APPENDIX C: QUESTIONNAIRE FOR COUNTRY REPORTS[1]

Each chapter that analyses a certain jurisdiction is meant to provide a description of the argumentative practices of the Court under consideration on the basis of an in-depth analysis of the Court's 40 selected landmark judgments and the relevant legal, political and academic context. Authors can refer to cases outside of the 40 landmark judgments, if this seems necessary in order to explain the wider context or to show contrasts. The present guidelines are there to ensure comparability and transparency across the Country Reports. Hence it is crucial for the comparative analysis and the validity of the research results that the authors read these guidelines carefully and follow them strictly while writing their chapters.

The answers should form a full-text, self-contained essay. Care should be taken to avoid repetitions and to present the answers in order that appears most relevant and appropriate. Besides the Questionnaire, each author should complete a separate Excel table in light of the analysis of the 40 selected judgments. As far as possible, the questions should be answered in the order given below. Authors may change the structure of the questionnaire and alter the order of sections and paragraphs, but only to the extent that is necessary to improve the readability and logical coherence of the Country Reports.

I. Legal, Political, Institutional and Academic Context

The exposition of the institutional context should not be overly detailed and should be limited to those general aspects or characteristic features that allow for a meaningful comparison with other experiences.

A. Legal and Political Culture as Context for the Constitutional Reasoning

The prevailing legal and political culture, including traditional conceptions of the nature of law, the constitution and the proper role of courts; attitudes and reactions of the other

[1] Updated and edited version of the Questionnaire for the purposes of the present publication. The present structure was borrowed from A Jakab et al, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017). See more about the methodology here, A Jakab, A Dyevre, G Itzkovich, CONREASON – The Comparative Constitutional Reasoning Project. Methodological Dilemmas and Project Design. MTA Law Working Papers. 2015/9.

branches of government towards perceived judicial 'activism'; and the extent to which judges have felt compelled to 'stretch' their constitutional authority in order to deal with problems such as corruption, oppression, injustice and abuse of power. What are the typical implied political philosophical presuppositions (the existence of a pre-legal state or human rights as natural rights) in general and related to the legitimacy of law? What are the usual spoken or unspoken premises about the purpose of the political community and of its constitution?

Are methods of legal reasoning different in ordinary courts? How far do the literature of your system and the judgments themselves consider the extent to which constitutions differ from statutes, and require different methods of interpretation? If there are such differences in practice and/or they are analysed in the literature, how are these differences explained? By the intended longevity of constitutions, their inclusion of broad, abstract terms, or the difficulty of amending them? Are ordinary courts following the judgments of the constitutional court?

B. The Court and Constitutional Litigation

What are the relevant competences (eg abstract review, individual complaint etc) of the court? Who has standing (MPs, ombudsman, ordinary courts, individuals …) to bring a case and under what circumstances can the court choose among the cases brought? Does the court have any discretionary power to refuse to review a case or to select a case for review? How responsive is the Court, how much is it responding to the arguments contained in the petition?

Do other courts have the competence to annul statutes?

Are cases (always, frequently, never) orally argued? Who are the parties to the procedure? Can the State (government organs, authorities, ministries, or the President) or state-owned companies bring a case to the Court? Under what conditions?

Are there any specific (constitutional/statutory) rules about the admissibility of proof/argument in the court? How often are they used? Please provide examples.

What is the workload of the Court (number of cases decided per year, incl. *a limine* rejections for formal reasons or for being obviously unfounded)? How has it varied throughout the years? Are all the decided cases published (what is the percentage of published vs. unpublished cases)?

What kind of judgments does the Court adopt as to their legal nature? Is there a commonly accepted typology of constitutional judgments? (eg, judgments on admissibility/on the merits, 'interpretative judgments', 'warning decisions', etc). What kind of remedies could the Court order as consequence for the unconstitutionality? Are they based on the constitution or on the laws or has the Court derived new means of remedies in its jurisdiction?

How could you characterise the efficiency of the Court's decisions in general terms? Are the decisions of the Court usually respected by other state branches? Have the decisions of the Court been overruled by the legislative or executive? How often has that happened? What is the perception of the academic and professional community on the level of compliance of the decisions of the Court?

C. The Judges

How many members does the Court have? How are the judges selected? Are they elected/appointed for life or for a shorter period? Is there any mechanism pertaining to the removal of individual judges? Has the Court throughout its history with constitutional review been dissolved, or has it gone through dictatorships? If yes, how was the Court affected by this, especially from the point of view of its competences, case load and efficiency?

Are the judges, academics, politicians, judges or other practitioners? Has the ratio of these four groups changed significantly over time?

D. Legal Scholarship and Constitutional Reasoning

Is legal scholarship critical/deferential towards the court? Are the works of law professors (who are not sitting on the Court) perceived to have an impact on the way the Court argues or on the court's jurisprudence? How do you see the prestige of a constitutional court judge compared to that of a constitutional law professor or a litigating lawyer in your system? Can you compare the salaries?

Are there any generally (or at least widely) accepted theories about constitutional reasoning, constitutional interpretation, or legal interpretation (including the ranking of interpretive methods) in general in the country under consideration? If yes, please outline them (two pages max.). Are these theories explicitly mentioned in the judgments? What do you think are the main divisions among the existing theories?

II. Arguments in Constitutional Reasoning

For this part of the Country Report the authors are required to base their analysis on the 40 selected landmark judgments of the Court. Each author should strive to identify the 40 judgments that are perceived, in the legal community broadly defined (ie encompassing judges, law professors and practitioners), as being the Court's most influential ever (both in the scholarly discourse and the legal practice). Authors should also include the separate (dissenting or concurring) opinions of the judgments in the analysis. Note that the Excel table as Appendix is attached as a separate file.

A. The Structure of Constitutional Arguments

What is the usual structure of arguments? What is your assessment of the frequency of use of the following argumentative structures in judicial opinions on constitutional matters:[2]

- One-line conclusive structure: deploying one conclusive argument (or chain of arguments following from one another)?

[2] Abbreviations of these indicators are based on the original terms of the options ('chain structure' as C, 'legs of a chair' as L, and 'dialogic' as D) that were later changed for more clarity.

- Parallel conclusive structure (legs of a chair): cumulative-parallel arguments, i.e. the arguments support a certain legal interpretation independently; every argument would suffice on its own; the reasoning thus resembles the legs of a chair?
- Parallel, individually inconclusive structure: the opinion presents a range of relevant considerations, none of which is really conclusive, yet taken together they indicate a certain way of solution (discursive or dialogic style)?

B. Types of Arguments in Constitutional Reasoning

Which of the following arguments are used (or explicitly rejected) in the 40 opinions? Please do not consider those arguments which are used to interpret statutes or regulations (ie infra-constitutional norms). Please fill in the summary table of the 40 judgments in the attached Excel table on the use of the following arguments:[3]

- Identifying or explicitly discussing the text of the Constitution.
- Applicability of constitutional law (eg, political question doctrine, conventionality control, state-centred arguments in a state of emergency).
- Analogies.
- Ordinary meaning of the words of the Constitution or reference to the 'wording of the Constitution' in general.
- Harmonising arguments (separate domestic harmonising and international/EU harmonising arguments).
- Precedents (former own cases).
- Doctrinal analysis of legal concepts or principles.
- Arguments from silence.
- Teleological/purposive arguments referring to the purpose of the text.
- Teleological/purposive arguments referring to the intention of the Constitution-maker (incl. travaux préparatoires).
- Non-legal (moral, sociological, economic) arguments.
- References to scholarly works.
- References to foreign (national) law.
- Pro homine/pro persona principles.
- Other methods/arguments (explain in the text especially these arguments).

Please also mark those judgments with 'YES' where a certain argument was considered but eventually rejected (eg 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 was rejected altogether or marked as irrelevant or inappropriate

[3] The present terminology and list of interpretive methods were borrowed from Jakab et al (n 1), which is based on the conceptual-doctrinal framework elaborated in A Jakab, 'Constitutional Reasoning. A European Perspective on Judicial Reasoning in Constitutional Courts' (2013) 8 *German Law Journal* 1215–78.

(eg the argument 'we do not consider here moral arguments because it is a court of law' does not count as a non-legal argument).

What are the typical situations in which these arguments are resorted to? Is there any self-reference in the Constitution about how to interpret its provisions?

C. The Overall Weight of the Arguments

What is the result of the analysis on the weight of the arguments? Does the Court usually consider the arguments that it mentions, by connecting them to the final conclusion of the case? Are there any specific doctrine in your country or in the jurisprudence of the Court on how to weight arguments (methods)? If yes, please give illustrations.

Can you identify any pattern regarding the conclusive argument? Which type of argument is usually the ratio decidendi? Is it possible to categorise arguments as auxiliary/secondary (offering only a backup or additional argument for the result which has already been derived from another argument) as opposed to main or primary arguments? Does the weight of a specific argument (eg, literal, purposive argument, or reference to precedents) differ depending on the specific area of constitutional law (human rights vs. power allocation)?

D. Judicial Candour and Judicial Rhetoric

Judges make value judgments while adjudicating cases, but to what extent are these value judgments acknowledged in their opinions? Do you see a correlation between opinion length and the judges' degree of candour?

Do the opinions deal with possible counterarguments (and/or the arguments of the parties, if there are parties to the procedure; and/or from legal scholars, even if not referring to them explicitly)?

How technical is the language used by the opinion writers? Is it understandable for non-lawyers and/or for lawyers not specialised in constitutional law?

Who are the target audience of the reasoning of the judgment? Courts? Parties in the proceedings? Lawyers? Politicians? General public? Law students? Academic constitutional lawyers? Judges of the same court? Foreign or international courts (aiming at judicial dialogue)? Please weigh the relevance of the audiences.

What is the degree of generalisation? Do judgments concentrate on the very specific issue to be decided or are they trying to develop a general conceptual frame and/or principle for future cases?

What is the degree of rhetoric? Do you find (legally irrelevant) political and/or emotional language in the text of judgments?

E. Length, Dissenting and Concurring Opinions

Does the length of the opinions show any correlation with the topic? Has it been growing by time or not? Are there any other factors influencing it (eg changes in political power, changes in constitutional text, changes in the personnel of the court)?

Is it possible to submit dissenting or concurring opinions? If yes, then how often does it happen? On what does it depend, whether there are dissenting and concurring opinions to a judgment? Are there any factors (the nature of the topic, changes in political power, changes in constitutional text, changes in the personnel of the court) that make it more it likely?

F. Framing of Constitutional Issues

Can you see any typical ways of characterising constitutional issues (eg as procedural/due process issue rather than as fundamental rights issue)?

Have there been changes over time in the way constitutional cases are conceptualised?

G. Key Concepts

Taking a broader look at the Court's jurisprudence and argumentative practices, how frequently, if ever, does it make use of the following concepts (please give a definition only where a constitutional lawyer with a general basic knowledge of comparative law might be surprised: the purpose is not to analyse any concept, but only to avoid misunderstandings when comparing with other countries):

- Rule of law (incl. 'separation of powers', 'primacy of the constitution', 'legality', 'legal certainty').
- Judicial independence.
- Democracy (incl. sovereignty of the people).
- Sovereignty ('international independence', 'state' or 'statehood').
- State form ('monarchy', 'republic').
- Government system by procedural structure (focusing on the different aspects of presidentialism, but containing the parliamentary system as well).
- Government system by power structure ('regionalism', 'autonomous regions', 'devolution', 'autonomy of local governments', 'subsidiarity).
- Secularism (or the separation of state and church).
- Nation (civic, ethnic or a mixture, plurinationalism).
- Proportionality.
- Core of constitutional rights (Wesensgehalt, of competences or of fundamental rights).
- Human dignity.
- Equality (or non-discrimination).
- Basic procedural rights (incl. 'due process' and 'presumption of innocence', but excl. procedure of law making).
- Freedom of expression.
- Rights to privacy (right to privacy, data protection).

- Post-material values (quality of life over material and physical aspects, like happiness, trust, ecology, civic culture).
- Justice (both corrective and distributive).
- Custom (as constitutional culture, customs of law).
- Family (legal, cultural, economic or social aspects of family).
- Transition (democratic transition or structural transition of legal or cultural institutions).
- Economic, social, cultural and environmental rights (women, indigenous people, ethnic minorities, refugees, rights of nature).
- Mechanisms of political control (corruption, good government, efficiency).
- Judicial activism.

Are there any further key concepts widely used by the Court? If yes, which ones and how are they defined? Are there are other peculiarities in constitutional terminology which could be surprising to foreign constitutional lawyers (max. one page)?

Are the key constitutional concepts spelled out in the constitutional text(s) (respectively in the text of the founding treaty)? Are the key concepts somehow derived from higher ranked constitutional provisions (Infinity clauses or alike)?

Are they used in an operative manner in the sense of triggering specific legal consequences, or are they essentially deployed as rhetorical device? Has the frequency of use of any of these concepts changed throughout the years? If yes, what would be the most plausible explanation?

III. Comparative Perspective

(*Authors should write this part after having read the first drafts of the other country reports, thus after our workshop in 11–12 June 2020.*)

Can you see any major differences in the applied key concepts, typical arguments etc as compared to the other countries as seen in the country reports? How can this be explained?

Please also consider: (1) the possible correlation between procedural aspects of constitutional review and the style of reasoning, (2) differences in political theory in the countries (relative roles of courts and legislature), (3) differences in legal culture, including legal theory, and (4) differences in personnel (including training and background) for explaining the differences in constitutional reasoning.

Hypotheses to be tested: (1) 'Without a full posterior constitutional review and a great amount of cases, the conceptual sophistication in constitutional law remains underdeveloped', (2) 'The older the Constitution is and the more difficult it is to amend it, the more likely the judges are to use purposive arguments instead of literal arguments', (3) 'The more academics are sitting in a court, the longer and more detailed the judgments/the more abstract the judgments/the more references to academic literature', (4) 'The closer the case in time to the dictatorial past, the more likely for it to use creative means of interpretation and extend its powers', (6) 'The closer to the contemporary times, the more likely that Courts would use foreign legal sources from Latin America'.

As a conclusion, list a handful of important general unwritten premises (implied presuppositions) that you think a foreign lawyer needs to know to understand a judgment of your constitutional court, for instance, 'the Constitution says something about every single legal case', 'constitutional law should only be considered, if it is an important political issue'.

IV. Evaluation, Pathology and Criticism

What features of the argumentative practices of the Court in your country do you consider to be pathological? Highly subject to criticism? For example, do judges manipulate constitutional language? Do they make bad arguments of a given type? What else? Or the opposite: do you see any exemplary elements which other countries should consider borrowing? How common are these? How would you summarise and explain the results of the indicators on the impact and quality of the Court's reasoning?

The authors are invited to conclude their chapters with some overall critical observations, on issues such as whether the courts have been either too legalistic or too creative, and the contribution they have made to their societies.