



## **Results of the July 4th, 2019 CORE Project Meeting (Santiago)**

Hereby, you will find the most important questions that came up during the project meeting, as well as others that might not have emerged directly, but they seemed to lurk behind the discussion and it's best to address them directly.

### A. General

#### **1. WHAT IS THE PURPOSE OF THE CORE PROJECT?**

The primary purpose is to develop a comprehensive and systematic analysis of Latin American constitutional reasoning that has a well-founded and coherent empirical basis using concrete constitutional court or supreme court sentences. Secondary purposes are to promote legal scholarship and the use of rigorous (social sciences) methods in the Latin American region as well as to contribute to the improvement of constitutional dialogue and public discourse on a national and on a regional level.

### B. The 40 decisions

#### **2. HOW DO WE CHOOSE THE 40 MOST IMPORTANT SENTENCES? 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. While selecting the cases, you should guess about the 'general scholarly opinion' in your country regarding the list of the 40 cases. It should not be a list of exceptions, nor cases with no jurisprudential relevance. Nor it should not be a sort of summary of the jurisprudence of the respective court. Rather, it is a selection of cases that signal the most important features of a country's constitutional culture and allow a regional comparison with similar types of cases from different countries.

The list of selected cases will be made public later on. (If you consider it useful, you could look at the lists of leading cases in the Comparative Constitutional Reasoning volume by CUP, or on the dataset available on the webpage of Cambridge (under Resources/Resources): <https://www.cambridge.org/gb/academic/subjects/law/comparative-law/comparative-constitutional-reasoning?format=HB>)

You should only have cases from one specific court (your constitutional court or supreme court, or the constitutional chamber of the supreme court), otherwise we cannot analyze the correlation between the specific institutional setting of a court and the style of reasoning in its leading cases. There is only one exception from this rule, the Commonwealth Caribbean, where – because of the special features of this region – we decided to include two courts, the Judicial Committee of the Privy Council and the Caribbean Court of Justice.



**3. SO IF IT IS NOT A REPRESENTATIVE SUMMARY OF THE GIVEN COURT’S JURISPRUDENCE, DOES IT MEAN THAT IT IS A SELECTION OF SPECIAL CASES? HOW WOULD THIS ALLOW US TO DRAW GENERAL CONCLUSIONS?**

Indeed, it is not a summary of the whole jurisprudence of the court, but a selection of the most important cases on constitutional review. Therefore, our results will be admittedly about ‘constitutional reasoning in the leading cases’ of a given constitutional-court and not an analysis of the complete jurisprudence. Later however, we will aggregate the country results into results on ‘leading cases of some/many constitutional courts of Latin America’. While this is certainly a limitation, but at least we clarify it, and we do not pretend to be able to generalize from a few judgments to the general features of constitutional reasoning. Therefore, in each country report, we will analyze only the 40 most important (‘leading cases’) of a given court and explain the results by the general political, legal and scholarly context as well.

**4. WHY DO WE CHOOSE EXACTLY 40 (AND WHY NOT MORE OR LESS)?**

A number much higher than 40 would be very difficult to adopt, as in many countries’ judgments are very lengthy, like in Colombia, and we cannot expect our authors to spend a full year with reading judgments for us. Instead, a smaller number would be too small even for a statement only about the leading cases of a court. Moreover, statistical counting becomes easier over 30, and we would like to be able to make statements at least about the ‘leading cases’ of a given (constitutional/supreme) court.

**5. SHOULD THE SELECTION OF THE CASES BE RESTRICTED TO CERTAIN PRE-DETERMINED FEATURES, SUCH AS CERTAIN PROCEDURES, OR FROM A CERTAIN TIME FRAME?**

There is no rule to select certain type of cases: neither a certain number of cases from certain procedures (abstract or concrete review, ex ante or ex post review, etc.), nor about certain topics (fundamental rights cases or state structure, etc.), nor from certain period of time – every author will be free to choose the most important landmark cases of constitutional review, independently from any specific pre-determined feature. Only this way it makes sense to include certain indicators that will show that – for instance – fundamental rights cases are on a rise (or not) in this region (you will find these indicators in the beginning of the Excel table).

**6. WHEN SHOULD WE CONSIDER THE IMPORTANCE OF THE CASES? WHEN THEY WERE DECIDED OR TODAY?**

Today. The list of leading cases meant to refer to the importance of the cases in the present, independently from whether the sentence was overruled or changed in any way.

**7. 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).



## **8. WHY NOT SELECTING THE 40 ON THE BASIS OF QUOTES IN THE SCHOLARLY LITERATURE?**

(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 database. 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.

## **9. 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**

## **10. WHEN ANALYZING 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.

## **11. HOW DO WE KNOW EXACTLY THAT WE HAVE FOUND AN ARGUMENT OF ANY KIND? FOR INSTANCE, PLAINLY MENTIONING THE WORD “EQUALITY” WOULD QUALIFY AS REFERENCE TO THE CONCEPT OF “EQUALITY”?**

No. What authors should do while analyzing the decisions is more than a simple word counter. At the same time, it should not be that broad and subjective either to impede comparability. In the “Project Guide” you can find a separate chapter on reasoning with further literature cited in order to find guidance. However, in general we can say that the difference between reasoning and simple series of statements is the type of logical connection between the propositions that explains the justification behind reaching a certain conclusion. For example, by simply citing the text of the constitution is not an argument, because it does not create any relation between the normative text cited and the conclusion that the court supposed to reach by this citation. To put it in a different way, when the text of the sentence clearly – or relatively clearly – gives answer to the question “why?”, it’s very likely that you have found a reason. Of course,



depending on the general style of the court or the concrete case, the reason-giving activity could sometimes be more expressive and relatively clear, and sometimes rather ambiguous. In each case, the authors will have to make a judgement based on the text of the decision on whether there is or there is no argument – and surely, this decision will have to be a prudent balance of reading between the lines but not imagining something that is actually not there.

The same goes with concepts like equality, presidentialism, etc. It is not enough to mention these concepts, because that could happen almost unconsciously, like in a long enumeration. Instead, we are looking for concepts mentioned in the framework of an argument or in the context of substantial analysis. Once again, to judge this on a case by case basis would require a prudent expert opinion.

**12. SHALL WE PUT “NO” IN THE EXCEL WHEN THE COURT SUBSTANTIALLY MENTIONS AN ARGUMENT OR A CONCEPT, BUT IN THE END THESE ARGUMENTS OR CONCEPTS ARE NOT TAKEN INTO CONSIDERATION? OR SHALL WE PUT “NOT APPLICABLE”?**

No. We would like to have uniform data (with two exceptions: ‘not applicable’ could appear about the case disposition, when – because of the nature of the procedure – it does not make sense to inquire about which party won, and for the same reason about state involvement). Beyond that, the questions are ‘is there an argument of type-x in this judgment?’, and the answer is either ‘yes’ or ‘no’, otherwise we might run into very difficult problems of deciding whether we deal with a ‘no’ or with a ‘not applicable’. If the author discovers borderline cases that repeat each other in other cases too, she or he should figure out a coherent way how to categorize those cases in the Excel, and then it can be further explained in the report itself – but in the excel table we just want a ‘yes’ or ‘no’.

Only when the court refers to an argument, but clearly and expressively it states that this certain argument will not be taken into consideration, the authors should mark ‘no’.

**13. WHAT IF I FACE A PROBLEM IN THE QUESTIONNAIRE? WHAT IF I CANNOT ANSWER A QUESTION OR I DO NOT UNDERSTAND A QUESTION?**

We can offer three solutions, depending on the nature and urgency of the issue. We are going to open a google document available and visible to all project members in order to ask and receive answers for questions and doubts during the analysis of the decisions. Secondly, I can offer a Skype session – if need be on a regular basis. Finally, we are more than happy to help you through a more personal channel of communication any time. Please contact us at [frohlijoh@gmail.com](mailto:frohlijoh@gmail.com); [jfrohlich@usfq.edu.ec](mailto:jfrohlich@usfq.edu.ec) and [arodas@estud.usfq.edu.ec](mailto:arodas@estud.usfq.edu.ec) or on my WhatsApp number: (+593)986847689.

D. The 5 experts

**14. WHO ARE THE ‘5 EXPERTS’, WHAT IS THEIR TASK AND HOW SHOULD WE SELECT THEM?**



We basically have in mind 5 constitutional law experts (professors or other legal academics), possibly prestigious ones who represent the mainstream in your system. The audience of the project are mainly academics, which also explains our preference for academics. Furthermore, the ‘canon of 40 leading cases’ is often determined or influenced by the scholarly debates, so the question of the leading cases is unlikely to come up in this form outside legal academia. If it seems to be impossible or too strange to choose only academics, you can also ask judges, but please do not ask politicians. It will be necessary to include the profession of the experts.

**15. DOES THE IDEOLOGY OR THE SCHOOL OF THOUGHT TO WHICH THE EXPERT BELONGS HAVE ANY RELEVANCE IN THE SELECTION?**

Only in the sense that you should try to make a balanced list of experts and include not only the members of the same school of thought, or the same university, but to select them from a more diverse academic background. 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 (universities, regions, etc.). (Similarly to the selection of the 40 judgments: they should not reflect any extreme idea, but they should possibly reflect the mainstream scholarly opinion.) So, we would ask you to exercise self-restraint when choosing the 5 experts and to invite those academics that have the potential to legitimize your list in the whole legal scholarly community.

**16. DOES THE OPINION OF THE 5 EXPERTS CHANGE MY 40-LIST?**

No. Once you choose your 40, it is final. We need the 5 experts only to have an idea whether your selection is well-founded or how debated it is.

**17. SHALL I WAIT FOR THE OPINION OF THE 5 EXPERTS BEFORE I CAN ANALYZE MY 40 JUDGMENTS?**

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

**18. DO THE EXPERTS HAVE TO ATTACH AN EXPLANATION OR A JUSTIFICATION TO THEIR OPINION ON THE 40-CASE LIST?**

No, it is not necessary. We will only publish an aggregated list of the decisions that show your list and the list of all the experts, together with the proportion of cases where there were agreement. (You can find guidance on the above mentioned database of the Cambridge University Press, where you can see all the expert opinions and the aggregated lists: under Resources/Resources): <https://www.cambridge.org/gb/academic/subjects/law/comparative-law/comparative-constitutional-reasoning?format=HB>)

**19. CAN WE USE A FORM LETTER IN ORDER TO CONTACT THE 5 EXPERTS?**



Of course. Because in the majority of the cases you will write in Spanish, I provide the form letter in Spanish here. You are welcome to change anything you consider necessary.

“Estimada/o XY,

Hace algunos meses, he sido invitado/a a participar en el Proyecto CORE Latam, coordinado por la Facultad de Jurisprudencia de la Universidad San Francisco de Quito, y apoyado por el Programa de Estado de Derecho para América Latina de la Fundación Konrad Adenauer. Este proyecto tiene como objetivo investigar y analizar el razonamiento constitucional desde una perspectiva comparada. La Investigadora Principal, Johanna Fröhlich, me ha pedido que identifique las 40 sentencias mas importantes de la Corte xxxxxxx.

Para asegurar el éxito del Proyecto, es muy importante comprobar que haya cierta concordancia en la selección de las 40 sentencias mas importantes de la Corte xxxxxx, de modo que la comunidad académica esté de acuerdo con al menos la mayoría de la selección. Por lo tanto, la Investigadora Principal me solicitó que identifique 5 expertos constitucionales de nuestro sistema jurídico quienes, por su prestigio académico, podrían asumir la tarea de revisar la lista de las 40 sentencias, y dar su opinión sobre la selección de éstas. Considero que usted es uno/a de las expertas constitucionales mas prestigiosas en xxxxx, por lo que quisiera pedir su gentil colaboración en este esfuerzo académico. Además de usted, ya he contactado a xxxxxxx.

Puede encontrar la lista de las 40 sentencias que he seleccionado en el adjunto. Por favor, note que el orden de las sentencias no refleja ningún tipo de jerarquía (por ejemplo, que la primera sentencia sea más importante que la última).

Le agradecería mucho si pudiera revisar la lista y enviarme su propia lista hasta el día **31 de diciembre de 2019**, aclarando cuales sentencias mantendría y/o cuales sentencias borraría de la lista. Según el diseño de la investigación y el principio de comparabilidad, la lista debe contener exactamente 40 sentencias, ni más ni menos. Entonces, en caso de añadir una, por favor, indique cuál borraría. De la misma manera, si usted quisiera borrar una sentencia de la lista, por favor, indíqueme cuál sentencia le gustaría incluir en lugar de la que ha eliminado.

Por favor, tome en cuenta que su lista no podrá modificar la lista de 40 sentencias que adjunto. Su opinión experta servirá para medir el acuerdo de la comunidad académica en este asunto. Sin embargo, la versión final de la investigación, que será publicada en un volumen editado, incluirá su opinión experta como un indicador de la medida del acuerdo entre los principales expertos constitucionales con respeto a la jurisprudencia de la Corte xxxx. A través de las opiniones expertas será posible también identificar las sentencias mas consensuales y las que representan una divergencia más alta en la comunidad académica en xxxxx.

El equipo del Proyecto CORE y yo, estamos más que agradecidos de su ayuda.

Saludos cordiales,”



## E. Practical Issues

### **20. WHEN ARE WE GOING TO RECEIVE THE FINAL CODE BOOK AND FINAL EXCEL TABLE WITH THE INDICATORS?**

I am working on including all the comments of our meeting in the Code Book and in the Project Guide, and especially concerning the last few indicators, I am intending to offer a more elaborated version in order to find a common ground. I will send this new version as soon as possible, but hopefully no later than two weeks.

### **21. WHAT ARE THE DEADLINES?**

(1) Please select your 40 judgments by **September 1st, 2019** and send us the list ([jfrohlich@usfq.edu.ec](mailto:jfrohlich@usfq.edu.ec)) by using a simple Word document. In case of the new members of the projects who were included after our meeting in Chile, this deadline can be prolonged.

(2) Please choose the 5 experts by the **October 1st, 2019**. The 5 experts should return their opinion by **December 31st, 2019** (to you or to us. In case only you received it, please forward it to us as well ([jfrohlich@usfq.edu.ec](mailto:jfrohlich@usfq.edu.ec))).

(3) The first draft of your country report should be sent us by **June 1st, 2020**.

(4) The second project meeting is going to be **at the end of June, 2020**, where we will discuss problems that came up while writing the reports. Details regarding the place and the concrete date of the meeting is under organization.

(5) We expect the final versions of the country reports by **February 2021**.