Nordic CONREASON Project: Codebook (version 1.7)

(last modified on 2 February 2024)

The questions used in our project are marked by an N. After that number, between brackets, you will find the number of the same question in the CONREASON Project and in the CORE Latam Project, where applicable. Variables and instructions that come from the CORE Latam Project but were not, or not explicitly, included in the CONREASON Project are highlighted in **green**. New questions, changes or additional explanations specific to the Nordic CONREASON Project are highlighted in **blue** (so these were not included in either the CONREASON or the CORE Latam Project). The most recent additions to the text (compared with the 1.5 version of the codebook sent out in December 2022) are highlighted in **red**.[1]

We would like to minimize missing values (or 'not applicable', N/A values). We would like to have uniform data (with two exceptions: 'not applicable' is used for N4, 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, and N17, if the domestic constitution is not applied in the case). 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 coding 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 N/A.

In the case of **binary variables** (approximately half of the variables, 27 out of 53), there is only one column, in which you have to write either YES or NO (except for N4, where 'N/A' and blank box are also an option, and N17, where 'N/A' is the third option). In the case of **categorical variables**, you will find as many columns as different YES options. There is no separate column for NO. If all boxes are left blank for that variable, it will be equivalent to a

[1] Additions **in the 1.1 version** consist of additional instructions in relation to variables N17, N18, and N20 for the coding of cases in which the domestic constitution is not mentioned. Corrections **in the 1.2 version** concern the introductory text on p. 1 related to the use of N/A values, the text related to the coding of cases in which the domestic constitution is not mentioned on p. 6, and the formulation of subcategory 2 of variable N13. **In the 1.3 version** the instructions for variable N8 (length of the judgment) have been modified in a way that – contrary to before – the lower court's decision is to be included in the word count even if it is attached to the supreme court's decision separately. The relevance of lower courts' decisions quoted in the judgments is clarified also in the general instructions on p. 2 and in relation to variable N12 (structure of argument). Additions **in the 1.4 version** concern the implications of the choice to code the Swedish decisions both with and without the lower courts' decision (see at p. 2, fn 8 at N8, and fn 12 at N12), a clarification related to the variable of references to foreign law (N26) in the context of a historical account and to the variable of references to a non-judicial body (N27), and further clarifications and suggestions for the coding of concepts and principles (N31-N51) used only implicitly (on p. 15, including fn 22-23, and under variable N31). Finally, there is a change in relation to the coding of the two measurement variables (N52 and N53) and the 'structure of argument' variable (N12): it is not necessary to choose any of the options, if there are no constitutional arguments in the judgment or the court does not invoke any constitutional concept or principle (the instructions on p. 1 have also been adjusted accordingly). Additions **in the 1.5 version** concern clarifications for the variables N5, N29 (see fn 21), N31, N40, and N46. There is also a minor correction in the instructions for N30 (an incomplete constitutional argument may be related to one of the *findings* of the court, not necessarily to its final conclusion). A change related to the coding of N31_2 is that when the principle of legality is used in the specific context of criminal law, it is *also* to be marked as N44 (basic procedural rights). Additions **in the 1.6 version** concern the general instructions (pp. 1–2) and clarifications for variables N4, N5, N17, N31, N32, N33, and N48. There are a few corrections **in the 1.7 version** to remedy a discrepancy between the codebook and the actual coding related to variable N7 and to add information on the aggregated results of the subcategories of several variables that appear in the dataset as separate variables.

NO.[2] While the coder is instructed to write a number in the box for the categorical variables, in the final dataset these are converted to YES or NO. There are, however, three categorical variables where you must choose at least one of the options. These are N5 (general topic), N7 (type of dispute), N11 (panel formation). For these three variables, leaving all boxes blank is not an option.

The analysis always concerns the whole judgment, not only the majority opinion (the only exception is N52). The main question for this project is not what is in the "winning arguments", but which arguments are accepted as legitimate arguments by the argumentative culture of the given (supreme or constitutional) court, ie. what may be used as an argument. And this takes into account the separate opinions as well.[3] This means that we also count arguments and concepts contained in quoted sources, including the parties' arguments, as these arguments are also indirectly legitimised by the court. This also means that even arguments and concepts used by the lower courts (if included in judgment) are to be coded. The Swedish cases are planned to be coded both with and without the lower courts' decision so that we can evaluate the latters' impact on constitutional reasoning.

Please use the technique of taking **side notes** whenever the instructions ask you to do so.[4] By side note we mean a separate file (either in Word or in Excel format), where you annotate in which cases you found that given characteristic that we are not able to measure in the coding.

TABLE OF CONTENTS:

Variables related to the characteristics of the case

N1 (Q1/Q1): Reference of the decision

Please give the official reference of the decision in original language.

[2] This is the case for 14 categorical variables: N3, N13, N14, N16, N18, N23, N24, N25, N26, N31, N34, N41, N45, and N50.
[3] Response from András Jakab.
[4] You find such instructions for variables N25 and N28, and as a general instruction for all variables related to conceptualisation (see at p. 15).

N2 (Q2/Q2): Year

Specify the year in which the decision was delivered.

N3 (Q3/Q3): Dissenting or concurring opinions in the case

Please indicate the type(s) of separate opinion attached to the judgment by writing the relevant **number(s)** in the relevant column(s) (ie. write '1' in column P3_1, '2' in column P3_2, etc.). If a certain type of separate opinion is *not* present in the judgment, leave the box in that column blank. If there are no separate opinions at all, please leave all columns blank.

1) Dissenting on the constitutional issue
2) Dissenting on other issues
3) Parallel concurring opinion on the constitutional issue
4) Parallel concurring opinion on other issues
5) Supplementary concurring opinion related to the constitutional issue
6) Supplementary concurring opinion related to other issues[5]

The same separate opinion be counted both as a dissent and as a concurrence if the dissent and the concurrence concern different constitutional issues. Definition of parallel concurring opinion: the judge offers an alternative reasoning, so s/he agrees with the outcome but not with the reasoning. Definition of supplementary concurring opinion: the judge offers additional arguments supporting the same outcome, while not questioning the reasons offered by the majority. If the opinion is parallel concurring, it cannot be supplementary on the same constitutional issue at the same time.

In the dataset the following aggregations of the subcategories are also included as separate variables: N3_135 (separate opinions related to the constitutional issue), N3_246 (separate opinions on other issues), N_12 (dissenting opinions), N_34 (parallel concurring opinions), N_56 (supplementary concurring opinions).

N4 (Q4/Q4): Case disposition / Outcome of the constitutional issue

Please indicate whether the court found (at least partially) against the law/decision/act (of the government) challenged (YES or NO). If the judgment prescribes a binding interpretation (of a statute or of the Constitution), then the box should be left blank. If the court established an "unconstitutional omission" (if that is possible in your legal order), then it counts as a YES. Admissibility decisions can also be categorized as YES (admissibility granted) or a NO (admissibility denied). If the case is only about interim relief, then an interim relief against the law/decision/act also qualifies as a YES.

In the case of a supreme court, such as the Nordic courts analysed here, it is important to distinguish between the disposition of a case and the decisions on a constitutional issue. The fact that an appellant wins a constitutional argument does not necessarily mean that the appeal

[5] 'Parallel concurring opinion' and 'supplementary concurring opinion' are the terms used in the UK Chapter, so for the sake of coherence and clarity we employ these terms. See the UK Chapter, p. 713.

is upheld, since the constitutional issue might have been only one aspect of a complex case. Therefore, in line with the UK Chapter of the CONREASON Project, in the Nordic jurisdictions we take into consideration how the court decided the constitutional issue, not how it disposed of the case.[6]

This variable may also be 'not applicable' if the legal dispute took place between private individuals or organisations. In such case you must write N/A in the box. However, not all civil cases qualify automatically as N/A. If the court exercises judicial review of legislative or executive acts, then it is to be marked either as YES or NO. N/A is to be marked in the case of horizontal application of the constitution, procedural issues or general principles.

Summing it up, there are four options as an answer to this question:

- YES
- NO
- N/A
- leaving the box blank

N5 (Q5/Q5): General topic

Please specify: (F) Fundamental rights, (S) State Organisation, (P) Procedural, Due Process aspect, or (O) Other. When the issue is characterised as pertaining to the separation of powers or federalism, it is to be coded as (S). Other rule of law or legality matters do not belong to this category and should be coded as 'Other' (N5_O).[7] The (P) option means that the court, instead of examining the constitutional question on the merits, decides on procedural grounds (for example, declares the petition inadmissible). When the due process of the main procedure before the lower court is the constitutional question, it does not count as (P) but as (F).[8] You can also indicate a combination of the general topics if there were several in one single judgment. Write the relevant **letter(s)** in the relevant box(es).

N6 (Q6/Q6): Concrete issue

Please characterize the issue at hand, using your own words. More than one issue may be entered. Write words and short expressions rather than full sentences in this box, at a reasonable level of abstraction (not too specific and detailed).

N7 (-): Type of dispute

Please indicate under which jurisdiction the case was decided by the court, by writing **the relevant letter (only one)** in the relevant box, and leave the other boxes blank:

C) Civil case

---

[6] See the UK Chapter in Jakab et al. (eds.), *Comparative Constitutional Reasoning* (CUP 2017), p. 692.
[7] See Jakab et al. (eds.), *Comparative Constitutional Reasoning* (CUP 2017), p. 784.
[8] Answer from Johanna Fröhlich.

P) Criminal case
A) Administrative case or a case against the executive branch
O) Other

N8 (-/Q8): Length of the judgment

Please indicate the number of words of the judgment, also considering the separate opinions. Only the following parts are to be *excluded* from the word count: the summary, keywords and references listed before or after the text of the judgments. The lower court's decision is to be taken into account in the word count even if it takes the form of a separate attachment to the judgment.[9]

N9 (-/-): Length of the majority reasoning

Please indicate the number of words of the court's reasoning in the judgment, including the case disposition. Please disregard the statement of the case (facts, sources of law, procedural history and the parties' arguments) when counting the number of words. As a rule of thumb, the majority reasoning begins where the court begins to talk about law and discusses the legal questions raised in the case.

In the dataset a separate variable (N9_8) has been created to indicate the proportion between the total length of the judgment and the length of the majority reasoning (see column DQ).

N10 (-/-): Voting result

Please indicate how many members of the decision-making panel voted for and against the judgment, by indicating the number of judges in favour first. For example, if 3 judges voted for and 2 judges voted against the judgment, write "3-2" in the box. If all five judges voted for the judgment, write "5-0" in the box.

In the dataset the variable N10_un is added as a binary variable (see column DP) indicating whether the decision has been unanimous (YES or NO).

N11 (-/-): Panel formation

Please write the letter (O) if the case was decided by an ordinary panel or the letter (S) if it was decided by a strengthened panel (e.g. Grand Chamber or plenary session) in the relevant column. Leave the box in the other column blank.

[9] The Swedish cases will, however, be coded both with and without the lower courts' decisions.

Variables related to the arguments used in the case

You should only consider *constitutional* interpretation. If a case brought before the supreme court deals exclusively with the interpretation of ordinary legislation, then these arguments are not relevant – or, at least, not directly relevant – for this Project. As regards the interpretation of a statute in the light of the constitution, we are only interested in arguments establishing the meaning of the constitution, as opposed to how these arguments bear on the meaning of ordinary legislation.

Please try to classify the arguments as one from our list. If – despite your efforts – it does not seem possible, then there is a special box in the table (N28), and you can explain in your report (the qualitative analysis) why it did not fit into any of our categories.

Please mark also those judgments with a YES where a certain argument was considered but eventually rejected (e.g. if the opinion distinguishes the case at hand from former precedents, it does count as an "argument from precedent"). However, do not mark YES if the argument type is rejected altogether as irrelevant or inappropriate (e.g. the argument "we do not consider here moral arguments because it is a court of law" does not count as a non-legal argument).

You should equally consider majority and minority (dissenting or concurring) opinions: it does not matter whether the argument turned up in the majority or in the minority opinion. We only consider whether a type of argument came up in the reasoning, not how many times it did. Because of repetitions and half-repetitions, it would be difficult and very time-consuming to quantify the frequency within the judgments.

If we consider an argument as borderline between two types of arguments, then we shall make a mark for both categories. If a judgment quoted an argument from another judgment, then the quoted argument also qualified on its own (and not just as a "precedent-argument").

Simple affirmations, declarations, or the recalling of factual circumstances, as well as mere citations of laws or the constitution, are not considered as reasoning without answering why that information or detail supports the opinion. In order to be able to call a set of propositions an argument, it needs to contain an inference, a sort of logical connection that binds the premise to the conclusion with a normative force. For instance, pseudo arguments are assertions that could appear as arguments at first sight, but after a more careful analysis, they do not contain the necessary normative connection between the mentioned assertions. Furthermore, there are deceptive arguments, that refers to the intentional use of fallacies, such as appeal to emotions, arguments *ad hominem* or distractions from the substance of the issue at hand.[10] These distinctions and definitions are also relevant in relation to the second-last variable (N52).

If the ECHR has a constitutional or semi-constitutional status in your jurisdiction, please take into consideration the special instructions concerning variables N13 (establishing or discussing the text of the constitution), N17 (domestic harmonizing argument), N18 (harmonising with international law), N20 (invoking a concept or principle not mentioned in the constitution), and N23 (historical teleological argument).

[10] CORE Latam Project Guide, pp. 4–5.

N12 (Q7/Q9): Structure of argument

Please specify if you identify: (C) a "one-line conclusive argument", (L) "parallel conclusive arguments", or (D) "parallel, individually inconclusive, but together conclusive arguments", and write the relevant **letter** in the relevant column.

- (C) (1) "one-line conclusive argument": We mean a self-standing structure, in which every premise is presented as a necessary component of the argument.
- (L) (2) "parallel conclusive argument": We mean a cumulative parallel structure, in which distinct, autonomous considerations lead to the same conclusion.
- (D) (3) "parallel, individually inconclusive, but together conclusive arguments": The various considerations brought up by the opinion are neither presented as necessary nor as sufficient to entail the conclusion, but as elements bearing, at least, some relevance for the issue at hand.

The three types of structure are in a more or less relationship as to their structural clarity, ie. the "one-line conclusive arguments" is the clearest structure and the "parallel, individually inconclusive, but together conclusive arguments" is the most opaque one.[11] 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 a (C) (1).

Every judgment is one analytical unit, regardless the presence of separate opinions and the number of constitutional questions decided in it.[12] If both (C) (1) and (L) (2) structures are present in the same judgment, then mark it as (L) (2). If you notice a (D) (3) structure, then mark the judgment with (D) (3) even if there are also (C) (1) and (L) (2) structures. This also applies to the opinion of the lower courts cited in or attached to the supreme court's decision.[13]

The analysis shall focus on the reasoning that is related to the constitutional issue, as opposed to the reasoning of the whole opinion. It can happen that the constitutional reasoning is built on a "one-line conclusive argument", but the judge also supports the conclusion of the decision by another, non-constitutional argument. For the purpose of this analysis, this additional argument does not make the structure of the argument "parallel conclusive", since the additional argument is not related to the constitutional issue. On the other hand, when the judge's position on the constitutional issue is based on a "one-line conclusive argument", but an intermediary step in the reasoning is supported by parallel arguments (either individually conclusive or not), the structure is to be coded as a parallel argument.[14]

If there is no constitutional argument in the judgment, for example because the court only interprets a statute in conformity with the constitution without interpreting the constitution or because there is no logical link between the invoked constitutional provisions and the court's conclusion, leave all boxes blank.

---

[11] CONREASON Project Design, p. 13.
[12] Response from Andras Jakab.
[13] The Swedish cases are, however, planned to be coded both with and without the lower courts' decision.
[14] This explanation is from the UK Chapter, pp. 692–3.

N13 (Q8/Q10): Establishing or discussing the text of the constitution

Please indicate whether the opinion explicitly discusses what counts as constitutional text. Establishing the text is different from establishing the content of the constitution. The latter refers to the meaning and interpretation of what is already identified as a *constitutional* text. Prior to that is the question of what counts as a constitutional text. This is the question the present category is intended to capture. It includes all segments of an opinion in which the constitutional status of legal sources is considered (e.g. what is considered to be a standard of review). These arguments usually emerge when it is not clear whether a norm is part of the supreme law of the land, i.e. if it is recognised as a constitutional text or not. In the Nordic context it may also include discussions on whether or not a constitutional custom or tradition counts as constitutional text and whether the ECHR is considered part of the constitution in the broad sense. At the same time, if it is taken for granted by the court that the ECHR has a constitutional or semi-constitutional status, and the issue is not being explicitly discussed, (1) is *not* to be marked.

If there is no such discussion in the reasoning, leave all columns blank. If there is, please indicate which type of discussion can be found in the reasoning by writing the corresponding **number(s)** in the relevant box(es):

1) Discussing whether the ECHR is considered part of the national constitution / constitutional law;
2) Discussing whether other sources of written law, which are not incorporated into the constitution, are considered part of the constitution / constitutional law;
3) Discussing whether a tradition or custom is considered to be part of the constitution / constitutional law.

N14 (Q9/Q11): Is the applicability of constitutional law discussed?

Please indicate whether the opinion explicitly considers whether constitutional law can be applied by the Court to the case at hand (e.g. because/despite political question doctrine). Does the opinion consider the applicability of constitutional law to the case at hand? This question may notably arise in connection with political question doctrines and state of emergency situations or, in EU member states, in relation to the primacy of EU law over domestic constitutional law, or when the court holds that the case is not governed by the constitution, but by some other legal source. Deferential arguments, stating that no constitutional answer can be found to the question, should also be noted here. This category covers considerations as to the applicability *ratione materiae* of the constitution, the binding force, as well as to the enforceability and justiciability of the constitution. Illustrations are statements such as "the case at hand has no constitutional relevance", "the case falls within the discretion of the legislator [or other non-judicial institution]", "a Constitution has to bind all state organs", etc. Using the doctrine of conventionality control or the concepts like the margin of appreciation would fall under this category as well. If the court finds that constitutional law is not applicable to the case at hand, the judgment can be included in the list of landmark cases only if the court states this explicitly in its reasoning.

If there is no such discussion in the reasoning, please leave all columns blank. If there is, please indicate which kind of discussion can be found in the reasoning by writing the corresponding **number(s)** in the relevant box(es):

1) Political question doctrine
2) Other questions of applicability *ratione materiae*
3) State of emergency situations
4) Primacy of EU law
5) Other

N15 (Q10/Q12): Analogy

Please indicate (YES or NO) whether the opinion features any instance(s) of analogical reasoning. For the purposes of our research, analogy is an argument that is presented as filling a gap (lacuna) in the constitution and is used to solve a case that is not explicitly regulated by the constitution by using a constitutional provision that regulates similar cases, or by using similar institutions or principles from other fields of jurisprudence. If the court categorically says that "analogy as such is always an invalid argument" then you should *not* count it. But if the court simply rejects the use of analogy in a certain case without rejecting the genre of this argument in general, then you should count it.

N16 (Q11/Q13): Ordinary meaning of words

Please indicate whether the opinion explicitly considers the ordinary meaning of the text of the constitution. By ordinary meaning of words, we refer to the grammatical-literal interpretation of the words/phrases/articles of the constitution, following its everyday or professional meaning.

If there is no explicit reference to the ordinary meaning of the text of the constitution in the reasoning, please leave both columns blank. If there is, please indicate where that reference can be found by writing the corresponding **number(s)** in the relevant box(es):

1) in the majority opinion,
2) in a separate (dissenting or concurring) opinion.

N17 (Q12/Q14): Domestic harmonising arguments

Please indicate whether the opinion seeks to conciliate different constitutional requirements with one another. In case harmonizing involves international law, or sources of international law that were incorporated into national law, it should be categorized under N18 (with the separation of N17 and N18, we aim at acquiring information also about the openness towards international law). Please do not consider interpretation of statutes in light of the constitution, as that is not about the interpretation of the constitution but about the interpretation of statutes which we are not dealing with. This method refers to those types of arguments that interpret different articles, sections or provisions of the same constitution in harmony with each other. It can also be called "integrative" method or "systematic interpretation". If the national

constitution is a fragmented constitution, it also includes arguments that seek to conciliate the provisions of the central constitutional document (e.g., the Instrument of Government) with provisions contained in other fundamental laws. Contrary to N20 (concept or principle not mentioned in the text of the constitution), this argument is always based on the text of the constitution.

If the opinion does not apply the domestic constitution at all, please write N/A (not applicable) in the box. This will be the case when the reasoning only relies on the ECHR or on general constitutional principles.

N18 (Q13/Q15): Harmonising with international law requirements

Please indicate whether the opinion seeks to interpret constitutional law in light of international law (including EU law and the ECHR).

If there is no such argument in the reasoning, please leave all columns blank. If there is, please indicate which kind of source the court seeks to harmonize the constitution with, by writing the corresponding **number(s)** in the relevant box(es):

1) EU law / EEA law (including CJEU / EFTA Court case-law);
2) ECHR[15] (including ECtHR case-law);
3) Other binding sources of international law (e.g., the ICCPR);
4) Sources of international soft law (e.g., an opinion of the Venice Commission).

If the ECHR is considered to have a constitutional or semi-constitutional status in your jurisdiction, and it is being harmonised with another international human rights treaty, this variable is to be marked both as (2) and (3), even if the domestic constitution is not invoked. In this way we acquire more accurate information about the openness towards the different sources of international law.

N19 (Q14/Q16): Precedent-based arguments

Please indicate (YES or NO) whether the opinion considers previous rulings of the court. Please also mark it with YES if the court distinguished the present case from the former one, and therefore they did not apply it. A precedent-based argument means the use of previous judgments or preliminary rulings of the same court, already resolved, in order to interpret the text of the constitution. Only those precedents count that are relevant to the constitutional question and the constitutional reasoning.

[15] In CORE Latam the first option is reference to international legal instruments from the Inter-American system, while we consider the two European systems (EU/EEA and ECHR) separately. We can still collapse the data on (1) and (2) later in order to compare the frequency of references to regional instruments in Latin-America and Northern Europe.

N20 (Q15/Q17): Invoking a concept or principle not mentioned in the text of the constitution

Please indicate YES or NO. The application of concepts and principles (incl. different constitutional tests for fundamental rights restrictions) developed by courts or by legal scholars.

Examples of such concepts and principles: (1) overarching constitutional principles, whose legal status does not derive from any specific enactment, but rather from the fact that they serve to rationalize and justify legal rules and legal institutions (such as separation of powers, rule of law or parliamentary sovereignty); (2) doctrinal categories that are recurrently used to structure the argument of the court, such as proportionality, if not specifically mentioned in the constitution.[16]

If you consider the ECHR to be part of the constitution, then concepts that are explicitly mentioned in the ECHR (including its Preamble) cannot be counted here.

This variable does not cover the implicit use of concepts or principles that are mentioned in the text of the constitution.

N21 (Q16/Q18): Argument from silence

Please indicate (YES or NO) whether the opinion considers argument from silence. An argument from silence (*argumentum ex silentio*) is based on the omission or lack of expressive reference to something in the constitution.

N22 (Q17/Q19): Teleological (textual) arguments

Please indicate (YES or NO) whether the opinion invokes or considers the supposed purpose of the constitutional text or part thereof. This kind of teleological argument (often called "objective teleological argument", because it refers to the purpose or the aim of the provision in question that has expressive textual basis in the constitution) refers to the purpose of the text rather than to the purpose of its authors. Consequently, references to preparatory works are not to be marked here, but under N23.

N23 (Q18/Q20): Teleological (historical-intentional) arguments

Please indicate whether the opinion invokes or considers the purpose of the constitution-makers. This type of teleological argument (often called "subjective teleological argument") equates the purpose of a constitutional provision with the purpose pursued by the constitution-makers. It may take the form of a reference to the travaux préparatoires. These may also include expert opinions by scholars that were taken into account during the constitution-making process. (In such case it is only to be coded here, and not under N25).

[16] These examples are from the UK Chapter, p. 699.

If there is no such argument in the reasoning, please leave both columns blank. If there is, please indicate where that argument can be found by writing the corresponding **number(s)** in the relevant box(es):

1) in the majority opinion,
2) in a separate (dissenting or concurring) opinion.

If the ECHR is considered to have constitutional or semi-constitutional status in your jurisdiction, references to the preparatory work of the incorporation of the ECHR are not to be counted here if the argument is about the purpose of the incorporation of the ECHR and not about the purpose of the ECHR itself.

N24 (Q19/Q21): Non-legal arguments

Please indicate (YES or NO) whether the opinion explicitly considers economic, sociological, moral/religious or scientific/medical arguments. The present project does not want to contribute to the endless debate about the concept of law, so we are using a rather practical and simple test on what counts as "non legal". For the purposes of the present research, non-legal arguments are explicitly moral/religious, economic, sociological and scientific/medical arguments (i.e. arguments that are explicitly grounded on considerations external to the law) about the interpretation of the constitution.

There is a significant degree of overlap between legal and other forms of discourse. This fact is particularly evident in the realm of constitutional law and with terms such as "sovereignty", "human dignity", "democracy", etc. Generally speaking, though, the fact that an expression is also used in moral or political discourse does not automatically make it non-legal. Though explicit mention in the constitutional text is not a necessary condition for legalness, it should in principle be sufficient. So, if a specific constitutional rule mentions "public morality" or "budgetary stability" then the explanation of these concepts is legal. Also, the explanation of the facts of a case does not qualify as a non-legal argument: we are looking only for arguments which justify a certain interpretation of a constitutional rule.

We also remind you that the court should not be regarded as having recourse to a non-legal argument when a non-legal argument is rejected as invalid, irrelevant or inappropriate. If, for example, the court observes "we do not consider here moral arguments because it is a court of law", this does not count as a non-legal argument.

The proportionality analysis is an interesting issue because it explicitly requires courts to balance rights against public morals or safety, etc. We would still suggest that this should not be categorized as a non-legal argument. Because if we say that this is a non-legal argument, we will end up including too much in the 'non-legal' category. Similarly, many constitutions explicitly refer to public morals and safety and health or "human dignity" and therefore require the courts to interpret them and protect them. But again, if we included these concepts which are commonly contained in written constitutions, the category of non-legal arguments would become too broad, and it would be misleading.

The relationship with teleological reasoning is also an interesting issue, because the purpose of a norm is usually a non-legal purpose. If the court refers to a non-legal purpose of the norm that it interprets, then it is to be coded as a teleological argument (N22 or N23, depending on if it is

only based on the text or on the intent of the constitution-maker), and not to be marked here. On the other hand, if the court argues that this norm is to be interpreted in a given way because this and that non-legal reason, then it is a non-legal argument and to be marked here. In any case, we either mark teleological argument or non-legal argument, not both at the same time (in relation to the same argument).

If there is no such argument in the reasoning, please leave all columns blank. If there is, please indicate which kind of non-legal argument(s) the reasoning invokes or considers, by writing the corresponding **number(s)** in the relevant box(es):

1) economic argument,
2) sociological argument,
3) moral/religious argument,
4) scientific/medical argument.[17]

N25 (Q20/Q22): Reference to scholarly work

Please indicate (YES or NO) whether the opinion explicitly mentions academic literature. Unnamed, generic references to the "dominant doctrine", "authoritative doctrine", etc., should also be qualified as references to scholarly works. On the other hand, the use of concepts and theories known to have scholarly origins should not count as "references to scholarly works" if no explicit references to legal scholarship are made. Nuances in the use of scholarly arguments that are not captured by the Table can, and should, be discussed in your written report (the qualitative analysis).

Since the CORE Latam project (unlike the parent project) instructed the coders to mark this variable only in case of a direct reference, and not in case of a reference contained in a citation, if the reference is contained in a citation, please take a side note, but still mark it under N25.

In the UK Chapter, also references to non-legal academic literature were included here (e.g. literature on the historical or socio-economic context).[18] The authors of the US Chapter, on the other hand, did not include references to scholarly work aiming at establishing empirical rather than legal propositions.[19] In the Nordic CONREASON Project we choose the second option, so only references to legal scholarship are to be marked under this variable. If the judgment refers to other (non-legal) research, it may be marked as N24 (a non-legal argument).

If there is no such reference in the reasoning, please leave all columns blank. If there is, please indicate the legal system object of the referenced scholarly work by writing the corresponding **number(s)** in the relevant box(es):

1) Scholarly work on the domestic legal system,
2) Scholarly work on another Nordic legal system,

---

[17] Non-legal arguments were categorized in a different way in the UK chapter: (1) policy arguments, (2) principles of political philosophy, (3) empirical assumptions, (4) positive morality arguments. See the UK Chapter, pp. 703–4. Example of empirical assumption: the significance of the dress code in Muslim society. Example of positive morality argument: the increased social acceptance of different sexual orientations.
[18] See p. 704.
[19] See p. 744.

3) Scholarly work on international law,
4) Scholarly work on a foreign legal system, including comparative works.

When marking (2), (3) or (4), please take a side note on the country of affiliation of the author(s).

A scholar's expert opinion given in the context of the drafting or amending of the constitution (for example in the form of a memorandum) is not to be counted here but under N23.

In the dataset the following aggregations of the subcategories are also included as separate variables: N25_13 (scholarly work on domestic and international law), N25_24 (scholarly work on foreign law).

N26 (Q21/Q23): Reference to foreign legal material

Please indicate YES or NO. A vague reference to "foreign laws" or an expression such as "after having analysed the results of comparative law" does qualify as a comparative law argument in the Excel Table. By contrast, simply quoting a foreign concept (even if it is used in a foreign language, e.g. German words like *Drittwirkung*) should not count as a reference to foreign law. By referring to foreign law, we allude to arguments that explicitly invoke or consider foreign legal sources (foreign countries' legal norms, foreign courts' sentences or the "results of comparative law", meaning the experience of foreign legal institutions).

Nuances in the use of both foreign law arguments that are not captured by the Table can, and should, be discussed in your written report.

If there is no such reference in the reasoning, please leave all columns blank. If there is, please indicate the geographical origin and the type of the referenced legal material by writing the corresponding **number(s)** in the relevant box(es):

1) Nordic case-law,
2) Nordic legislation or other written source of law,
3) Non-Nordic case-law,
4) Non-Nordic legislation or other written source of law.[20]

If the reference to foreign law is part of a historical account aiming to explain the origin of a constitutional provision and not to interpret the constitutional provision in question, it is a part of subjective teleological reasoning (N23) and not to be marked here.

In the dataset the following aggregations of the subcategories are also included as separate variables: N26_12 (Nordic law), N26_34 (non-Nordic law), N26_13 (case-law), N26_24 (legislation or other written source of law).

[20] In the CORE Latam project the two options were (1) foreign laws from Latin American countries, (2) foreign laws from other regions, therefore our data obtained from (1)+(2) is comparable with their (1), and our (3)+(4) with their (2).

N27 (-/-): Reference to a non-judicial body's opinion

Please indicate (YES or NO) whether the judgment explicitly refers to the opinions of a domestic non-judicial body on a constitutional matter. This includes, in particular but not exclusively, references to the opinions of the Law Council (*Lagrådet*) in Sweden and the Constitutional Committee in Finland.

N28 (-/Q24): Pro homine or pro persona principles

Please indicate (YES or NO) whether the judicial opinion explicitly uses *pro homine* or *pro persona* principles of interpretation. This is an interpretative principle the aim of which is to maximize the protection of human rights and, at the same time, minimalize restrictions pertaining to them. It has an interpretative aspect and an aspect of application of the law. The first means an extensive interpretation or a restrictive interpretation depending on which one is more in favour of the effective protection of rights, while the other aspect means the preference of norms that are more favourable to the effective protection of human rights.

Thus, the application of this principle includes restrictive interpretations of limitations on rights. On the other hand, it does *not* include the constitutional-friendly or constitutional-rights-friendly interpretation of ordinary legislation (*verfassungskonforme Auslegung*), if the argument does not contribute to establish the meaning of the constitution. In other words, it is to be marked as YES when the constitutional right is being interpreted, not the statute.

At the same time, the use of this principle has to be explicit at least to some extent. Even if it is not named, it should still be discussed in some form (for example, when the court claims that is chooses a certain interpretation in order to ensure the effective protection of a right).

If you mark YES for this variable, please take a side note on how explicitly and in which form this principle is applied.

N29 (Q22/Q25): Other types of argument or method

Please indicate YES or NO. Including references to domestic legal history, if you cannot qualify it as some kind of teleological argument.

Other arguments included in the UK Chapter: deference (to the other branches of government)[21] and arguments from actual political practice (especially in relation to the limits of prerogative powers).

N30 (-/-): Incomplete constitutional arguments

Please indicate (YES or NO) whether the judgment contains any incomplete constitutional argument. By incomplete argument we mean that the court identifies the legal basis (typically: a constitutional provision) on which it bases its finding but does not draw a logical inference

[21] See the UK Chapter, pp. 707–8. Please note that we code deferential arguments under the 'rule of law' variable (as a 'separation of powers' argument = N31_4).

from it that would create a clear and logical connection between the legal basis and the finding. In other words, it states that the finding is based on a given provision, but it does not explain why, so it is not possible to identify a method of interpretation on which the argument is based, not even in the form of reference to a secondary legal authority.

Variables related to conceptualisation

The CORE Latam project instructed the coders that it is not enough that a key concept is mentioned in the reasoning, but it has to be used in the framework of an argument or in the context of substantial analysis.[22]

In the Nordic context, we also count concepts that are applied in the judgment implicitly.[23] We also created a separate variable to measure the extent to which the courts use concepts and principles implicitly (N53). However, even in the case of implicit use of a concept or principle, so when the court does not name the concept or principle itself, it has to be clear to an informed reader to which concept or principle the court refers exactly.[24] Therefore, every time you mark a concept or principle as present in the judgment under the following variables (N31–N51), please take a side note on whether that concept or principle was mentioned explicitly (ie. named by the court) or implicitly (in a way that is clear to an informed reader to which concept or principle the court refers to exactly). An even simpler way to do it can be to write the value ('YES' in the case of a binary variable or a number or letter in the case of a categorical variable) in red colour in the Excel file when the given concept or principle is only used implicitly in the judgment. This will also help you to choose the value for the last variable (N53).

N31 (Q23/Q26): The rule of law invoked as an argument

Please indicate whether the opinion invokes the rule of law or a similar concept. This refers to the rule of law (or similar concept, such as *rättsstat* in Swedish) and includes principles the concept is generally taken to imply: the separation of powers, the supremacy of the constitution, access to justice, principle of legality (*legalitetsprincipen*) and legal certainty (if these are considered to be part of the rule of law in the legal order you are analysing).

If there is no such concept invoked in the reasoning, please leave all columns blank. If there is, please indicate which concept is invoked, by writing the corresponding **number(s)** in the relevant box(es):

1) Explicit rule of law argument / *rättsstat*
2) Principle of legality / *legalitetsprincipen*
3) Legal certainty / *rättssäkerhet*

---

[22] See the Results of the July 4th, 2019 CORE Project Meeting, p. 4.
[23] The arguments (variables N13-N30), on the other hand, have to be used explicitly in the judgment.
[24] Note that many concepts and principles are already defined broadly in the codebook. We tried to solve this problem by creating subcategories for some of these variables: rule of law (N31), sovereignty (N34), nation (N38), core content of rights or competences (N41), freedom of expression (N45), and economic, social, cultural and environmental rights (N50). There are, however, many of the remaining binary variables that are still defined broadly. An implicit use means that the court does not explicitly name any of the subcategories or related concepts mentioned in the Codebook but can still be clearly qualified as such.

4) Separation of powers / *maktfördelning*
5) Access to justice
6) Other implicit rule of law argument

Mark (1) if the court uses the exact term 'rule of law' (in the respective language).

By principle of legality, we mean that if the legislature intends to interfere with fundamental rights or principles, it must express that intention by clear and unambiguous language, and that certain matters are to be regulated by law according to the constitution. In criminal law, it means that no one shall be held guilty of any criminal offence which did not constitute a criminal offence by the law when it was committed (*nullum crimen, nulla poena sine lege* principle). When used in the specific context of criminal law, it is also to be coded under N44. The 'being provided by law' requirement of the proportionality test is *not* to be counted here but only under N40.

By legal certainty, we mean both the law's internal consistency and its predictability.

By separation of powers, we mean the separation between the executive, legislative and judicial powers. Discussing the relationship between any two of the three branches may fall under this category. Explicit deference of the judges towards the legislature is also to be included here. If you marked N14_1 (political question doctrine), you also have to mark N31_4.

By access to justice, we mean access to courts and any discussion of this problem. Discussions on the right of appeal are, however, not to be coded here but under N44 (basic procedural rights), unless in the context of the national constitutional tradition the right of appeal is enshrined in the constitution and perceived as part of access to justice.

Mark (6) if the court uses the concept of rule of law implicitly, while none of the other four values are applicable (for example when the supremacy of the constitution is invoked). Even in this case, it has to be clear to an informed reader that the court meant to refer to the rule of law, so use this option parsimoniously.

N32 (-/Q27): Judicial independence

Please indicate (YES or NO) whether the reasoning expressively invokes the concept of judicial independence (*domstolarnas och domarnas oberoende* in Swedish). The concept of judicial independence means that no other state function can interfere with the judicial branch, as it shall enjoy independence from the interventions of the other branches. The judges while interpreting and applying the laws shall only be subjected to the constitution and the laws. Judicial independence has a structural aspect, according to which the judicial branch shall have an independent organization, and a financial one, which refers to the budgetary independence that this branch shall enjoy. If you mark this variable as YES, you should also mark N31_4 (separation of powers).

Arguments on judicial deference to the legislature or to the executive are not to be included here but under N31_4 (separation of powers). If the judgment invokes the concept of impartiality of judges, it is not to be marked here but under N44 (basic procedural rights).

N33 (Q24/Q28): Democracy

Please indicate (YES or NO) whether the opinion invokes democracy. Reference to the concept of democracy may also come in the form of phrases such as "sovereignty of the people" (*folksuveränitetsprincipen* in Swedish) or "government of the people". It also includes references to instruments of direct democracy (referendum, popular initiative), but not references to local democracy, which are considered under the concept of federalism (N39).

Following the conceptualization offered by Dahl (1971), a substantive perspective of democracy categorizes political regimes in relation to the outcomes that they generate. A minimalist, or procedural, perspective of democracy refers to political regimes in relation to their institutions and procedures. In this regard, democracy can be conceptualized and measured into two dimensions: (1) contestation or the extent to which the demos are free to create political organizations in order to channel the social demands into decision-making process; and (2) inclusion or the degree of participation in the democratic process.

This variable is not to be marked if the term 'democracy' is only invoked as part of the necessity clause of the proportionality principle ('necessary in democratic society').

N34 (Q25/Q29): Sovereignty

Please indicate whether the opinion invokes sovereignty. According to the Westphalia Pax, sovereignty means state authority (Krasner 2001). Following Thomas Hobbes, sovereignty relapses on the ultimate decision unit. Sovereignty within a state comprises a permanent population, a geographically defined territory, and a government with the capacity to establish (cooperative) relations with other sovereign states.

This variable includes references to the concept of state, statehood, international independence, and parliamentary sovereignty.[25] References to popular sovereignty (*folksuveränitet*), on the other hand, are to be considered under the 'democracy' variable (N33), not here.

If there is no such concept invoked in the reasoning, please leave all columns blank. If there is, please indicate which version of the concept is invoked, by writing the corresponding **number(s)** in the relevant box(es):

1) external sovereignty (e.g. state sovereignty),
2) internal sovereignty (e.g. parliamentary sovereignty).

N35 (Q26/Q30): State form

Please indicate (YES or NO) whether the opinion invokes arguments related to the form of the state (republic, monarchy).

[25] 'Parliamentary sovereignty' was coded under this variable for the UK. See the UK Chapter at p. 715.

N36 (Q27/Q31): Government form / Government system by procedural structure

Please indicate (YES or NO) whether the opinion invokes arguments related to the government form (parliamentary, presidential).

N37 (Q28/Q33): Secularism

Please indicate (YES or NO) whether the opinion invokes arguments related to the separation of state and religion. This includes references to "secularism", the separation of church and state and state neutrality in religious affairs (or the "laic state"). Freedom of religion is also included here.[26]

N38 (Q29/Q34): Nation

Please indicate whether the opinion invokes the concept of nation (*folk* in Swedish). By the term of nation, we refer to the concept of nation-state (*nationalstat* in Swedish), which is a sovereign territory whereby the vast majority of inhabitants shares a similar culture and identity. We also mean to include the competing notions of nation, such as "plurinationality". It includes both civic and ethnic definitions of the concept (or a mixture of these) and references to ethnic minorities.

If there is no such concept invoked in the reasoning, please leave all columns blank. If there is, please indicate in which form this concept is invoked, by writing the corresponding **number(s)** in the relevant box(es):

1) the nation-state or national identity,
2) nationality (in the sense of national citizenship),
3) a national or ethnic minority.

N39 (Q30/Q32): Federalism / Government system by power structure

Please indicate (YES or NO) whether the opinion invokes federalism (including 'regionalism', 'autonomous regions', 'devolution', 'autonomy of local governments', 'subsidiarity').

N40 (Q31/Q35): Proportionality

Please indicate (YES or NO) whether the opinion considers proportionality or similar means-end test. Proportionality is a legal construct used to adjudicate human rights disputes, i.e. to resolve collisions between colliding values and rights. There are different versions of the test, but usually the model includes the following steps: legitimate aim, suitability of the aim, suitability of the restriction, proportionality of the restriction. We mean to include all versions of the test, from plain "balancing" and "scrutiny" until the most elaborated tests. An argument

[26] See the Results of the June 11-12, 2020 CORE Project Meeting, p. 4.

about whether a restriction is provided by law does not, in itself, qualify as a proportionality argument, but some kind of balancing has to take place or be at least taken into consideration.

N41 (Q32/Q36): Core of constitutional rights or competences

Please indicate whether the opinion considers doctrines referring to the core content (*Wesensgehalt*) of either fundamental rights or of competences. Please write (1) if the opinion considers the core content of a right. The legal construct of "core content of rights" refers to the unchangeable or inviolable essential origin of fundamental and human rights. Please write (2) if the opinion considers the core content of a competence. If there is no such doctrine mentioned in the opinion, please leave both columns blank.

N42 (Q33/Q37): Human dignity

Please indicate (YES or NO) whether the opinion explicitly invokes the concept of human dignity. According to Steinmann (2016), 'human dignity' is a contested concept. At the ontological level, the author defined 'human dignity' as a value or a right, directly associated with the unique qualities of every individual and the recognition of the second-generation social and economic human rights.

N43 (Q34/Q38): Equality

Please indicate (YES or NO) whether the opinion invokes equality (*jämställdhet, jämlikhet* in Swedish). This includes references to non-discrimination. By the concept of equality, we mean both general legal and political equality, in which all citizens in a given state are of equal standing before the law, and the equal treatment in terms of (human) rights (prohibition of unjustified discrimination).

N44 (Q35/Q39): Basic procedural rights

Please indicate (YES or NO) whether the opinion invokes basic procedural rights. This includes references to procedural due process, right to effective judicial review, adversarial principle, rights of the defence, right to be heard, *ne bis in idem*, principle of the legality of criminal offences and penalties, presumption of innocence, but excludes references to the constitutional requirements of the legislative and constitution-making process and parliamentary procedures.

N45 (Q36/Q40): Freedom of expression

Please indicate whether the opinion invokes freedom of expression rights. This includes reference to freedom of speech and freedom of the press. Please write (1) if the opinion invokes freedom of expression or freedom of speech, while write (2) if it invokes freedom of the press in the relevant column. If none of these freedoms is mentioned in the reasoning, please leave both columns blank.

N46 (Q37/Q41): Privacy rights

Please indicate (YES or NO) whether the opinion invokes the right to privacy or the right to respect for private and family life. This includes references to data protection and copyrights.

_____CONREASON variables finish here_____

Additional key concepts from the CORE Latam Project

N47 (Q43): Justice

Please indicate (YES or NO) whether the opinion invokes or considers the concept of justice. We consider here the material concept of justice (both in the corrective and distributive sense). Justice has three basic elements: it is interpersonal, meaning that it can only exist in relation to another person(s); it involves a duty, meaning there is something that is owed to another person; and it implies equality, meaning an equilibrium or balance in relation to what is owed. This also includes references to reasonableness (*rimlighet* in Swedish).

N48 (Q44): Custom

Please indicate (YES or NO) whether the opinion invokes or considers the concept of custom (*sedvana, sedvanerätt* in Swedish). Custom refers to the legal tradition on a national level, either with or without an explicit mention of a concrete source from the domestic legal history. On a high level of generality, references to the "constitutional tradition", "customs of law" or the like should be included in this category. It applies only if one cannot qualify it as subjective teleological argument. It also includes references to local traditions, e.g. Sami customs. If you marked N13_3 (discussing whether a tradition or custom is part of the constitution/ constitutional law), you should write YES here too.

N49 (Q45): Family

Please indicate (YES or NO) whether the opinion invokes or considers the concept of family. References to family in general, or specifically to the social, legal and cultural aspects, conditions or values of family shall be considered here.

N50 (Q47): Economic, social, cultural and environmental rights

Please indicate whether the opinion invokes or considers second- or third-generation rights. Write (1) if the opinion invokes or considers economic, social and/or cultural rights, while write (2) if it invokes or considers environmental rights in the relevant column. If none of these rights is invoked or considered in the reasoning, please leave both columns blank. The right to property is not to be marked under this variable.

Additional key concept only in the Nordic CONREASON Project

N51: Transparency

Please indicate (YES or NO) whether the opinion invokes or considers the concept of transparency. This also includes references to access to public documents.

Conclusive measurement variables

N52 (-/Q50): The overall weight of the arguments

This variable refers to the ratio between those arguments that were mentioned but not taken into consideration and those that in fact contributed to the conclusion of the issue at hand (i.e. the disposition of the case). Please check (M) (1) if the majority of the arguments mentioned in the opinion were *ratio decidendi* or *obiter dictum* arguments. Please check (E) (2) if the proportion between the *ratio decidendi* and *obiter dictum* arguments on the one hand, and the decorative, rhetorical or deceptive use of arguments, on the other hand, were practically equal. Please check (R) (3) if in the majority the opinion used rhetorical or deceptive arguments.

This variable is coded on the basis of the majority opinion, so not taking into account separate opinions, because it aims to discover to what extent do the arguments used by the court actually determine the outcome of the case.[27]

If there is no constitutional argument in the judgment, for example because the court only interprets a statute in conformity with the constitution without interpreting the constitution or because there is no logical link between the invoked constitutional provisions and the court's conclusion, leave all boxes blank.

N53 (-/-): Implicit use of concepts

This variable refers to the ratio between implicit and explicit use of concepts and principles, concerning the concepts and principles coded under variables N31–51. Please check (E) if the majority of the concepts and principles are mentioned in the opinion explicitly. Please check (P) if the proportion between the explicit and implicit use of concepts and principles were practically equal. Please check (I) if in the majority the opinion used concepts and principles implicitly. Please check (O) if the opinion only invoked concepts or principles implicitly, and none of them was named explicitly.

If there are no constitutional concepts or principles used by the court at all in relation to the interpretation of the constitution, leave all boxes blank.

[27] Response from Johanna Fröhlich.