updated form again?

Sure, every relevant document is attached in its newly updated form.