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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**Preliminary Report
on the composition of Constitutional Courts**

Preliminary Report on the Composition of Constitutional Courts

At its 23rd plenary meeting (May 1995), the Venice Commission decided to undertake a study on the composition of Constitutional Courts. The purpose of the study is to identify - beyond a simple description of rules governing composition - the techniques employed by constitutional laws to ensure and maintain the representation and balance of different political and legal tendencies within constitutional courts. At its 25th plenary meeting (November 1995), the Commission adopted a first version of the Questionnaire on the Composition of Constitutional Courts CDL (95) 15. Given the fact that some questions involved an evaluation of the established practice, it was decided that the questionnaire would be directed to the members of the Commission rather than to the liaison officers at the various constitutional courts. A final version of the questionnaire was prepared in May 1996 (CDL-JU (96) 5) and sent out to the members of the Commission.

On the basis of information available from the Documentation Centre on Constitutional Justice, and with the assistance of liaison officers and Commission members, the Secretariat had prepared a preliminary information note in the form of synoptic tables on the composition of constitutional courts (CDL-JU (96) 8). The information presented in the tables relates to the appointment of constitutional judges, eligibility criteria, term of office, incompatible concurrent offices, and dismissal. This information was to be supplemented by the responses to the questionnaire.

It was acknowledged that a comparative analysis of the information provided would only serve a limited purpose if the powers exercised by the various courts differ. As a consequence, this report distinguishes between constitutional courts *proper* from superior courts which exercise ordinary jurisdiction. Basic differences in composition may generally be observed between these two types of court.

Although the questionnaires received so far¹ do not yet allow for an overall picture, especially as several of the 'older' constitutional courts are not yet covered, some trends may be distinguished:²

¹ These are Albania, *Argentina*, Armenia, Bulgaria, *Canada*, *Finland*, France, Germany, *Ireland*, *Japan*, Latvia, Lithuania, "The Former Yugoslav Republic of Macedonia", *Norway*, Portugal, Romania, Russia, Slovakia, *Switzerland*, Turkey, see document CDL-JU (97) 4.

² The above report is based almost entirely on the responses to the Questionnaire on the Composition of Constitutional Courts. The degree of detail provided varied greatly from answer to answer. In some cases, information beyond the scope of the questions was volunteered, which the Secretariat found relevant and included in its survey. Therefore, it may well be that a phenomenon or tendency actually applies to more countries than appear in the lists provided, but that the necessary information had not been supplied for the missing country to be included. The Secretariat has tried to avoid such omissions as far as possible and asks the contributors to inform the Secretariat of any serious omissions which may appear from the text of the commentary above or of the Table on the Composition of Constitutional Courts (CDL-JU (97) 9).

Eligibility for appointment as a constitutional judge

As expected, several answers differ according to whether the court in question is a Constitutional Court proper or a Supreme Court exercising *inter alia* constitutional jurisdiction. This is particularly true for the appointment requirements, whereby Supreme Courts are always made up of lawyers (*Argentina, Canada, Ireland, Japan, Norway*).³ A minor exception is the *Finnish* Supreme Court, in which generals or engineers are members of the Court in cases concerning court martials or water rights and patent cases respectively. Another exception is *Switzerland's* Federal Court (being the final stage of appeal for ordinary jurisdiction), which does not require its judges to have had a legal education. However, only on rare occasions will a judge not be a lawyer.

The general preference for lawyers may be observed in many Constitutional Courts as well (Albania, Bulgaria, Germany, Latvia, Lithuania, Portugal, Romania, Russia, Slovakia, "The Former Yugoslav Republic of Macedonia"). At least some Constitutional Courts, however, expressly allow for non-lawyers to become members of the Court in order to take political and social issues into account (Armenia, France, Turkey). In practice, however, these courts are largely made up of lawyers.

Where legal qualifications are required, the kind of experience expected varies from long-standing service in the judiciary (Albania) to experience in any kind of legal profession (*Argentina, Bulgaria, Canada, Finland, Latvia, Lithuania, Norway, Romania, Russia, Slovakia, "The Former Yugoslav Republic of Macedonia"*). Some countries have a quota of recruitment from the judiciary (Germany, Portugal), or a requirement that the candidate have either judicial experience or legal professional experience, whereby the years of experience required are generally fewer for judges than for other lawyers (*Ireland, Japan*).

Evaluation of the eligibility requirements

On the whole, the eligibility requirements for constitutional judges were seen as appropriate and effective (Albania, Bulgaria, *Canada, Finland, France, Ireland, Japan, Lithuania, Romania, Slovakia, Switzerland*). Only in Armenia, Bulgaria⁴ and Russia was general dissatisfaction with the system voiced.

³ The names of countries which do not have Constitutional Courts are shown in *italics* in order to highlight this jurisdictional difference within a given group of countries to which a phenomenon applies.

⁴ Differing opinions were provided by the two Bulgarian contributors on this point.

Appointing authorities

It is very often the case that Parliament and the President each have the right to nominate a certain number of judges (Albania, Armenia, Bulgaria, France, Latvia, Lithuania, Romania, Russia, "The Former Yugoslav Republic of Macedonia"). At times the appointments are made exclusively by the Executive branch (*Canada, Finland, Ireland, Norway, Turkey*), though the decisions will often involve a consultation of other authorities. Sometimes the appointments are made pursuant to an agreement between the Executive and Legislative branches (*Argentina, Slovakia*). And some judges are nominated by the Court itself or a Board made up of higher courts (Bulgaria, Lithuania, Portugal). In Portugal, for example, ten out of thirteen judges are elected by Parliament with a two-thirds majority, whereas the three remaining judges are co-opted by the first ten judges. This constitutes an element of self-completion by the Court. In some cases it is only one or both of the chambers of Parliament which are involved in the selection (Germany, *Japan, Latvia, Switzerland*), but other authorities will often play a part by supplying Parliament with their nominations.

Aims of appointment procedure

One of the primary aims of the appointment procedure is often to ensure the independence of the Court from political influences (Albania, *Argentina, Bulgaria, Canada, Lithuania, Norway, Portugal, Russia, Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey*), despite the fact that political institutions may have the power to make nominations and appointments. A similar aim is pursued in striving towards a balance of political and legal tendencies within the Court (Bulgaria, Portugal, Romania, *Switzerland*). In the case of Slovakia's and Lithuania's Constitutional Courts, this aim was only recognised indirectly from the appointment procedure. Court composition in other countries, however, is not (at least not *explicitly*) geared towards a political or legal balance (Albania, *Argentina, Finland, France, Germany, Ireland, Japan, Latvia, Norway, Russia, Switzerland, Turkey*). Those countries which *expressly* deny the relevance of political influences to the aims of the appointment procedure (*Argentina, Canada, Finland, France, Ireland, Japan, Norway, Russia*) for the most part represent the Supreme Court variety. A fair balance between the executive and the legislature can be pursued by giving the latter a slight preponderance in the number of judges it has to nominate (Armenia).

Evaluation of the appointment procedure

Contributors' appraisals of the appointment procedure were mainly positive (Armenia, Bulgaria, *Canada, Finland, Germany, Japan, Lithuania, Portugal, Romania, Russia, Slovakia, Switzerland, "The Former Yugoslav Republic of Macedonia"*), even though the balance achieved was not necessarily perceived to be a product of legislative intent (Germany). On the other hand, some contributors identified a power imbalance (Albania, Bulgaria⁵), particularly in

⁵ The opinions of the two contributors from Bulgaria differed on this point.

the event of an over-representation of a party within the group of nominating authorities (France). The *Norwegian* government has recently appointed a commission to analyse the problems inherent in the appointment procedure.

Representation of minority groups

The representation of minority groups on the bench seems not to be a common goal. This may depend upon a number of factors, such as the size and status of these groups in the country in question. Several contributors stated that minorities do not present a problem or that their discrimination is prevented by other means; therefore, no provision is made for their representation (*Argentina*, *Armenia*, *Bulgaria*, *France*, *Slovakia*).

Linguistic differences form the principal exception to this trend. *Switzerland* and *Canada*, being countries which have more than one official language, cater for linguistic differences *de jure*. In the case of *Switzerland*, the proportionate representation of linguistic differences must be by native speakers. Apart from this legal requirement, the judges will *de facto* have a passive knowledge of the other two official languages. In *Finland*, a *de facto* representation of Swedish and Finnish linguistic groups is strived for.

Apart from the requirement that *Canada's* Supreme Court judges be largely bilingual, they must also represent a mixture of common law and civil (ie continental) law jurisdictions (this combination is particularly significant for private law). Three judges must come from Quebec and be of civil law training, whereas the remaining 6 judges must have a common law training. *De facto* the representation is also of the various provinces, the common law quota being distributed among Ontario (3 judges), the Western provinces (2 judges) and the Eastern coastal provinces (1 judge). In *Russia*, too, 2 of the 19 judges belong to constituent nations other than Russian.

De facto ethnic minority representation on the Court was also observed in "The Former Yugoslav Republic of Macedonia" (3 out of 9 judges) and *Lithuania* (1 out of 9 judges).

The representation of women on the Court is also worthy of note. Although they do not form a minority group, several contributors mention women in this context for obvious reasons. Although no female quota was observed as a legal requirement, a *de facto* representation of women on the Court was observed in the case of *Armenia* and *Lithuania* (each having 1 female judge out of 9), *Germany* (5 female judges out of 16). A gender balance is also strived for in *Finland*, though the lack of experienced female candidates presents a problem.

The *de facto* representations outlined above are arguably the mere product of the differences themselves, rather than of an effort to afford a balanced and truly representative Court composition. This point was made by the French contributor, who, in particular, commented on the French Constitutional Council's tradition of having at least one protestant on the bench, adding that such group representations surely happen by chance and not design (the Romanian contributor echoed this view). In *Ireland* there is also the practice of ensuring the presence of one non-Catholic on the Supreme Court, and in *Germany* a *de facto* Protestant and Catholic balance is traditionally achieved.

Appointment of the President of the Court

Two main modes of selection of the President or Chief Justice of the Court may generally be observed. On the one hand, there is the internal ballot by the judges themselves who elect a President from among their number (Albania, *Argentina*, Bulgaria, Portugal, Romania, Russia, "The Former Yugoslav Republic of Macedonia", Turkey). An absolute majority is normally required, but in some cases there must be a two-thirds majority (Portugal).

On the other hand, there is the election of a President of the Court either by Parliament (Germany (power alternates between the Federal Council and the Federal Diet), Lithuania, *Switzerland*) or by the country's Head of State (*Canada* (Prime Minister), *Finland*, France, *Ireland*, *Japan*, *Norway*, Slovakia).

In Armenia, the Parliament has the principal power to appoint a President of the Court, and if it fails to do so, the power devolves upon the President of Armenia. Another "mixed form" is the Romanian one, which allows the Romanian President to select a President of the Court from among the three nominations made by the Court members themselves.

The office of Chief Justice of the Supreme Court of *Canada* alternates between a franco-phone civil lawyer and an anglo-phone common lawyer.

Term of office, re-election and dismissal of the President of the Court

Although details of the President's term of office or the possibility of his or her being re-elected or dismissed were not specifically requested for the Questionnaire, this information was nevertheless provided in a number of responses. A brief comment on this information follows.

The presidential term ranges from 2 years (*Switzerland*), to 3 years (Albania, Romania, Russia, "The Former Yugoslav Republic of Macedonia") to 4 years (Turkey) and sometimes with the right of re-election (Albania, Russia, Turkey). The President may sometimes be dismissed early from the presidential office, eg by secret ballot on the initiative of at least five judges and by a two-thirds majority of the 19 judges (Russia).

Functions of the President of the Court

The President of a Constitutional Court is usually *primus inter pares*, merely presiding over the Court, and not exercising any higher jurisdictional function (Albania, *Argentina, Canada, Finland, Germany, Ireland, Japan, Portugal, Switzerland*), with the occasional exception of crucial issues of competence (Germany). *Ex officio* functions may also be observed on occasion, eg as advisory to, or co-representative of, the President of the State in case of absence, death or incapacitation (*Ireland*), or as depository of applications for the position of the President of State or as presiding over meetings to review the validity of the President of State's election (Portugal). The President will sometimes have the casting vote in case of a tie (France), or will have the power to instruct the other judges on the cases to be examined (Armenia, Lithuania, Romania, Russia), by eg distributing the cases to be dealt with individually by one of the judges as rapporteur (France). For some Courts the President will even be in charge of disciplinary action against the other constitutional judges (Slovakia).

The function of representative of the Court, either in its domestic or its external affairs, was also noted on numerous occasions (Armenia, *Finland, France, Germany, Portugal, Romania, Russia, "The Former Yugoslav Republic of Macedonia", Turkey*).

The President will often see to the administration or organisation of the Court's activities (Armenia, *Canada, Finland, France, Germany, Ireland, Japan, Lithuania, Norway, Portugal, Romania, Russia, Slovakia, Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey*).

Offices incompatible with that of a constitutional judge

Constitutional judges are usually not allowed to hold another office concurrently. The limits range from a blanket incompatibility with any other public or private activity (*Argentina, Bulgaria, Canada, Ireland, "The Former Yugoslav Republic of Macedonia", Turkey*) except occasional expertise with the Court's permission (*Switzerland*), University teaching (Armenia, Germany, Lithuania, Portugal, Romania, Russia, Slovakia), legal research (Armenia, Portugal, Russia, Slovakia) or creative activities (Armenia, Lithuania, Russia), and sometimes no remuneration for these exceptional activities is allowed (Portugal, *Switzerland*). Members of the Supreme Court of *Japan* may only hold another salaried position if the Court gives them permission. Armenian constitutional judges may not hold a public office or exercise an activity that could be detrimental to a judge's independence or impartiality. In some cases the only incompatibility is with the office of Member of Parliament (*Finland*) or with any public office (France). One criticism of strict incompatibility requirements was that they tend to produce a court composition of *retiring* members of society (France).

Membership to a political party is not usually allowed (Albania, *Canada, Romania, Russia, Slovakia, Turkey*), or at least no active participation in one is permissible (*Argentina, Armenia, Finland, France, Ireland, Japan, Lithuania*). However, past political involvement is often permissible (Armenia, *Ireland, "The Former Yugoslav Republic of Macedonia", Turkey*). Sometimes there is only a bar from taking an executive, leading or professional role in a

political party (Germany, Portugal), but even then judges must show some restraint. Cases of no incompatibility with membership to a political party are rare (*Norway, Switzerland*), and political involvement by such judges is unlikely to come about, since this would be inappropriate.

The age limit for the office of constitutional judge

The maximum age of constitutional judges ranges from 65 (Turkey), to 67 (*Finland*), to 68 (Germany, *Switzerland*), to 70 (Armenia, *Ireland, Japan, Latvia, Norway, Russia*), to 75 (*Argentina, Canada*) and to no limit at all (Albania, Bulgaria, Lithuania, Portugal, Romania, Slovakia, "The Former Yugoslav Republic of Macedonia").

Terms of office and re-election of judges: aims

Only a few contributors identified an aim to establish a certain balance of representation from their Court's rules on terms of office and on the possibility of re-election to office (Albania, Armenia, Lithuania). For other Courts, simply a good turnover of judges was aimed at and achieved (*Canada*), but by no means was a *political* balance aimed at (*Canada, Finland*). Some identified freedom of thought or the independence of the judges as the primary aim (France, Lithuania, Romania), especially considering the additional possibility of delivering dissenting judgments (Germany). In particular, re-election for another 6-year term at the *Swiss* Federal Court is automatic, thereby ensuring the independence of judges. Others still, did not identify any aim at a balance of representation from the rules (*Norway, Portugal, Russia, Slovakia, Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey*). Romania also identified from its Court's rules the aim to avoid the risk of the Court's excessive ageing.

Constitutional judges' immunity

Most courts surveyed reserve immunity from prosecution of their members (Albania, *Argentina, Armenia, Bulgaria, Lithuania, Portugal, Romania, Russia, Slovakia, Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey*), except perhaps where the judge is caught at the scene of a crime (Russia) or where a serious crime attracting a heavy prison sentence is involved (Turkey). In Lithuania, this blanket immunity is afforded to judges even in a state of war or emergency. Some constitutional judges do not enjoy criminal immunity (*Canada, Ireland*).

Judicial immunity may normally be lifted by the Court itself (Albania, Armenia, Bulgaria, Lithuania, Portugal, Russia, Slovakia, *Switzerland, "The Former Yugoslav Republic of Macedonia", Turkey*) and sometimes only by application of the Attorney-General to the Court (Bulgaria, Lithuania). Other authorities with the power to revoke a judge's immunity are the Council of the Judiciary (*Canada*), the High Court of Impeachment by application of the Chancellor of Justice or the Parliamentary Ombudsman (*Finland*), the Lower House of Parliament (*Argentina*), or a Permanent bureau of the authority which originally appointed the judge in question, and only by application of the Attorney-General (Romania).

In several jurisdictions no special provision is made for judicial immunity (*Finland, France, Germany, Japan, Latvia, Norway*). In *Norway*, judges may be sentenced by ordinary courts, whereas in Lithuania, if the personal immunity has been lifted, the Supreme Court hears criminal cases against members of the Constitutional Court.

Dismissal

The possible reasons for the dismissal of a judge will vary considerably from one jurisdiction to another. In general, the more dishonourable the reasons for dismissal, the more stringent the procedural requirements for dismissal, and normally it is only possible to dismiss a judge for very serious reasons. One example is Germany's Federal Constitutional Court, the members of which may only be dismissed by a two-thirds majority of the Court and only on the grounds of dishonourable conduct or a prison sentence exceeding six months. Rather than give a detailed account of the pre-requisites of dismissal for each jurisdiction, the following will canvass the various authorities responsible for dismissal.

The dismissal of a judge by an authority other than the Court itself is impossible in most jurisdictions (*Albania, Bulgaria, Germany, Latvia, Portugal, Romania, Switzerland, Turkey*). In some jurisdictions, it is the Court that makes the preliminary decision to revoke a judge's powers, then the final decision to dismiss must come from the relevant nominating authority (*Armenia, Slovakia, "The Former Yugoslav Republic of Macedonia"*). In some responses the dismissing authority was the Lower House (*Lithuania*); the Senate upon an accusation by the Lower House (*Argentina*); either the Lower House or the Senate (*Canada*); either by absolute majority of the Court or upon the Court's proposal to the Council of Ministers (*France*).

Following a resolution by each House of Parliament calling for a judge's removal, the President of State may dismiss a judge (*Ireland*).

Impeachment proceedings are also a method of dismissal (*Finland, Japan, Lithuania*). In *Japan*, the Impeachment Court is composed of Members of Parliament.

In several jurisdictions the dismissing authority will depend on the reasons for a judge's dismissal. In *Finland*, the power to dismiss will lie with an impeachment court in cases of serious misconduct, and with either the Court itself or with the Supreme Administrative Court for illness or incapacity. In *Russia*, the Constitutional Court is responsible for dismissals for loss of eligibility requirements, on the basis of a criminal conviction, for failure to fulfil duties or for incapacity, whereas the Federation Council - upon the proposal of a two-thirds majority of the Court - is responsible for dismissal in cases of violation of the appointment procedure or where a judge has committed a dishonourable act.

In *Norway*, the judges of the Supreme Court may be dismissed by the ordinary courts.

There were no cases of dismissal registered in the responses.

Relationship between composition and powers exercised

The responses on the extent to which composition is attributable to competencies varied according to the type and degree of jurisdiction exercised by the Court in question. On the one hand, there are the constitutional courts, exercising special constitutional jurisdiction (Albania, Armenia, Bulgaria, France, Germany, Latvia, Lithuania, Portugal, Romania, Russia, Slovakia, "The Former Yugoslav Republic of Macedonia"). On the other hand, there are the Supreme Courts, that is the final appellate courts which exercise ordinary jurisdiction (*Argentina, Canada, Finland, Ireland, Japan, Norway, Switzerland*).⁶ Turkey's Constitutional Court only has constitutional jurisdiction, unless it acts in its capacity as Supreme Court.

Although a general distinction between the two types of Court may be made, a considerable range of different levels of competencies will become evident upon closer examination. Thus, for example, the powers of a Constitutional Court proper may be limited by the fact that it can only exercise constitutional control by judicial review of laws *before* they are finally passed and proclaimed by Parliament (France) or by the fact that citizens cannot appeal directly to the Court (Bulgaria, France), as opposed, for example, to the German Federal Constitutional Court, which is not limited by either of these factors, but, as a consequence, has a considerable backlog of cases.

Similarly, significant differences in judicial discretion among the Supreme Court jurisdictional species may be observed, notably in the case of *Finland*, where the Supreme Court may only exercise *a priori* constitutional control of legislation. In fact, it shares, as it were, the constitutional competence with the Parliamentary Constitutional Committee, which also applies preventive measures of constitutional control.

Only in a selection of responses was a direct causal connection identified between the rules of composition and the powers exercised by the court in question (Albania, Lithuania, Romania, Turkey), and in particular with respect to the number Court members (*Argentina, Russia*), the status of its members (*Canada*) or the qualifications required of judges (Armenia, Germany). A connection was observed on several occasions between an aspect of the court's composition and the number of cases it hears (Germany, *Ireland, Portugal, Switzerland*). The requirement of leave to appeal was also identified as stemming from the need to control or reduce the Court's workload (*Finland, Germany*).

In some cases no correlation between powers and composition requirements could be identified definitely (*Norway, Slovakia*).

⁶ Wherever this information was missing from the responses to the questionnaire, it was taken from the Venice Commission's *Bulletin on Constitutional Case-Law, Special Edition 94*.

**Constitutional judges' wish for improvement in their status
or in the functioning of the Court.**

Of the responses which provided information on constitutional judges' criticisms, some indicated the judges' wish for improvement in their status (Armenia, *Finland*, Lithuania, Romania), but most criticism was directed at the functioning of the Court (*Finland*, France, *Switzerland*), calling, in particular, for reform of the Court's statute (Albania, Russia), for their decision-making powers to be widened (Romania, Slovakia), for the appointment procedure to be made more workable (Portugal), or for the problem of their workload to be solved (*Argentina*, Germany, *Ireland*). In Argentina there is talk of instituting a Constitutional Court with exclusive constitutional jurisdiction. However, this would require a reform of the constitution.