

RESULTS OF THE JUNE 11-12, 2020 CORE PROJECT MEETING

The principal aim of the Workshop was to present and discuss the preliminary empirical results from each jurisdiction and through the discussion of the most important features and findings, try to point out commonalities, differences and trends about constitutional reasoning in Latin America. Below you will find the main insights and questions that were mentioned, some methodological clarifications, as well as the most important deadlines for the year ahead of us.

In his Special Welcome, Paolo G. Carozza, Professor of Law and Director of the Kellogg Institute for International Studies at the University of Notre Dame, IN, talked about relationality as a core aspect of comparative constitutional law in our contemporary time. While sharing the main insights of a soon-to be published volume on *Dialogues on Italian Constitutional Justice*, co-edited by Professor Carozza, he explained how dialogue appears as a method for comparative law. He underlined that dialogue in a thick sense means a network of different interactions between justices on a bases of collegiality, and however cosmopolitanism is sweeping new feature among courts, dialogue in this framework also implicates a serious domestic mission with national self-awareness and the use of critical reason. Finally, referring to the Forward article authored by Doreen Lustig and Joseph Weiler on *Judicial Review in the Contemporary World – Retrospective and Prospective*,¹ he was wondering how the Latin American experience would fit into this explanatory framework and other global trends.

A. Hypotheses and preliminary findings

1. THE HISTORICAL CONTEXT FREQUENTLY INFLUENCES THE COURTS' REASONING

Several teams have presented their results on the basis of the different historical and political periods of the Courts and pointed out that these historical moments or phases determined the characteristics of the Courts' approach and method of constitutional reasoning.

Regarding the possible similarities and waves of constitutional review in the region's history, it would be desirable to identify those countries that share these common constitutional moments for our future cluster analysis.

2. THE PERSONAL BACKGROUND OF JUSTICES AND ITS IMPACT ON CONSTITUTIONAL REASONING

In some countries there has been an increase in the number of justices with a stronger academic or professional background compared to their predecessors with more political profiles. However, it is sometimes pretty hard to define and differentiate clearly between the different profiles, as we have seen in the case of Argentina, in countries where such differentiation is more feasible, we could see that the personal background of the justices influenced the

¹ ICON (2018) Vol.16. No.2. 315-372.

reasoning methods and the style. For instance, as the Ecuadorean case shows, justices coming from the academia tend to use more concepts and principles. At the same time, however, there have been an increase in academic profiles among the justices of the Courts in the region, a somewhat paradoxical outcome is a growing use of non-legal arguments, mainly referring to the social and economic aspects of the cases. Furthermore, we mentioned that justices with a certain background have a different audience than justices with another background.

If one's country experience permits posing this question, one should try to identify those characteristics that were impacted by the justices' professional background. This information could later help us analyze how exactly the professional, academic background of the justices influences the reasoning of the Courts in the region.

3. MAIN LINES OF DIVISION IN CONSTITUTIONAL REASONING

On the basis of the first results, we could confirm some interesting divisions. For instance, the division between the "formalist" and "anti-formalist" methods seem to explain some features of the preliminary results. However, there is no clear definition for what counts as "formalist" methods of interpretation, we have chosen the textual and the subjective teleological (intention of the constitution-maker) methods as those that could highlight this approach of the majority/minority in the Courts. We do not have an obvious pattern here (mainly because not every Court produces a lot of minority opinions), but the methods that could be considered as "anti-formalist", such as the *pro homine* principle, international harmonization, the use of foreign law and non-legal arguments are clearly a dominant trend.

Another interesting divide seems to take shape on the grounds of the structure of arguments (Q9) of the cases. Based on the first results, we could see that several Courts use an accumulative structure for their decisions. The first results show that however it would be not necessary, or it is even incorrect procedurally, several Courts tend to include as much grounds of justification as possible (this translates into a high number of parallel conclusive structure).

Furthermore, reviewing the General topic of the cases (Q5), one would expect to see the dominance of Fundamental Rights cases (in line with global trends as well as with general regional culture). It is interesting to see however, that there are various cases on Procedural Rights (due process, right to defense, etc.) and procedural issues (such as the basic rules of certain constitutional review procedures, rules of standing, etc.), which could add an interesting take to the type of rights talk that is prevalent in Latin America.

Finally, we have seen that the rhetoric use of different argument (such as the originalist method in Bolivia, or the textual method in several other countries) is an interesting feature in the region. Please, note that the last indicator (Q50) is designed to measure the overall weight of the arguments. Therefore, this indicator could/should be useful for making rhetoric use of arguments visible.

B. General findings on the basis of the preliminary results

4. DESPITE THE DOMINANCE OF CIVIL LAW TRADITION, LATIN AMERICA SEEMS TO JOIN THE TREND OF COMMONLAWIZATION

The use of precedents in order to interpret the constitution is among the most common methods in Latin American Courts (Q16).

5. GROWING CONCEPTUAL DIVERSITY

Latin American Courts are using more and more concepts and principles (Q17).

6. GROWING REGIONAL JUDICIAL DIALOGUE

Courts are increasingly referring to the different sources of the Interamerican System of HR and other Latin American countries' decisions. It would be interesting to identify "the favorite(s)", as well as the "outliner(s)" of the region.

7. KEY CONCEPTS

On the basis of the preliminary results there seems to be a diversity in the key concepts. At the moment, we can identify three different groups of concepts. There are strong key concepts that are present more or less in every or in the majority of the Courts, such as Equality, Proportionality, and Basic Procedural Rights. Secondly, there are concepts that are present mainly in one certain region or in certain countries. For instance, Rule of Law and Human Dignity seems to be strongly present in certain countries, such as Argentina or México, while it is only sporadically considered in others, like Ecuador, Bolivia, or Venezuela. There are other concepts, like Post-material values, Democracy or Economic, Social, Cultural and Environmental Rights that are frequently used in certain countries, but which are rarely used in other countries. Finally, there are concepts that are practically non-existent in almost all the countries, such as State Form, Sovereignty, Secularism, Nation, Core of Constitutional Rights, Privacy or Judicial Independence. It would be interesting to find explanations for this and identify correlations between these concepts and others, if possible.

C. Doubts and questions

8. HOW TO CODE "DIVISION OF POWERS"

Many of you have had this question in the previous weeks. In order to harmonize the coding, it should be considered as a type of Rule of Law argument (Q26).

9. HOW TO CODE "PRESIDENCY"

Q31 is the indicator on “Government system by procedural structure”, however, it does not include indications on how to code when the Courts consider simply “Presidentialism” and not one of the specific concepts of it. Therefore, I suggest coding it as YES without using any of the numbers.

10. HOW TO CODE THE LOCAL POWERS OF MAYORS AND MUNICIPALITIES?

If the competences of mayors are considered as an argument in the framework of horizontal power structure, it should be coded as Q32 “Government system by power structure”.

11. HOW TO CODE “REASONABILITY”?

Depending on the motives of the Courts for considering this concept, it could be simply another concept that you can code as Q25 “Other”, or you can code it as Q35 “Proportionality” if the Court considers it as part of the proportionality test or balancing.

12. HOW TO CODE “RIGHTS OF NATURE” OR “ENVIRONMENTAL RIGHTS”?

It should be coded as “Economic, Social, Cultural and Environmental Rights” (Q47)

13. HOW TO CODE “FREEDOM OF RELIGION”?

We did not specify this fundamental freedom as a separate indicator, and while supposedly very few cases will contain this freedom, it still should be included in our data. In order to make this freedom visible, we could code it as part of “Secularism” (Q33), and in your chapters you can explain the content of this indicator if needed.

14. HOW TO CODE “CONTROL DE CONVENCIONALIDAD”?

This is a type of International harmonizing argument, so it could be coded as Q15(1). However, if it appears more as a concept and not as a method of interpretation, you may code it as Q25 “Other” as well. However, one should avoid coding it two times, as – just in any other case – it could distort the numbers and the same argument would appear twice, with double weight in the results.

D. Timeline for the year ahead

15. WHAT ARE THE DEADLINES?

For members who are drafting a country chapter:

- (1) If you would like assistance in translating your chapter, please contact us at frohlijoh@gmail.com or marie-christine.fuchs@kas.de as soon as possible.

- (2) Please, review and finalize your Excel table, and send it (frohlijoh@gmail.com) and upload it in the Google Drive until **July 15th, 2020**.
- (3) Please, send the first complete draft of your chapter (frohlijoh@gmail.com) until **September 30th, 2020**.
- (4) We will review and comment on the draft of your chapter and send it to you until **November 30th, 2020**.
- (5) Please, send us the final version of your chapter until **February 28th, 2021**.

For members writing the aggregation chapters:

- (1) Please send the first complete draft of your chapter (frohlijoh@gmail.com) until the **October 31st, 2020**.
- (2) We will review and comment on your draft and send it back to you by **November 30th, 2020**.
- (3) Please, send us the final version of your chapter until **February 28th, 2021**.

The final version of the chapters should be between 10.000-12.000 words including footnotes. We do not have yet a Guideline for citation and style, but once we have a contract, we will be able to give you more information. Therefore, for now, please use a common style (Times New Roman, 12, and single space) and include complete footnotes. This however, as well as other details related to the publication could change in the light of the contract with Hart Publishing.

16. WHAT IF I NEED HELP IN THIS PROCESS?

We are more than happy to help you any time. Please contact us at frohlijoh@gmail.com and arodas@estud.usfq.edu.ec.