Introduction

Comparing Constitutional Reasoning with Quantitative and Qualitative Methods

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The past thirty years have witnessed a dramatic rise in the power wielded by judicial institutions.[1] Uneven as the judicial push may have been, it has been real and, despite regional variations, truly global in scope.[2] Not only have judges been playing an increasingly larger role in defining the direction, shape and content of public policies in an increasingly larger number of countries; from abortion and health care provision to party funding and same-sex marriage, there is hardly any facet of public or private life that can claim to have been left untouched by the judges' steadily expanding reach. Accompanying the rapid diffusion of judicial review across the world, constitutional judges have been at the forefront of this remarkable evolution. Their growing influence has spurred an explosion in constitutional litigation, with the result that constitutional modes of argumentation have become a pervasive feature of public discourse. And so, just as they have witnessed the creeping constitutionalisation of much of executive and legislative politics,[3] citizens have grown accustomed to the spectacle of constitutional courts setting aside democratically enacted laws in the name of constitutional rights.

[1] For critical remarks on the introductory and concluding chapters we are grateful to Mónika Ambrus, Lídia Balogh, Mátyás Bencze, Nóra Chronowski, Péter Cserne, György Gajduschek, Katalin Kelemen, Viktor Lőrincz, Margit Mészáros-Kiss, András László Pap, Zsófia Papp, Kálmán Pócza, Miklós Sebők, Jørn Øyrehagen Sunde, Miklós Szabó, Zoltán Szente, Michel Troper and Zsolt Ződi, in addition to the authors of the present volume.

[2] See C. Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1995).

[3] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000).

Some regard the constitutional judges' newfound assertiveness as nothing short of judicial usurpation.[4] Others, on the contrary, hail it as the triumph of the rule of law and human rights.[5] But one need not have a horse in this race to wonder how constitutional judges manage to justify and communicate their rulings when these so often touch on deeply divisive societal issues. Like legislators, constitutional judges are public decision makers. However, to the extent that they are not elected and cannot be voted out of office, they lack democratic credentials. This raises one of the central puzzles of constitutional law in democratic regimes. How do unelected judges explain their decision to the litigants who happen to wind up on the losing side of a constitutional dispute? How do judges justify the decision to disapply a law passed by legislators who have themselves been chosen in free and fair elections? Constitutional reasoning, understood as the reasons constitutional judges publicly adduce for their decisions, is thus crucial to understanding constitutional adjudication.[6] As non-majoritarian institutions, constitutional tribunals cannot hope to achieve social and political acceptance but by demonstrating that their rulings are based on sound justifications.

The present book undertakes to explore what these justifications are and how they vary across constitutional orders of the world. On the following pages, we first show how empirical methods are slowly gaining popularity in comparative constitutional scholarship in general (Section I), then we define what we mean by 'constitutional reasoning' in this volume

[4] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

[5] See e.g. András Jakab, 'Application of the EU Charter by National Courts in Purely Domestic Cases' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 252–62.

[6] On the legitimacy-building role of judicial reasoning in general, see Aulis Aarnio, *The Rational and the Reasonable: A Treatise on Legal Justification* (Reidel 1987); Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992); Uwe Kischel, *Die Begründung* (Mohr Siebeck 2003); Manuel Atienza, *El Derecho como argumentación* (Ariel 2006). On the different mechanisms of how legitimacy is created by constitutional courts, including *inter alia* their reasoning, see André Brodocz, 'Constitutional Courts and Their Power of Interpretation' in Antonia Geisler, Michael Hein and Siri Hummel (eds), *Law, Politics, and the Constitution. New Perspectives from Legal and Political Theory* (Peter Lang 2014) 15–29; Hans Vorländer, 'Deutungsmacht – Die Macht der Verfassungsgerichtsbarkeit' in Hans Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag 2006) 9–33; Christian Boulanger, 'Vergleichende Verfassungsgerichtsforschung: Konjunkturen verfassungsgerichtlicher Autorität am Beispiel Bundesverfassungsgericht und ungarisches Verfassungsgericht' in Robert Christian van Ooyen – Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (2nd edn, Springer 2015) 911–926.

(Section II), we review the most important descriptive (i.e., not normative) theories of constitutional reasoning (Section III), and we explain the research design and the types of questions that we hoped to answer with our project (Section IV). Because we considered our research partly as a mapping exercise, and partly as following the general idea behind grounded theories, we wanted to avoid a narrow focus on very specific research questions.[7]

I The Emergence of Empirical Methods in Comparative Constitutional Scholarship

Of course, this book is not the first to deal with constitutional reasoning. The subject has spawned a vast literature. A glance at the bookshelves of a good law library will reveal a wealth of contributions on legal argumentation and constitutional interpretation in many different languages. Legal scholars and constitutional theorists alike have been engaged in endless debates about the merits of various approaches to constitutional interpretation.[8] In the United States, the debate, in a somewhat simplified manner, is often summed up as one pitting "originalists" against proponents of the "living constitution". Originalism is commonly associated with the view that judges should stick to the original meaning of the constitutional text or to the intentions of its framers when deciding cases. Theories of constitutional interpretation based on the idea of the "living constitution", by contrast, are supposed to emphasize the need to interpret and "update" the text in light of contemporary moral values. Echoes of the US discussion can be found in other jurisdictions, from Malaysia to the European Convention of Human Rights.[9] Elsewhere, as in the European Union, for example, critics have focused on the European Court of Justice

[7] In traditional (positivist) social science, for a research design we need a theory, a specific research question (in the form of a hypothesis) embedded into that theory and then the testing of the hypothesis. In contrast to this, grounded theory (or the "discovery of theory from data") is an inductive method where you start with a conceptual frame but without very specific hypotheses, you then analyse your material empirically and you try to build your theory based on the data you acquired. Cf. Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine 1967); Antony Bryant and Kathy Charmaz (eds), *The SAGE Handbook of Grounded Theory* (SAGE 2007).

[8] See the different discourses in each chapter of the present volume.

[9] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Yvonne Tew, 'Originalism at Home and Abroad' (2013) 52 *Columbia Journal of Transnational Law* 780; Danny Nicol, 'Original Intent and the European Convention on Human Rights' (2005) *Public Law* 152.

and its reliance on "teleological" interpretation as a means to expand the remit of EU legislation.[10] The discussion has, of course, touched upon various other questions, such as whether constitutional judges should be encouraged or prohibited to consider foreign legal materials; whether balancing and means-end tests like proportionality represent a legitimate way to adjudicate constitutional disputes;[11] whether judges should make consequentialist or strategic considerations explicit in their opinions, etc.

Poring over the countless monographs, edited volumes and law review articles, what strikes the reader is the overly normative focus of the discussion. Legal scholars, generally, have been focussing almost exclusively on how judges ought to arrive at their decisions.[12] Assuredly, if we conceive of law as a practical discipline continuous with the activity of legal practitioners, this normative focus appears entirely warranted. Aside from providing judges with normative guidance, this scholarship furnishes legal counsels with rhetorical ammunitions in the battle for persuasion that drives courtroom proceedings. Generally missing from this literature, though, is a systematic account of how constitutional judges

[10] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012).

[11] Short explanation for non-lawyers: judicial balancing (*Abwägung, ponderación, mise en balance/conciliation, bilanciamento/ponderazione, mérlegelés*) refers to explicit weighing of competing principles or interests to determine the outcome of a legal case. A distinct kind of balancing judgment is the proportionality test, which occurs when the adjudicator, faced with a law or other measure that impinges on a constitutional right, evaluates (a) whether the aim of the measure is legitimate, (b) whether the measure is suitable to achieve the legitimate aim, (c) whether the measure does not go beyond what is necessary to achieve the aim, and (d) whether the benefit of the measure is not outweighed by the harm caused to the constitutional right (so called "proportionality in the strict sense", which implies a balancing judgment). In the extensive literature on balancing and proportionality, recent contributions include Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73; Grégoire CN Webber, *The Negotiable Constitution. On the Limitation of Rights* (Cambridge University Press 2009); Aharon Barak, *Proportionality. Constitutional Rights and Their Limitations* (Cambridge University Press 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012); Moshe Cohen Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013); Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013); Liora Lazarus, Christopher McCrudden and Niegel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014); Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014).

[12] A remarkable contribution to this particular genre, resting its normative claims largely on comparative considerations, is Vicki C. Jackson, 'Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet' (2008) 26 *Quinnipiac Law Review* 599–670.

do actually justify their decisions. In fact, precisely because of its normative focus, constitutional law scholarship is easily enmeshed in domestic judicial politics. And so the discussion over constitutional reasoning tends to reflect the degree of political polarisation within the legal academy, along with the law professors' ideological predilections and attitudes towards the courts. The result is a literature that is almost as parochial as it is plethoric. Looking only at English-language contributions, we see new normative theories of constitutional interpretation continually adding to an already massive stock.[13] So numerous are the theories spawned by the normative discussion that it may not be entirely exaggerated to say that whatever decision she reaches, a constitutional judge will always find some normative theory to back it. Also, tailored as they are to the expectations and beliefs of their particular domestic audiences, these theories tend to reflect the degree of sophistication of public discourse in the jurisdiction under consideration as well as the controversies surrounding particular local rulings. Sensitivity to local concerns and politics means that the literature differs greatly in diversity, breadth and sophistication from one country to the next, with the consequence that issues regarded as central in one setting are comprehensively ignored in others.[14] A corollary of this state of affairs is that one is unlikely to get a reliable sense of how reasoning practices differ across constitutional systems by simply juxtaposing scholarly contributions from distinct jurisdictions.

Standing in sharp contrast to this cornucopia of normative arguments about constitutional reasoning is the relative paucity of research on the judges' actual reasoning practices. Traditionally, the discipline of comparative law has a more descriptive outlook. Detached, at least in appearance, from the inward-looking and often ideology-driven discussion unfolding in the domestic legal context, comparativists usually take the description of "foreign" law – rather than the advocacy or criticism of specific doctrines – as their primary concern. Early judicial comparativism was especially preoccupied with differences between the Common and Civil Law traditions and how these affected the style, tone and loquaciousness of court opinions. They contrasted the brevity and oracular style of French supreme court opinions with the more discursive approach practiced by

[13] For overviews of normative theories see e.g., Giulio Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context' in Jakab and Kochenov (n 5); Stephen M Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996) 140–191; Cesare Pinelli, 'Il dibattito sull'interpretazione costituzionale tra teoria e giurisprudenza' in *Scritti in memoria di L. Paladin* (Jovene 2004) III, 1671.

[14] For an overview of different national theories of constitutional interpretation, see Marie-Claire Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Economica 2010) 295–314.

US judges.[15] Among the most important contributions to this strand of literature in recent years is the work of the American comparativist Mitchell Lasser.[16] Comparing judicial reasoning of the French *Cour de cassation*, the US Supreme Court and the European Court of Justice, his analysis seeks to cast a wider light on the broader discursive setting in which these judges announce their decisions. He insists that, unlike US Supreme Court opinions, both French supreme court opinions and ECJ decisions are not self-contained documents. Far from standing alone, the opinions issued by these courts are embedded in a larger, less formal discourse developed by reporting judges, advocate generals and legal scholars. Based on careful documentation, his argument challenges the crude opposition between a reputedly rigidly formalist Civil Law style and a Common Law approach supposedly more candid and open to policy considerations – a perspective that long represented the received view within the discipline. While Lasser casts his argument as one about "judicial deliberations" and rests his analysis on mostly non-constitutional cases, his analysis does have implications for our comparative understanding of constitutional argumentation. Not only is the claim that judicial argumentation differs in constitutional cases nowhere to be found in his writing, but he explicitly suggests that what he says about the argumentative practices of the *Cour de cassation* holds in equal measure for the Constitutional Council.[17]

Lasser, to be sure, has not been alone in seeking to cast a wider light on the points of convergence and divergence among legal cultures when it comes to the justification of judicial outcomes. Similar to Lasser, comparative legal scholarship has addressed constitutional reasoning under the more general heading of "reasoning" or "legal reasoning".[18] But fresh

[15] See John Philip Dawson, *The Oracles of the Law* (University of Michigan Law School 1968); Gino Gorla, *Lo stile delle sentenze, ricerca storico-comparativa e testi commentati* (Foro italiano 1968).

[16] Mitchel de S Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004). For a thorough analysis of the conceptual frame and method applied by Lasser, see Nick Huls et al. (eds), *The Legitimacy of Highest Courts' Rulings – Judicial Deliberations and Beyond* (Springer 2009). For earlier carefully designed, but non-quantitative projects on comparative legal reasoning see Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes. A Comparative Study* (Aldershot 1991) and *Interpreting Precedents. A Comparative Analysis* (Ashgate 1997).

[17] Lasser (n 16) 287. On the differences between the styles of the *Cour de cassation* and the *Conseil constitutionnel*, see John Bell, *French Legal Cultures* (Cambridge University Press 2008) 219.

[18] Jaap Hage, 'Legal Reasoning' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 521–537; Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013); PS Atiyah and Robert S Summers, *Form*

research has begun to look specifically at how constitutional reasoning differs across constitutional systems.[19]

Yet, however rich and insightful, the comparative studies that have come out of this line of research present important limitations. Such studies typically consist of loosely assembled country reports looking at half a dozen or more jurisdictions or, alternatively, of tightly-knit narratives but with a characteristically narrow geographical scope. Such an approach is certainly appropriate in the early, exploratory stage of a new field of inquiry when researchers have little clue as to which variables will emerge as important from the comparative study of legal systems that are, by definition, unfamiliar. Rather than devising a detailed questionnaire or an elaborate analytical matrix ex ante, it is then often preferable to allow the important issues to emerge freely from a discussion unimpaired by preconceived ideas. In that regard, it is probably in highlighting the most important unknown unknowns – i.e., the features of a legal system that we may not even anticipate to be relevant – that this early-stage scholarship on constitutional reasoning makes its greatest controbution. Yet, from this baseline, taking the research further requires a methodological upgrade. Argumentative practices can vary significantly across constitutional cases and tend to evolve over time. But variations of this sort are easily overlooked when sweeping claims about the reasoning style of a particular court are based on the analysis of a handful of opinions selected without any explicit methodology. So, there can be little hope of constructing a more accurate picture of the diversity of constitutional reasoning practices throughout the world unless scholars develop a more systematic approach to the comparative study of constitutional opinions.

Some scholars have already begun to take up the methodological challenge. In a pattern that is now familiar in legal scholarship, the first to embrace empirical methods were those with a foot in the social sciences. American political science has a long tradition of empirical research on law and courts.[20] Until recently, though, their work was more or less exclusively concerned with the courts' decisions on the merits and paid

and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (Clarendon 1991); Mario Bessone and Riccardo Guastini (eds), *Materiali per un corso di analisi della giurisprudenza* (Cedam 1994) 361–479.

[19] See e.g. Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006).

[20] Cf. John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press 1995); Herbert M Kritzer, 'Empirical Legal Studies before 1940: A Bibliographic Essay' (2009) 6 *Journal of Empirical Legal Studies* 925.

little attention to judicial reasoning. But things have started to change, and the exclusive focus on case disposition has been gradually displaced by a more comprehensive approach to judicial decision making. There is now a rapidly expanding body of empirical work that seek to map, document and explain (but not justify) the content of judicial opinions. This research has brought a battery of new methods to the study of judicial reasoning. Some political scientists have used game theory to model opinion-writing dynamics on collegial courts[21] and to identify the conditions under which judges are more likely to write vague opinions.[22] Others have applied a technique called "network analysis" to explore patterns of citations to precedents.[23] Yet others have looked at the decision records of federal courts to identify the factors that influence the length of opinions.[24] Still others have gone on to manually code hundreds of US Supreme Court opinions to investigate temporal changes in interpretive regimes.[25] More recent research has deployed computer-based techniques to analyse characteristics such as the use of open-ended language.[26] Political scientists have even made use of plagiarism software to determine the extent to which Supreme Court opinions borrow arguments from the parties' briefs[27] or crib from the text of lower court decisions.[28] While much empirical work has concentrated on US courts, political scientists have begun to look at courts in other regions of the world. Erik Voeten, for one, has analysed citations of previous decisions in the decisions of the European Court of Human Rights.[29] Among other interesting findings,

[21] Jeffrey R Lax and Charles M Cameron, 'Bargaining and Opinion Assignment on the US Supreme Court' (2007) 23 *Journal of Law, Economics, and Organization* 276.

[22] Jeffrey K Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions' (2008) 52 *American Journal of Political Science* 504.

[23] James H Fowler et al. 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court' (2007) 15 *Political Analysis* 324; Yonatan Lupu and Erik Voeten, 'Precedents in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) *British Journal of Political Science* 413.

[24] Lee Epstein, William M Landes and Richard A Posner, 'Why (And When) Judges Dissent: A Theoretical and Empirical Analysis' (2011) 3 *Journal of Legal Analysis* 101.

[25] Nancy Staudt et al. 'Judging Statutes: Interpretive Regimes' (2004) 38 *Loyola of Los Angeles Law Review* 1909.

[26] Rachael K Hinkle et al. 'A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions' (2012) 4 *Journal of Legal Analysis* 407.

[27] Pamela C Corley, 'The Supreme Court and Opinion Content. The Influence of Parties' Briefs' (2008) 61 *Political Research Quarterly* 468.

[28] Pamela C Corley, Paul M Collins and Bryan Calvin, 'Lower Court Influence on U.S. Supreme Court Opinion Content' (2011) 73 *The Journal of Politics* 31.

[29] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.

his study shows that when a case comes from a Common Law jurisdiction (such as the UK or Ireland), the Court takes extra care to embed its decisions in prior case law, with case citations going up by 30 per cent on average. Studies applying similar methods to the European Court of Justice have also started to appear in the pages of European law reviews.[30]

Recently, comparative legal scholars, too, have come to realize that their discipline badly needs a methodological update. In that regard, the volume edited by Tania Groppi and Marie-Claire Ponthoreau on the use of foreign precedents by constitutional judges represents an important contribution to the comparative study of constitutional reasoning.[31] In a spirit very similar to that followed in the present book, their research design mixes qualitative and quantitative approaches to compare citations to foreign judicial decisions across 16 courts. Along with a qualitative, highly contextualized account of judicial practices regarding the use of foreign law, each country report includes results on the number of foreign cases cited. The aggregate figures offer a measure of how prevalent references to foreign cases are in constitutional adjudication. Broken down by jurisdiction cited, they also provide a sense of which courts get the most citations and command the most authority abroad. (These would seem to be, in order of decreasing influence: the US Supreme Court, the Supreme Court of Canada, the South African Constitutional Court and the German Constitutional Court.) The authors use this evidence to discuss a number of hypotheses about the factors – such as a shared language or legal tradition – that appear to either drive or impede citations to foreign case law. Thus, while qualitative analysis remains essential in providing the necessary background information to allow understanding and interpretation of the quantitative indicators, the book demonstrates the potential of quantitative measures to enhance comparability.

Our project follows in these footsteps. More generally, though, we see it as part of a wider empirical shift that is enriching comparative constitutional scholarship. The last few years have seen the emergence of several large-scale research projects that, we are convinced, will forever change the study of constitutional systems. By systematically coding the content of all human rights catalogues enacted since WWII worldwide, Mila Versteeg and David Law have been able to shed light on fascinating trends in the evolution of global constitutionalism. These trends include

[30] Urska Sadl and Sigrid Hink, 'Precedent in the Sui Generis Legal Order: A Mine Run Approach' (2013) 20 *European Law Journal* 544.

[31] Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

the phenomenon of "rights creep" – the fact that an ever larger number of constitutions enshrine an ever larger number of rights – and the rise of "generic" human rights provisions – i.e., standardized rights provisions that now appear in most constitutional charters of the world.[32] More impressive still, the Comparative Constitutions Project has undertaken to assemble data on all constitutions and constitutional amendments since 1789. The result is an incredibly rich database, compiling information on more than 500 indicators over more than two centuries. These data have already served to test a wide range of hypotheses, whether it is the global spread of judicial review, the longevity of constitutions[33] or the incorporation of international law into domestic legal orders.[34] This new scholarship, we believe, points the way to an exciting future for comparative constitutional law. Of course, the emergence of empirical methods will not make the normative (e.g., doctrinal-legal) debates redundant. Questions that are fundamentally normative in nature cannot, by definition, be reduced to empirical ones. Still, empirical approaches potentially represent a great enrichment of the normative discussion. By sharpening our understanding of how constitutional law operates in its global diversity, studies based on empirical social science methods promise to foster a more informed and, we believe, more interesting normative debate.

II What Is Constitutional Reasoning?

This book presupposes that we can identify and compare constitutional reasoning across disparate legal contexts. Such an enterprise is bound to raise, at some point, a problem of definition. What do we mean exactly by "constitutional reasoning"? Does it mean the same in the United States as in Taiwan? In Germany as in the United Kingdom? To start with, we can contrast two senses of the word "reasoning".[35] In a first sense, reasoning refers to the motives and mental processes that lead a decision maker to

[32] David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

[33] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

[34] Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) 1 *University of Illinois Law Review* 201.

[35] For more details on this, with further references to the literature, see the foreword to the Special Issue of *German Law Journal* which served as a prelude to the present project, Arthur Dyevre and András Jakab, 'Foreword: Understanding Constitutional Reasoning' (2013) 14 *German Law Journal* 983.