

Reply to Comments and Critics

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We are grateful for the comments and critical remarks of *Pierluigi Chiassoni*, *Anna Gamper* and *Niels Petersen*. Also, the project, the result of which was our volume in 2017 with Cambridge University Press,¹ was conducted between 2011 and 2016 in the frame of a Schumpeter Fellowship by the Volkswagen Stiftung, and was seated in Heidelberg at the Max Planck Institute for Comparative Public Law and International Law. Therefore, we are especially happy that the Institute's flagship journal, the Heidelberg Journal of International Law (HJIL/ZaöRV) has accepted to publish these comments along with our reply. The comments by Professor *Chiassoni* and Professor *Gamper* were also presented at a workshop, held in Brescia on 20.9.2018, which was dedicated to the discussion of the book's findings. Professor *Petersen* was invited at a later stage to offer comments. While we are certainly honoured by their praising remarks, the tenor of our reply concentrates on what they perceive as weaknesses in our comparativist project. The aim of our reply is thus to shed more light on the conceptual and methodological choices we made as part of our effort to map and analyse constitutional reasoning in the 16 jurisdictions investigated in the book.

I. Conceptual Framework

Pierluigi Chiassoni elaborates a detailed critique of our analytical framework which he challenges at multiple levels. Before replying to his comments, however, a preliminary remark is in order. The analytical framework for an empirical research project such as the one at issue here must satisfy various conditions, practical as well as analytical. It must be logically consistent. It must rest on plausible, preferably well-accepted, theoretical assumptions, which, of course, holds with greater force for the assumptions

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¹ *A. Jakab/A. Deyevre/G. Itzcovich* (eds.), *Comparative Constitutional Reasoning*, 2017, in the following referred to as CCR.

that the research does not intend to test. Yet, while it must be sufficiently articulated in order to provide valuable information and to allow a systemic comparison, it must also be workable and simple enough to be implemented by a research group composed of jurists coming from different legal cultures with distinct academic traditions. While there certainly is more than one way to meet these constraints, the complexity/feasibility trade-off remains. Given how legal scholars work and are used to work alone or in group, a degree of conceptual simplification is a necessary condition for a comparative enterprise bringing together the efforts of 20 academics. Ultimately, what matters is whether the research is able to generate new knowledge in a methodologically sound way and stimulate further enquiries. For that purpose, conceptual distinctions constitute a necessary tool. Too simple, a theoretical apparatus would prevent the research from collecting reliable, useful and comparable data. But conceptual distinctions are also intrinsically debatable. They easily lend themselves to misunderstanding and misinterpretation. This creates the risk that they are misapplied or applied inconsistently. In any empirical research, the distinctions should be formulated in a way, which ensures that repeated coding leads to the same results, therefore it is inherent in the nature of such projects to lean towards relative conceptual simplicity.

Maybe here it is useful to think of our conceptual framework as primarily providing a convention for a common, accessible language for a comparative law rather than as an exercise in legal theoretic analysis. Our purpose was not to provide for a new theory of legal reasoning, but to compare the styles of constitutional reasoning in different countries. We do not parse the language of constitutional provisions and rulings as an analytical philosopher would. Not because we think this would be wrong. But our perspective and research goals are simply different. When it comes to language and the empirical analysis of documents, complexity reduction is often a fruitful strategy. Models of language used in automated content analysis and text-mining applications tend to rely on simplifying assumptions, which would be anathema to many language philosophers. Yet these models have been shown to produce useful results, whether it is summarising the contents of large collections of documents or to scale the sentiment they express.² We do not go as far as these computer models in simplifying constitutional language. But we are nonetheless convinced that our simplifying assumptions

² See *A. Dyevre/N. Lampach*, Issue Attention on International Courts: A Text-Mining Approach, <<https://papers.ssrn.com>>; *A. Dyevre*, The Promise and Pitfalls of Text-Scaling Methods for the Analysis of Jurisprudential Change, <<https://papers.ssrn.com>>.

yield interesting results, which a more complex but less practicable conceptual matrix would not have delivered in our research context.

Bearing this in mind, we now turn to the substance of *Chiassoni's* comments.

1. Explanatory Motives v. Justificatory Reasons

Chiassoni accepts, as we do, the basic distinction between justificatory reasoning – the object of our research – and motivational reasoning, that is the causal-psychological process whereby the judge arrives at her decision. The latter is largely outside the scope of Comparative Constitutional Reasoning (CCR). *Chiassoni* further accepts our claim that constitutional reasoning may sometimes be insincere and strategic: as we wrote in the *Introduction*, “we do not always say what we believe, nor do we always believe what we say”, and “[o]ccasionally, a decision maker will refrain from revealing her true motives and will, instead, put forth reasons that she believes others are more likely to regard as valid and legitimate”³. However, *Chiassoni* is puzzled by our terminology and in particular by the statement that “[p]rovided her motives are honourable enough, a decision maker may publicly offer them as justification for her course of action”. This proposition, he argues, implies that “motives” are *congeners* to “reasons”. On the contrary, he maintains, a motive is a state of mind or attitude endowed with causal force and explicatory power with regard to a certain decision, while a reason, on the other hand, is a justification, a normative standard, “that can be used to present a decision [...] as ‘right’”, and that “is not, in itself, a motive, a motivating factor”.

We can accept this distinction between reasons and motives. However, we do not believe that it impinges, as *Chiassoni* seems to imply, on our claims concerning the nature of legal argumentation. What our analysis tries to bring out is that reasons and motives can occasionally “overlap”. When it is the case, the motive driving judicial decision making may also be expressly adduced as justification for the outcome reached. Such would be the case, for instance, when a judge reaches an outcome because she feels constrained by the plain meaning of a constitutional provision or sincerely believes that she has a duty to uphold that particular provision and presents the constitutional provision as justification for her decision. As part of our elaboration on the motives/justification distinction, as “honourable” we characterise the

³ A. Jakab/A. Dyevre/G. Itzcovich (note 1), 11.

motives which the decision maker believes can be accepted by her audience as a legitimate justification for her decision. A “legal” motive would typically satisfy this honourability threshold. A partisan or purely ideological motive would normally not.

One may, of course, quibble about our choice of terminology. Should we speak of “motive” or “reason for action”? On that matter, usage varies across philosophers and social thinkers. In everyday linguistic practice too “motive” is sometimes used as “reason for doing something”, and “reason” as justification, but also cause and explanation, for an action or event. A glimpse in the dictionary confirms this impression,⁴ which is also in conformity with at least some of the jurisprudential terminology.⁵ More importantly though, the question is: Would a different terminology make any meaningful difference to our analysis? *Chiassoni* correctly infers that our book is concerned with justificatory reasons, not behavioural motives. Which means that our distinction has accomplished the goal for which we used it.

2. The Distinction Between Interpretive and Non-Interpretive Problems

Chiassoni finds a second occasion for puzzlement, he writes, “in the terminological and conceptual apparatus (‘frame’) that the editors [...] use to cope with the phenomenon of constitutional interpretation”, and advances several criticisms in that regard.

The first one deals with the distinction between interpretive and non-interpretive problems. *Chiassoni* argues that the “sharp divide” we trace between these two kinds of problems “appears dubious”. According to our terminology, he argues, “(properly) interpretive problems” are “the problems of constitutional interpretation, which require using ‘interpretive arguments’”, and “non-interpretive problems” are “problems ‘where arguments are non-interpretative in their nature’”, such as establishing the text

⁴ The Oxford English Dictionary defines “motive” as “[t]hat which ‘moves’ or induces a person to act in a certain way; a desire, fear, or other emotion, or a *consideration of reason*, which influences or tends to influence a person’s volition”; “reason” is defined as “[a] fact or circumstance forming, or alleged as forming, a ground or *motive* leading, or sufficient to lead, a person to adopt or reject some course of action or procedure, belief, etc.” (emphases added).

⁵ *J. Gardner/T. Macklem*, Reasons, in: J. Coleman/S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence*, 2002, 440 et seq. (with further references); *N. E. Simmons*, Central Issues in Jurisprudence. Justice, Law and Rights, 2nd ed. 2002, 301; *P. Selznick*, *The Sociology of Law*, in: M. D. A. Freeman, *Lloyd’s Introduction to Jurisprudence*, 7th ed. 2001, 730 et seq.

of the constitution, determining whether the constitution is applicable and filling-up a constitutional gap (the quotations within quotation refers to the essay by *Jakab*, *Judicial Reasoning in Constitutional Courts*⁶). *Chiassoni* correctly stresses that the solution of non-interpretive problems may occasionally be found in the meaning of some piece of constitutional text, and thus it may be interpretive in nature. Such would be the case, for instance, when a constitutional court, faced with the problem, if the preamble of the constitution has legal value, employs a subjective teleological argument (relies on the intentions of the framers of the constitution) or refers to precedents and scholarly works.

However, it seems to us that the distinction between interpretive and non-interpretive problems is not as sharp as *Chiassoni* understands it. In the example just made, the participants to our research should have indicated “Yes” both with regard to the question whether there was an argument in the judgement “establishing or discussing the text of the constitution” and to the argument types “precedents”, “objective-teleological argument”, and “reference to scholarly works”. Non-interpretive problems can be addressed by employing interpretive arguments and their construction may depend on interpretive choices, as *Chiassoni* rightly notes; moreover, interpretive problems can be solved by recurring to non-interpretive arguments, such as appeal to pragmatic considerations and moral principles. Thus, the distinction should not be based on the kind of arguments that can be used for solving the problem. In an empirical research such as ours, there should be no *a priori* delimitation of the set of arguments available to the courts. On the contrary, the distinction refers to the nature of the problem faced by the constitutional judge. In case of interpretive problems, the judge is required to determine the meaning of the constitutional text; in case of a non-interpretive problem, she is asked to establish what counts as constitutional text, or whether the constitution is applicable to the case at hand, or how to solve a case that she claims it is not covered by the constitution.

While the terminology we used in CCR could probably be improved in the light of *Chiassoni*'s remark, that remark does not seem to affect the outcomes of the research: the distinction between the non-interpretive arguments that are “establishing or discussing the text of the constitution”, about “the applicability of constitutional law discussed”, or some form of “analogy”, on the one hand, and interpretive arguments (ordinary meaning of the words, harmonising arguments, teleological arguments etc.), on the other hand is not exclusive and, in that sense, it is not “sharp”. It is, howev-

⁶ A. *Jakab*, *Judicial Reasoning in Constitutional Courts: A European Perspective*, in: GLJ 14 (2013), 1215 et seq.

er, a useful distinction, as it allows us to assess whether the non-interpretive nature of the problem addressed by the court may have an influence, as one could expect, on the kind of concepts and arguments available for its solution.

3. The Distinction Between Constitutional Text and Constitutional Norm

Chiassoni criticises us for not having “made [an] adequately explicit” distinction that “runs through the whole conceptual frame of CCR”, that is, the one between constitutional-sentences, constitutional-explicit norms, and constitutional-implicit norms.

We agree with *Chiassoni* that this distinction is useful and can help sharpen our analysis of legal reasoning, and we also agree that it has been implicitly taken into account and employed in designing the conceptual frame of the book. However, it is not entirely clear how a doctrinal exposition of the distinction “would have contributed to a greater perspicuity in the formulation of the results [of] the analysis”, as *Chiassoni* claims. What and how would have our findings differed? On that score, *Chiassoni’s* comments would be more helpful if they pointed out what conclusion, assertion or observation would have diverged if we had followed his recommendations.

4. The Category of Arguments from Silence and the Meaning of “Constitutional Interpretation”

Here *Chiassoni’s* criticism seems more compelling. The editors, he argues, face an alternative. Either they define “constitutional interpretation” as “the determination of the meaning content *expressed* by a constitutional text (what the text *says*)”, or they intend it as “the determination of the *full communicative content* conveyed by a constitutional text (what the text *communicates*)”. In the former case, arguments “from silence”, such as *a contrario* and *a fortiori*, should be included in the class of the non-interpretive arguments: as there is no determinate constitutional provision to be interpreted, they are used to cope with problems of constitutional gaps and, in that regard, are identical to analogical arguments. Alternatively, if by “constitutional interpretation” is meant the determination of the content conveyed by the constitution as a whole, then all arguments are inter-

pretive in nature and, again, arguments from silence and analogical reasoning should belong to the same and unique class.

This argument appears to be inspired by the difference between semantic and pragmatic meaning in the philosophy of language. The book implicitly assumes the first, narrow sense of constitutional interpretation. Philosophers such as *Paul Grice* have developed a powerful theory of pragmatic inference, showing how contextual assumptions allow a speaker to communicate more than just what she explicitly says.⁷ But while this work could, in principle, serve as a basis for an ambitious research programme on comparative legal reasoning, the practical obstacles such a programme would face are daunting, to say the least.

As with many other assumptions in the book, our point of departure was not legal theory or the philosophy of meaning but, instead, the intuitions and practices of comparative constitutional scholars. For that purpose at least, the distinction between interpretive and non-interpretive arguments can be defended as a sensible one. Equally, a good case can be made for distinguishing between arguments from silence, on one side, and analogy, on the other, and for ranking the former among the interpretive arguments and the latter among the non-interpretive ones.

In the case of analogy, the judge is perceived to perform an essentially non-interpretive operation because rather than determining the meaning of a constitutional provision, she is speculating on its *ratio* – the underlying principle, the substantive justification, the objective goal pursued by the framers, the provision's *raison d'être*. Analogical reasoning presupposes that the same *ratio* is controlling where, *prima facie*, the wording of the rule might suggest it is not applicable. While we could imagine circumstances where an argument from analogy could be constructed on the basis of a pragmatic inference from the constitutional text and/or its context of promulgation, analogical argumentation typically involves a large measure of judicial discretion. It is in that sense that *Kelsen* characterised analogy as “highly subjective” and as vesting in the law-applying authority “a wide area of discretion within which this organ can create new law for the case before it”⁸. The recognition of the “creative” character of analogical reasoning is what seems to underpin its prohibition in criminal cases in many legal systems of the world. Moreover, even if we were willing to accept that in case of analogical reasoning the discretion of the decision maker is not quantitatively greater than in case of recourse to arguments from silence, we

⁷ See *H. P. Grice*, *Studies in the Way of Words*, 1989; see also *D. Sperber/D. Wilson*, *Relevance: Communication and Cognition*, 1996.

⁸ *H. Kelsen*, *General Theory of Norms*, 1991, 268 et seq.

must acknowledge that it is qualitatively different: discretion is made explicit and openly displayed by the judge, as she takes upon herself the responsibility of expressing the substantive reasons underlying the legislative and constitutional choices.

5. The Theory Concerning the Ambiguity of Constitutional Sentences

We can certainly agree with *Chiassoni* that the ambiguity of constitutional provisions is not only a semantic phenomenon, dependent of the abstract nature of the language usually employed by the constitution, but it is also pragmatic in nature, as it depends on the variety and outlook of the political visions that define the contextual backdrop against which constitutional charters are enacted and construed. Indeed, what makes constitutional adjudication puzzling from the viewpoint of moral philosophy and political theory is that

“the interpretation of the constitution involves the power of the judiciary [...] to determine issues of profound moral and political importance, on the basis of very limited textual guidance, resulting in legal decisions that may last for decades and are practically almost impossible to change by regular democratic processes”⁹.

This is precisely one of the reasons why we asked the project participants to convey information on the legal and political culture that represents the context for constitutional reasoning. We asked them to describe “the prevailing legal and political culture, including traditional conceptions of the nature of law and the proper role of courts”, the “typical implied political philosophical presuppositions” and “usual spoken or unspoken premises about the purpose of the political community and of its constitution” (CCR, pp. 799-800).

6. The Relationship Between Interpretation and Argumentation

With regard to the relationship between interpretation and argumentation, one of us elaborated that

⁹ A. Marmor, *Interpretation and Legal Theory*, 2nd ed. 2005, 141.

“[o]ne may argue *before* the actual decision, i.e., searching open-mindedly for the best interpretation; but also *after* the decision is made, i.e., trying to persuade others about one’s decision, providing arguments supporting the decision already made”¹⁰.

We agree with *Chiassoni* that the same point can be expressed by distinguishing between a “heuristic” and a “justificatory” use of interpretive methods. Interpretive methods can be used, as he writes, “*heuristically* [...] *to get to* some interpretation of a certain constitutional-sentence” and

“in a *justificatory function* [...] when an interpreter makes use of them in order to build up an argumentative discourse in favour of an interpretation she has previously decided to set forth”.

7. The Distinction Between Interpretive Arguments and Interpretive Rules

Chiassoni proposes “a more sophisticated frame” than the one adopted by our research, and distinguishes between interpretive rules, argument-types and argument-tokens. The distinction is certainly sensible and clearly expressed by *Chiassoni*. Our analysis maps argument-types rather than argument-tokens: we report the presence or absence of a mode of argumentation (argument type) but we do not report how many times this argument is used (argument token). While we believe the type/token distinction would be useful for a larger set of judgements—although it would then have to be somehow weighted by opinion length (longer opinions tend to contain more tokens of the same argument type) to allow meaningful comparisons – we see it as less relevant in the context of our research project, where the analysis is restricted to the 40 most salient judgements.

8. The Category of “Evaluative Arguments”

The notion of evaluative arguments, which *Chiassoni* criticises because of the assumption that all arguments are evaluative, has been adopted by *András Jakab* in a previous essay of his,¹¹ but has not been proposed to the participants of the research project of CCR. Here we find the category of

¹⁰ *A. Jakab* (note 6), 1219.

¹¹ *A. Jakab* (note 6), 1241 et seq.

“non-legal arguments” defined as “explicitly moral, economic and sociological arguments (i.e. arguments that are explicitly grounded on considerations external to the law)”.¹² Indeed, we can agree that all arguments are evaluative in that they guide the assessment of choices – the choices constitutional judges have made or must make. Arguments in the context of constitutional reasoning are also normative in the sense that they entail normative consequences. However, our concept of “evaluative” argumentation is more restrictive. “Evaluative” in our analysis is simply a designator we thought our country correspondents and readers – who, we repeat it, are not legal philosophers – would find intuitive for a class of arguments where the decision maker appeals to considerations that are persuasive not because they are founded in the law, but because they are morally right, economically profitable, philosophically or sociologically grounded, and so on. One of the aims of our research was to inventorise the use of this category of arguments in constitutional reasoning and “evaluative” seems a convenient – albeit, we agree, perhaps not optimal – way to label it.

9. The Distinction Between “Binding Arguments” and “Persuasive Arguments”

Also the distinction between “binding” arguments (textual arguments, systemic arguments and evaluative arguments) and “persuasive” arguments (arguments from scholarship and comparative law) has been proposed by *Jakab* in his essay *Judicial Reasoning in Constitutional Courts*, but has been abandoned in CCR precisely because, as *Chiassoni* rightly notes, it is difficult to provide a criterion for distinguishing between the two.

10. The (No-)Theory of Antinomies or Normative Conflict

According to *Chiassoni*, “a full-fledged theory of antinomies would have been in order, as a tool for analysing judicial reasoning”, yet he does not provide an argument for the claim, apart from the reasonable observation that antinomies are important in constitutional adjudication. Again, this is all well and good and we agree that a richer theoretical framework could help illuminate aspects of constitutional reasoning that deserve fuller investigation. Yet we also know the practical difficulties that mapping antinomies

¹² A. *Jakab/A. Dyevre/G. Itzcovich* (note 1), 812.

across even a very small set of constitutional opinions would raise. Thus, our remarks at the beginning of our reply and above under 7. apply also to this criticism by *Chiassoni*.

11. Queries and Conclusions

We share the opinion of *Chiassoni* that arguments from precedent have always been one important argumentative tool in Civil Law countries. However, it should be stressed that in the French case a reference to previous decisions was found only in three opinions of the 40 leading judgements investigated. Moreover, the proportion of leading judgements featuring precedent-based arguments has changed in the course of time. In Civil Law countries it has increased from an average of approximately 45 % in the 1950s up to an average of more than 80 % in the 2000s. Reference to precedents has always been an acceptable practice and yet something has changed in the last decades with regard to its diffusion and probably also practical relevance.

With regard to textualist arguments in Common Law jurisdictions, it is certainly true, as *Chiassoni* remarks, that “so far as the application of statutory law is concerned, common-law judges have traditionally given pride of place to the literal rule”. This, however, does only prove that “the received wisdom about the civil law/common law divide” is false, as *Chiassoni* maintains, and the results of our empirical analysis of the case law confirm this conclusion.

Finally, with regard to the alternative between “scientific exposition” and “rhetoric”, this may be a mere matter of words, as *Chiassoni* simply proposes to replace it with the apparently less self-explanatory and less immediately intelligible distinction between a “methodology of method” and a “methodology of result”: what we call a strictly scientific approach to constitutional reasoning – an approach that no court has ever adopted – could be nothing but the “diachronically stable use of the same interpretive code”, as opposed to the opportunist “cherry-picking” of arguments that our analysis showed to be what happens in practice. However, we do not go so far as *Chiassoni* in suggesting that the adoption of a “methodology of method” would be desirable (“the most we can expect from constitutional judges”) as in constitutional adjudication the need for flexibility may well be as important as the need for legal certainty and logical consistency.

ZaöRV 79 (2019)

II. Methodology and Implementation

Anna Gamper and *Niels Petersen* concentrate their respective criticisms more on the methodology and its implementation than on the conceptual framework. *Anna Gamper* rightly asks the question “why exactly 40 judgements per country” are analysed. It is true that there was no hard and fast rule of statistics or empirical methodology to choose the number 40. However, given the resources of our projects, it struck a reasonable balance between depth and coverage. In some countries constitutional judgements can span well over 100 pages. In that sense, a large number of judgements would easily have strained the resources of our research project. A smaller number, on the other hand, would have made the exploration of cross-national and temporal differences impossible or meaningless. We considered different methods for selecting the 40 judgements.

A *randomised sample* was not suitable, as randomised samples make sense only if their results can be generalised to the whole original group (in our case: to all judgements of that court). But the number 40 is statistically too small (as compared to total numbers of tens of thousands of judgements which was the case in many of the countries) to make such generalisations. The results could only be generalised for the whole population if the results in all 40 judgements of the given legal order were homogenous. But we expected them not to be homogenous, so a randomised sample would not make sense under these circumstances. In non-homogenous samples, we would have needed considerably larger samples.¹³

We also considered the application of *stratified samples*. It would have meant, e.g., to have a weighted selection of rejected cases and approved cases mirroring the general success rate at the court. Beyond that we could also have tried to balance samples to reflect the proportion of litigant types or the issue area. I.e., we could have had a small sample of 40, which mirrors in all its relevant features the proportions of the whole population of judgements. If we had managed that then we could have generalised our results to “constitutional reasoning in general”. Unfortunately, however, it was not possible. Public opinion polls do use this technique and they can indeed have good predictions on the whole population based only on relatively very small samples. They use, however, also formerly collected data sets which we did not possess. They know that e.g., education, religion, sex,

¹³ For a population of 10.000 judgements we would have needed 264 analyses (!) if we had aimed for a margin of error on an acceptable level (5 %). In Hungary, 27.000 cases are in the interval 1990-2010, i.e., around 700 judgements should have been analysed, which was not doable.

geographic location and age are relevant for party political affiliation (but colour of hair or height is not relevant). They know what the “relevant” features are 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 judgements (panel decisions vs. single judge decisions). We do not really know whether an institutional or legal feature of a court is relevant (“religion”) or irrelevant (“hair colour”) for constitutional reasoning. So we could not use stratified samples for this project.

We were thus not able to model the whole population of judgements (i.e., all judgements) of any court in the sample of 40. Thus we decided to focus on *the 40 leading judgements* of the constitutional courts. The results of the country reports were therefore *only about the reasoning of the 40 leading judgements and not about the reasoning of the constitutional courts in general*.

We were considering different methods how to select these “40 leading judgements”. The number of self-quotes was, unfortunately, not applicable in some countries. (1) In France, e.g., the Constitutional Council hardly ever refers to its own former judgements. (2) In another country where we tested this method, in “Hungary 1990-2010”, the results were shockingly surprising. A short software was written (courtesy of Opten Ltd.) to find the 40 most quoted judgements. From the 40-list 35 were unknown to the scholarly community. The reason for that was a huge number of petty “copy-paste” cases which distorted the results.¹⁴ (3) Besides that we would have technical difficulties in many countries, as the databases are electronically not easily accessible and we should have ordered specific software for every single country to find this list, which did not seem possible (both 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.

Another option was to count the number of quotes in scholarly literature. Unfortunately, we could not apply this method either. (1) In some countries there are no major electronic legal databases in which we could run the searches. Consequently, the search should have been done manually,

¹⁴ This problem can be rectified, if we do not simply count the number of judgements which quote our “quoted” judgement, but if we also weigh the “quoting” judgements: if the “quoting” judgements are often quoted themselves by third judgements, then a quote in them is worth more than a quote by an unimportant everyday judgement. For the application of such a method in order to determine whether a judgement is a leading one or not, see *U. Sadl/Y. Panagis*, What Is a Leading Case in EU Law? An Empirical Analysis, *ELRev* 40 (2015), 15 et seq.

for which we did not have the resources. (2) In some other countries you do have electronic databases, but sometimes there is more than one database. Moreover, we could not simply add the results from the different databases, but in some cases we would have had to clean the data, as the databases sometimes overlap. Consequently, this method seemed technically complicated, and (even more importantly) not universally applicable in every country.

Therefore we used a third method in order to select the 40 leading judgements, often applied in social sciences: expert opinion (also called “judgement sample”). We asked the authors of the country reports to choose the “leading judgements” of their systems, which is normally the “canon of cases” that they teach at the university.¹⁵ The authors were supposed to guess about the general scholarly opinion (*herrschende Meinung*) on the list of 40 leading judgements. The primary audience of the project are academics all around the world, so the academics of their legal order possibly had to agree with their choices.

Authors had to choose cases from one specific court (their constitutional court or supreme court – otherwise we could not have analysed the connection between the specific institutional setting of a court and the style of reasoning in its leading judgements). For the same reason, we excluded non-judicial bodies from the analysis. After long consideration, authors were *not* given a time frame (e.g. only cases after World War II). Even though a specific time frame seemed first a compelling idea in order to make the results more comparable, any such time frame would have been highly artificial and for some legal orders (e.g. the United Kingdom), as it would have excluded some very important cases. Consequently, the age of the case was not a factor to exclude any case. We asked the authors to consider the leading nature of a judgement as of today (and not at the time or directly after they were made). Authors had to give their 40-item list that they thought forms the canon of leading judgements in their legal system. Even overruled decisions (like *Dred Scott* in the United States) could be on the list.

When selecting the 40, we asked the authors to *disregard* the fact whether a case is a human rights or a state organisation case. We considered it also

¹⁵ Some of the authors also used collections for law students. For such collections see, e.g., L. Favoreu/P. Loïc (eds.), *Les grandes décisions du Conseil constitutionnel*, 15th ed. 2009, D. Grimm/P. Kirchhof/M. Eichberger (eds.), *Entscheidungen des Bundesverfassungsgerichts. Studienauswahl*, 3rd ed. 2007; B. Davy (ed.), *Rechtssprechung des Verfassungsgerichtshofes. Eine Studienauswahl*, 1985. Others used information by the respective court concerning the importance of a judgement: certain courts list their most important judgements on their website under a separate heading. The actual decision about the list of 40 Leading Judgements, however, remained always in the hands of the authors.

important information whether a list of 40 consists of human rights cases or of state organisation cases.

Anna Gamper is also wondering “whether landmark cases really are the most suitable decisions”. *Oliver Wendell Holmes*, for one, was wary of the distorting effect that great cases may have on legal thinking:

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance [...] but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”¹⁶

The risk exists, indeed, that a fixation on landmark decisions distorts our picture of constitutional reasoning. Yet landmark judgements tend to set the tone of a court’s jurisprudence, as they often provide the lens through which court watchers recognise the defining traits of a court’s approach to constitutional argumentation. For the same reason, they probably exert more influence on the practices of other judges, both at home and abroad, than do less salient decisions.

Niels Petersen rightly notices that there can be “reasonable disagreement” about which are the 40 “great”, “important”, or “leading” judgements.¹⁷ How does this not constitute an irreducibly subjective criterion? We were fully aware of this problem. However, we assumed that, in any legal community, a relative consensus usually exists as to what decisions constitute leading judgements.¹⁸ We asked the author(s) of each court report to draw

¹⁶ *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (*Holmes*, dissenting). For a recent work taking issue with *Holmes*’ claim in US case-law see *L. H. Bloom Jr.*, *Do Great Cases Make Bad Law?*, 2014.

¹⁷ Throughout the volume, the word “leading” was used interchangeably with “landmark”, “important” and “great”, and the word “case” with “judgement”, “opinion”, “ruling” and “decision”, unless otherwise indicated or obvious from the context.

¹⁸ This raises the question as to *why* a decision comes to be regarded as canonical by the scholarly community. For some tentative explanations see, e.g., *P. Gonod*, *À propos des grands arrêts de la jurisprudence administrative*, in: R. Abraham/P. Bon/J.-C. Bonichot/P. Cassia (eds.), *Juger l’administration, administrer la justice: Mélanges en l’honneur de Daniel Labetoulle*, 2007, 441 et seq. (arguing that leading cases provide a simplified summary of a more complex body of case law and encapsulate the values supposed to inspire judicial decision making); *A. Jakab*, *Application of the EU Charter by National Courts in Purely Domestic Cases*, in: A. Jakab/D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, 2017, (arguing that leading cases are often *contra legem* at the time they are decided but typically consonant with the present or upcoming social and political *Zeitgeist*); *J.-C. Venezia*, *Petite note sur les Grands arrêts*, in: *Au Carrefour des droits: Mélanges en l’honneur de Louis Dubois*, 2002, 221 et seq., (suggesting that what makes a case canonical is the significance of the jurisprudential developments with which it coincides and the extent to which it is indicative of the direction of legal change). As for the question whether the landmark character of a case primarily derives from its legal significance, or arises

up a list of 40 leading cases list according to his or her assessment of the scholarly consensus, or what German legal scholars call the *herrschende Meinung*. We expected the list to include the landmark constitutional cases law students commonly encounter in a standard constitutional law course at law school. We did more than just assume the existence of a consensus, however. Indeed, once her 40-cases list had been established, each author was required to designate five mainstream legal experts (preferably constitutional law scholars) to review her choice of opinions.¹⁹ These experts were separately requested to indicate the extent to which they agreed with the choice made. We did not expect perfect agreement among the experts. But we believed a consensus would exist over at least a subset of these 40 decisions.

According to *Niels Petersen*,

“the observed [global] trends [of the last decades] could be due not to the changes in the style of constitutional reasoning, but to changes in the underlying composition of the panel [i.e. newly emerging constitutional courts]”.

We have to admit that the data allow for such an interpretation, but on the one hand establishing trends for single countries was not possible because we only had 40 judgements per country, and on the other hand the results that we acquired fits very well to mainstream political science and constitutional law scholarship results about the growth of judicial power. Therefore, on its own, our results do not prove the reasons for the trends, but they make them more plausible in connection with existing research on the judicialisation of politics.

Anna Gamper is questioning the “selection of 16 countries”. We settled in the volume for a research design that, we believe, strikes a fair balance between depth and coverage. As for the jurisdictions covered, we assembled

mainly from its social and historical relevance, see *Rt. Hon. Sir I. Richardson*, What Makes a “Leading” Case?, *V.U.W. L. Rev.* 41 (2010), 317 (arguing for the latter). By defining canonicity in terms of the relative scholarly consensus, our approach avoids the pitfalls associated with substantive definitions relying on essentialist criteria of leadingness. See *J. M. Balkin/S. Levinson*, *The Canons of Constitutional Law*, *Harv. L. Rev.* 111 (1997-1998), 963, 979: “Canonicity is not simply a matter of what one thinks important; it is also a matter of what one thinks *others* think important.”

¹⁹ The names and the answers of all the experts are downloadable at the website of the Research Documentation Centre of the Centre for Social Sciences of the Hungarian Academy of Sciences, <<http://openarchive.tk.mta.hu>> and at the website of Cambridge University Press, <<https://www.cambridge.org>>. While we are aware that the selection method of experts is necessarily biased to a certain degree, but as outsiders, we would have been simply unable to establish who are the “mainstream constitutional scholars” in a number of legal systems, thus we were compelled to leave the selection to the authors.

a team of comparative scholars to report on the practices of the following 18 courts: the High Court of Australia, the Austrian Constitutional Court, the Supreme Federal Tribunal of Brazil, the Supreme Court of Canada, the Czech Constitutional Court, the French Constitutional Council, the German Federal Constitutional Court, the Hungarian Constitutional Court, the Irish Supreme Court, the Supreme Court of Israel, the Italian Constitutional Court, the Spanish Constitutional Tribunal, the Constitutional Court of South Africa, the Constitutional Court of Taiwan, the Supreme Court of the United Kingdom, the Supreme Court of the United States, the Court of Justice of the European Union and the European Court of Human Rights.

While the overrepresentation of Europe reveals our initial impulse to focus on constitutional reasoning within the EU, we believe that this set of courts fairly reflects the diversity of constitutional traditions in the democratic world. In addition to featuring courts from all five continents, it achieves a remarkable balance between Common Law and Civil Law jurisdictions. Similarly, our nine specialised constitutional courts are matched by an almost equal number (eight) of generalist apex courts. By including the European Court of Justice and the European Court of Human Rights, our study further reflects the rise of supranational courts as quasi-constitutional tribunals. In Europe, the decisions rendered by these two institutions have become an integral part of domestic constitutional discourse. To be sure, we do not claim that these 18 judicial bodies are representative, in the statistical or probabilistic sense of the word, of the world's larger population of constitutional courts. Yet we are confident that we could greatly advance our comparative understanding of constitutional argumentation by looking at the decisions of the courts that are the most typical of their kind and the most influential outside their borders. Therefore, we have to concede to *Anna Gamper* that “we learn nothing about countries with non-Western systems”, but we also have to recognise that the research question itself (i.e. constitutional reasoning) already implies a Western style legal system. Our research question was clearly a Western one.

We agree with *Anna Gamper* also in the question that constitutional reasoning depends partly on the concrete text of the Constitution, but we are not sure whether it is “more [...] than the book concedes”. The individual chapters of the volume serve exactly the purpose of explaining how different local factors, such as the exact text of the Constitution, can influence the preferred methods of interpretation. The Australian style of constitutional reasoning, which rarely refers to fundamental rights, is definitely partly due

to the lack of a written bill of rights on federal level.²⁰ Yet most differences cannot be explained by the actual text of constitutions.²¹ Therefore we concede that even though we do not offer an actual theory of constitutional interpretation, there is an implied (even though very thin) theoretical presupposition behind the whole project: we deny that judges are merely “*la bouche de la loi*” – as *Anna Gamper* rightly noticed it. Our research question itself implies this theoretical presupposition, but we would not call it a theory, it is just a presupposition.

We agree with *Niels Petersen* that “the percentage of proportionality cases may partly be driven by the percentage of constitutional rights cases in the canon”.²² This is a result that definitely could have been emphasised more. And we also agree with him that “the function of reference to dignity is arguably different in the German jurisprudence than in the case law of the European Court of Human Rights” – exactly for this purpose we designed the project as not simply a quantitative, but as a mixed methods research which includes also qualitative elements, partly of traditional legal analysis in the individual country report chapters of the volume.

We beg to differ from *Anna Gamper* on whether countries with “no federal character” were taken into account during the coding: the codebook (CCR, p. 806) specified that by “federalism” we also mean in this project “regionalism, autonomous regions, devolution, autonomy of local governments and subsidiary”. Again, this was not meant as a theoretical claim, but more as a linguistic convention for the purposes of the project. And finally, we do hope, that as *Niels Petersen* put it, we were able to deliver some “surprising insights” with our work that will foster further discussion, both on the use of quantitative methods in legal scholarship and on constitutional reasoning.

²⁰ A. Jakab/A. Dyevre/G. Itzcovich, Conclusions, in: A. Jakab/A. Dyevre/G. Itzcovich (note 1), 791 et seq.

²¹ For a compelling study on codified rules of constitutional interpretation see A. Gamper, *Regeln der Verfassungsinterpretation*, 2012.

²² For a thorough quantitative analysis, based on manual coding, of the popularity of proportionality arguments, see N. Petersen, *Proportionality and Judicial Activism. Fundamental Rights Adjudication in Canada, Germany and South Africa*, 2017.