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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Revised Report on the composition of Constitutional Courts

Revised 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 also exercise ordinary jurisdiction. Basic differences in composition may generally be observed between these two types of court.

Responses were obtained from 34 countries.[1] The differences and similarities among them allowed

[1] These are Albania, *Argentina*, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, *Canada*, Croatia, Czech Republic, *Estonia*, *Finland*, France, Georgia, Germany, Hungary, *Ireland*, Italy, *Japan*, Latvia, Liechtenstein, Lithuania, *Norway*, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, *Sweden*, *Switzerland*, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine (see document CDL-JU (97) ***). A shortlist of 'core countries' with a significant constitutional history was drawn up as the minimum basis of the study. Submissions have been received from all of these core countries except Belgium. Countries in *italics* are those which do not have a Constitutional Court proper; this is done in order to highlight this jurisdictional difference within a given group of countries to which a phenomenon applies. Note, however, that *Estonia*'s Constitutional Review Chamber is a Chamber within the Supreme Court. The Constitutional Courts of Azerbaijan and Bosnia and Herzegovina are not yet established to date. Some courts have only very recently been established, as in the case of Latvia and Ukraine. *Finland* and *Sweden* both have two supreme jurisdictions: a Supreme Court and a Supreme Administrative Court, which share constitutional jurisdiction. Wherever information on jurisdiction was missing from the responses to the questionnaire, it was taken either from the Venice Commission's Bulletin on Constitutional Case-Law, Special Edition vols 1-3, and from material for the forthcoming volume.

the following trends to be recognized:[2]

Appointing authorities

There are generally two main systems of judicial appointment, plus the most common, which is a hybrid of the two. The first is the **direct appointment** system, which does not involve any voting procedure (*Canada*, *Finland*, France, *Ireland*, Lithuania, *Norway*, *Sweden*, Turkey).

This category may be subdivided into one group in which the appointing authority has virtually complete discretion to appoint (France, Lithuania, Turkey, *Canada*), and another group in which the appointing authority must take particular proposals into account (*Finland*, *Ireland*, *Sweden*). As for the first group, in France the appointments are simply shared equally between the three Presidents of the Republic, the Senate and the Lower House. Likewise in Lithuania between the three Presidents of the Republic, of Parliament and of the Supreme Court. The President of Turkey makes the judicial appointments, but on the basis of specific quotas from particular pools of professions. The common law systems typically involve a rubber stamp appointment pursuant to an executive nomination (*Canada*), so they would normally belong to the first group.

However, *Ireland* has a Judicial Appointments Advisory Board whose recommendations are taken into account.[3] As for other members of this second group, in *Finland* the Court itself makes the nominations, then the President of the Republic appoints new judges after consulting the Minister of Justice and the Council of Ministers. In *Sweden* the government appoints the judges on the proposal of the Minister of Justice. In some cases it was not clear whether the appointing authority retained much discretion (*Norway*).

The second system is the **elective** system, which in principle has more democratic legitimacy.

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[2] The present 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 one answer to another. In some cases, information beyond the scope of the questions was volunteered, which was found relevant and included in this 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. Such omissions have been avoided as far as possible and the contributors are asked to inform the Secretariat of any serious omissions which may appear from the text of the commentary above or of the revised Table on the Composition of Constitutional Courts (CDL-JU (97) ***).

[3] In fact, if the Government decides to appoint a candidate who was not recommended by the Board, it must make this known.

The electing authority is most often the House of Representatives (Azerbaijan, Hungary, Latvia, Liechtenstein, Portugal, Slovenia, "the former Yugoslav Republic of Macedonia") or both Houses of Parliament (Germany) are a Joint Sitting of the two (Switzerland). In the case of Germany, the Bundestag only elects its half of the judges indirectly through its Judicial Selection Committee, which is, however, a proportional representation of the Bundestag members. Another particular example is Portugal, where ten out of thirteen judges are elected by Parliament, whereas the three remaining judges are co-opted by the first ten judges. This constitutes an element of self-completion by the Court.

The most obvious difference among elective systems is the variety of authorities which have the task of proposing candidates for election. The proposals may come from the President (Azerbaijan, Slovenia), the Upper House (Croatia), a mixture of Parliament, the Executive and either the supreme judiciary (Latvia) or judicial council ("the former Yugoslav Republic of Macedonia") or proposals may simply be made by political parties in Parliament (Liechtenstein). In the case of *Estonia*, the President makes the proposal for the Chief Justice, then the Chief Justice makes the proposals for the remaining justices.

There is also the important issue of the degree of influence exerted by the proposals of candidates for election. That is to say, do the proposals of candidates essentially already determine the outcome of the election, or is there a real element of choice in the election process? This issue was generally not clear from the answers to the Questionnaire.

The third system is the **hybrid** between election and direct appointment, which is the most common, though it appears in many variations and sometimes in the guise of a direct appointment system which simply rubber stamps proposals from both an elective and an appointment component (Austria[4], Spain). In some systems the elective component may be equal in weight to the appointment one (Austria) but usually the elective component will be predominant (Albania, Armenia, Romania, Spain).

In the hybrid category, nominating authorities such as judicial authorities or boards may also perform a direct appointing function (Bosnia and Herzegovina,[5] Bulgaria, Georgia, Italy, Ukraine). These cases will typically involve a three-way split between an executive appointing authority, an elective authority and the judicial authority.

A second variant is a nomination-style which is, however, subject to approval by an electing authority (*Argentina*, Czech Republic, *Japan*, Russian Federation). A similar style is one in which

[4] Though there may be exceptions to the convention of rubber-stamping proposals, such as happened in Austria, when the President diverged from the expected practice of appointing the first of the three proposals by choosing the second.

[5] Though here this role is performed by the President of the European Court of Human Rights after consulting the Presidency of the Republic of Bosnia and Herzegovina.

the elective authority narrows down the short-list of candidates, from which the appointing authority may then choose (Slovakia).

Aims of appointment procedure

One of the primary aims of the appointment procedure is usually to ensure the independence of the Court from political influences (Albania, *Argentina*, Bulgaria, *Canada*, Hungary, Italy, 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. Another common aim mentioned was the recruitment of a competent and/or experienced body of judges (Austria, *Estonia*, Germany, Hungary, Latvia, Lithuania, *Norway*, Portugal, Russia, "the former Yugoslav Republic of Macedonia"), or that the Court itself and its administration of justice be balanced and legitimate (*Japan*, Romania, Spain). In Germany one aim is to ensure the democratic legitimacy of judicial elections.

The appointment procedures of the majority of countries surveyed make no provision for political representation. In *Canada* the relevance of political influences to the aims of the appointment procedure was even expressly denied. On the other hand some systems do strive towards a balance of political representation on the Court (Hungary, Italy, Portugal, *Switzerland*). This aim is seen as pursued in practice (Austria, Slovenia, *Switzerland*) or indirectly (Lithuania, Slovakia), eg through the lack of requiring the highest past professional accomplishments, thereby allowing for the consideration of competent candidates who may have been precluded from advancing in their career due to their politics (Czech Republic).

In some cases, legal tendencies are sought to be represented within the Court (Bulgaria, Portugal, Romania, *Switzerland*).

The representation of various legal professions was seen as an aim of the appointment procedure (Austria, Spain, Sweden, *Switzerland*), or that there be at least *some* representation of lawyers on the bench (Liechtenstein).

In Armenia, a fair balance between the executive and the legislature is pursued by giving the latter a slight preponderance in the number of judges it has to appoint. In some countries the appointment procedure is aimed at reflecting the three branches of state power (Romania, Spain), whereas in Georgia the power is geared at an *equal* balance among the branches.

Contributors' appraisals of the appointment procedure were mostly positive (Armenia, Bulgaria, *Canada*, Czech Republic, *Finland*, Georgia, Germany, *Japan*, Lithuania, Portugal, Romania, Russia, Slovakia, Slovenia, *Switzerland*, "the former Yugoslav Republic of Macedonia", Ukraine (though it is too soon to judge)), 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, Bulgaria[6], Hungary, Italy, Spain), particularly in 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 analyze the problems inherent in the appointment procedure. The problem of lack of transparency in Austria has also been addressed by a reform amending the Statute of the Court so as to require vacant seats to be publicised.

A possible flaw in the appointment process is that if it does not provide for default mechanisms, political opposition to the Court may prevent new appointments from taking place (Hungary). In Portugal, for example, judges continue to serve on the Court after the expiry of their term of office and until their successor is appointed. This effectively prevents a stalemate in the appointment process from destabilizing the composition of the Court.

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 applies in particular to the appointment requirements, whereby Supreme Courts are always made up of lawyers (*Argentina*, *Canada*, *Estonia*, *Ireland*, *Japan*, *Norway*). *Finland* forms a qualified exception: its Supreme Court and Supreme Administrative Court alter their composition in certain cases. In court-martial cases before the Supreme Court, two generals participate in the decision; where water rights and patent cases come before the Supreme Administrative Court, specialists in engineering take part in the decision. The supreme jurisdictions of *Sweden* also differ slightly: all members of the Supreme Court must be lawyers, whereas only two thirds of judges on the Supreme Administrative Court must have legal qualifications. 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 (Austria, Armenia, France, Liechtenstein, 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)[7] to experience in any kind of legal profession (*Argentina*, Bosnia

[6] The opinions of the two contributors from Bulgaria differed on this point.

[7] In *Estonia*, because the Constitutional Review Chamber is a Chamber of the Supreme Court, the judges must already be judges of the Supreme Court.

and Herzegovina, Bulgaria, *Canada*, Croatia, Czech Republic, Georgia, Hungary, Latvia, Lithuania, *Norway*, Romania, Russia, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Ukraine). 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 (*Canada*, *Ireland*, Italy, *Japan*). Similarly in *Finland* the experience in the judiciary required for election to the Supreme Court need not be long if it is supplemented by experience as a law professor or prominent advocate. In *Sweden*, too,

Liechtenstein and Bosnia and Herzegovina provide for the appointment of a number of foreign judges. In the case of Liechtenstein, the practice is that one judge comes from Austria and one from Switzerland, whereas in Bosnia and Herzegovina, the three judges appointed by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighbouring country.

On the whole, the eligibility requirements for constitutional judges were seen as appropriate and effective (Albania, Bulgaria, *Canada*, Czech Republic, *Finland*, France, Georgia, Hungary, *Ireland*, Italy, *Japan*, Liechtenstein,[8] Lithuania, Romania, Slovakia, Slovenia, Spain, *Switzerland*, Ukraine[9]). Only in Armenia, Bulgaria[10] and Russia was general dissatisfaction with the system voiced. In *Estonia* steps have been taken towards widening the scope of eligibility in reaction to the fact that the present system is too sate-oriented.

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; either for these reasons (*Argentina*, Armenia, Azerbaijan, Bulgaria, Czech Republic, France, Hungary, Italy, Liechtenstein, Slovakia, Ukraine) or for reasons not stated (Albania, Austria, Bosnia and Herzegovina,[11] *Estonia*, Latvia, Norway, Portugal, Slovenia, *Sweden*, Turkey), no provision is made for minority group representation.

Linguistic differences form the principal exception to this trend. *Switzerland* and *Canada*, being

[8] Here, the contributor approved of the enrichment of the State Council's jurisprudence through the practice of appointing foreign judges.

[9] However, it is still too soon for a comprehensive evaluation.

[10] Differing opinions were provided by the two Bulgarian contributors on this point.

[11] Here the Court rules are yet to be adopted.

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. Federalism as such also leads to quotas of representation: in Austria, residence requirements prescribe that a fourth of the judges must be domiciled outside Vienna.

De facto ethnic minority representation on the Court was also observed in Spain, Croatia (1 out of 11 judges), "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, Czech and Georgian contributors 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-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, Croatia, Georgia,[12] Hungary, Italy, Latvia, Portugal, Romania, Russia, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine). 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 (Azerbaijan, *Estonia*, Lithuania (all upon nominations by the President of the Republic), Germany (power alternates between the Federal Council and the Federal Diet), Liechtenstein,[13] *Switzerland* (the judges make nominations from among their number)) or by the country's Head of State (Austria (Federal Government nominates), *Canada* (Prime Minister), Czech Republic (from among the judges), *Finland*, Spain (both upon nominations by the Court), France, *Ireland* (upon the Government's nomination), *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. Other default mechanisms exist in Italy, Portugal and Spain. 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.

In *Sweden* the senior judge is appointed Chairman.

The office of Chief Justice of the Supreme Court of *Canada* alternates between a francophone civil lawyer and an anglophone 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.

The presidential term ranges from 2 years (Portugal, *Switzerland*), to 3 years (Albania, Bulgaria, Hungary, Italy, Latvia, Romania, Russia, Slovenia, Spain, "the former Yugoslav Republic of

[12] Nominations are made on consensus between the President of Georgia, the parliamentary Chairman and the Chairman of the Supreme Court.

[13] The election requires the confirmation of the Prince of Liechtenstein.

Macedonia") to 4 years (Croatia, Turkey), to 5 years (Georgia), to 9 years (France) and sometimes with the right of re-election (Albania, Bulgaria, Hungary, Italy, Portugal, Russia, Spain, Turkey). In *Finland* the Presidents of the two supreme jurisdictions serve until retirement. 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 jurisdictional function higher than that of the other judges (Albania, *Argentina*, *Canada*, Czech Republic, Germany, Hungary, *Ireland*, *Japan*, Latvia, *Norway*, Portugal, Slovenia, *Sweden*, *Switzerland*, "the former Yugoslav Republic of Macedonia", Ukraine), with the occasional exception of crucial issues of competence (Germany). The President will sometimes have the casting vote in case of a tie (Lithuania, France, Italy, Spain), or at least in most matters (*Finland*[14]). In Austria the President of the Court only votes when unanimity has not been reached and one opinion receives at least half of the votes. Sometimes the President will have the power to instruct the other judges on their work (Armenia, Latvia, Romania, Russia, Ukraine), by eg distributing the cases to be dealt with individually by one of the judges as rapporteur (Lithuania, France, Italy). In *Estonia*, the President of the Constitutional Review Chamber plays a part in the selection of the other members of the Chamber. For some Courts the President will even be in charge of disciplinary action against the other constitutional judges (Czech Republic, Slovakia, Spain).

The function of representative of the Court, either in its domestic or its external affairs, was also noted on numerous occasions (Armenia, Czech Republic, *Finland*, France, Germany, Hungary, Italy, Latvia, Portugal, Romania, Russia, Slovenia, Spain,[15] *Sweden*, "the former Yugoslav Republic of Macedonia", Turkey).

The President will often see to the administration or organisation of the Court's activities (Armenia, Austria, *Canada*, Czech Republic, *Finland*, France, Germany, Hungary, Italy, *Ireland*, *Japan*, Latvia, Lithuania, *Norway*, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, *Switzerland*, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine) or will notify the competent authorities of a vacancy of a seat on the Court (Austria, Slovenia).

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*), as depository of

[14] an exception being cases of criminal or disciplinary matters, in which the opinion more favourable to the accused shall prevail.

[15] The President of the Spanish Constitutional Court is the fifth authority of the State.

applications for the position of the President of State or presiding over meetings to review the validity of the President of State's election (Portugal), or calling and setting the agenda for the meetings of the Governmental Commission (Spain).

Offices incompatible with that of a constitutional judge

Constitutional judges are usually not allowed to hold another office concurrently. This general rule serves the purpose of protecting judges from influences potentially arising from their participation in activities in addition to those of the Court. At times a private interest in a particular decision may not be apparent, even to the judge in question. Such conflicts of interests can be prevented from the outset by way of strict incompatibility provisions.

On one end of the scale there is the blanket incompatibility with any other public or private activity (*Argentina*, Bulgaria, *Canada*, Croatia, *Ireland*, Italy, Spain, "the former Yugoslav Republic of Macedonia", Turkey) except occasional expertise with the Court's permission (*Switzerland*), teaching (Armenia, Azerbaijan, Czech Republic, *Estonia*, Georgia, Germany, Hungary, Latvia, Lithuania, Portugal, Romania, Russia, Slovakia, Slovenia, Ukraine), research (Armenia, Azerbaijan, Czech Republic, *Estonia*, Georgia, Hungary, Portugal, Russia, Slovakia, Slovenia, Ukraine), creative activities (Armenia, Azerbaijan, Hungary, Lithuania, Russia, Ukraine), or the management of personal assets (Czech Republic, Slovakia) or business activities that are not at the executive level (*Estonia*) 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. Judges of the Austrian Constitutional Court cannot hold offices in Government or Parliament, nor can they have held such an office in the four years preceding their appointment to the Court. In some cases the only explicitly stated incompatibility is with the office of Member of Parliament (*Finland*[16]) or with any public office (France, *Sweden*). Constitutional judges of Liechtenstein may be members of parliament or other courts but where a matter before the Constitutional Court is one in which the judge was involved during the exercise of this other function, the judge will be precluded from participation.

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 allowed in many countries (Austria, Albania, Azerbaijan, *Canada*, Croatia, Czech Republic, *Estonia*, Georgia, Hungary, Italy, Latvia, Romania, Russia, Slovakia, Slovenia, Turkey, Ukraine), or at least no active participation in a political party or public association is permissible (*Argentina*, Armenia, *Finland*, France, *Ireland*, *Japan*, Latvia, Lithuania,

[16] though the general restrictions forbidding judges from exercising activities that would compromise judicial impartiality would also apply.

Spain). However, past political involvement is often expressly permissible (Austria, 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 in their enjoyment of this freedom. Cases of no incompatibility with membership to a political party are rare (*Finland, Norway*, *Sweden*, *Switzerland*), and political involvement by such judges is unlikely to come about, since this would be generally seen as inappropriate.

The age limit for the office of constitutional judge

The maximum age of constitutional judges ranges from 65 (Turkey, Ukraine), to 67 (*Finland*, *Sweden*), to 68 (Germany, *Switzerland*), to 70 (Armenia, Austria,[17] Bosnia and Herzegovina, Hungary, *Ireland*, *Japan*, Latvia, *Norway*, Russia), to 75 (*Argentina*, *Canada*) and to no limit at all (Albania, Bulgaria, Czech Republic, Georgia, Italy, Liechtenstein, Lithuania, Portugal,[18] Romania, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia"). In *Estonia* judges may remain in office up to five years after reaching the age of retirement.

[17] The judge's term actually end on the 31st December following the judge's attaining 70 years of age.

[18] though the age of retirement for other judges is 70, thus the judges to be selected from the judiciary cannot be over 70.

Terms of office and re-election of judges

The duration of a constitutional judge's term of office combined with the issue of re-election is very significant to the make-up of the Court. These criteria may affect issues of turnover, the possibility of a political shift in the Court, the independence of the judges and institutional stability. From an appraisal of the contributions it appears that the system to be preferred would provide for relatively long terms of office with no opportunity for re-election or only one potential re-election.

Several countries do not fix a term, allowing the judges to serve until retirement (*Argentina*, Austria, Bosnia and Herzegovina,[19] *Canada*,[20] *Estonia*,[21] *Finland*, *Ireland*, *Japan*, *Norway*, Turkey). The judges of supreme courts exercising constitutional jurisdiction may all serve until retirement with the apparent exception of the *Swiss* Federal Court, where re-election is virtually automatic, thus also providing a guarantee of independence. Although the lack of a fixed term appears to involve risks of the over-ageing of a court, a limited turnover of judges and a general excess of institutional stability, this type of system must be viewed in the context of judicial power and the role of the judge in the relevant legal system. However, if one leaves differences in legal system aside in the interest of establishing a generally acceptable model, a fixed and relatively long term with no scope for re-election appears to be the most appropriate model.[22] The possibility of only one further appointment following a long term also appears favourable in order to allow for the continuing service of excellent judges.[23] However, it appears that in the interests of institutional stability, the duration of a judge's term of office should not be reduced in favour of the possibility of re-election. This is clear in the case of Hungary, where there is debate about abolishing the possibility of re-election and introducing a 12-year term in order to increase the stability of the Court. Nevertheless these considerations must be supplemented by the provision of default mechanisms in case of a failure to elect, re-elect or replace a judge. Sound and apparently reliable provisions for terms of office and re-election of constitutional judges may prove to be futile in the face of political opposition to the Court. A mechanism must be in place to ensure the stability or even subsistence of constitutional jurisdictions. A possible solution is the provision in place in Portugal, allowing judges to continue to serve after their term of office has ended and until their successor has been appointed. The lack of this very freedom is criticised in Italy and is the cause of the instability of the Constitutional Court of Hungary.

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[19] though the first composition of judges shall serve for a term of five years without the right of re-election.

[20] However, some judges quit after a 15-years term.

[21] though the judges may remain in office for up to five years after they have reached the age of retirement.

[22] Examples are: 9-year terms: Bulgaria, France, Italy, Lithuania (though there *is* scope for a re-election if the term is interrupted and after an interval), Portugal (after the 1997 reform), Romania, Slovenia, Ukraine; 10-year terms: Georgia; 12-year terms: Germany, Russia.

[23] Examples are: Azerbaijan (15-year term, with a possible further term of 10 years), Hungary (9-year

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, Spain). For other Courts, simply a good turnover of judges was aimed at (Czech Republic) 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, Germany, Lithuania, Romania, Ukraine), especially considering the additional possibility of delivering dissenting judgments (Germany). Others still, did not identify any aim at a balance of representation from the rules (*Estonia*, Liechtenstein, *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

Rules on immunity serve the purpose of protecting the judge against unfounded accusations (which are also damaging to the Court) and are intended to ensure that he or she will observe a very high standard of professional behaviour. On the other hand, as Article 6 of the Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe puts it in relation to the judges of the European Court of Human Rights:

> Privileges and immunities are accorded to judges not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions. The Court alone, sitting in plenary session, shall be competent to waive the immunity of judges; it has not only the right, but is under a duty, to waive the immunity of a judge in any case where, in its opinion, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.

Most courts surveyed reserve immunity from prosecution of their members (Albania, *Argentina*, Armenia, Bulgaria, Croatia, Georgia, Lithuania, Portugal, Russia, Slovakia, "the former Yugoslav Republic of Macedonia", Turkey), except perhaps where the judge is caught in the act of committing an offence (Hungary, Russia, Slovenia, Spain) or where a serious crime (Italy) attracting a heavy prison sentence is involved (Turkey, Slovenia). Complete criminal and civil immunity is also available in several countries (Azerbaijan, *Estonia*, Latvia, Lithuania, Romania, *Switzerland*). 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*, Germany, *Ireland*, *Japan*, *Sweden*). It should be noted that the Supreme Courts tend to fall in this category. Criminal immunity against prosecution for indictable offences may also be conditional (Czech Republic) or qualified (Ukraine).

Judicial immunity may normally be lifted by the Court itself (Albania, Armenia, Bulgaria, Croatia,

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term).

Georgia, Hungary, Italy, Lithuania, Portugal, Russia, Slovakia, *Sweden*,[24] *Switzerland*, "the former Yugoslav Republic of Macedonia", Turkey) and sometimes only by application of the Attorney-General (Bulgaria, Lithuania) or the Parliamentary Ombudsman or Justice Chancellor (*Sweden*). 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 Legal Chancellor with the consent of a parliamentary majority (*Estonia*), the Lower House of Parliament (*Argentina*, Latvia, Slovenia,[25] Ukraine), the Upper House of Parliament (Czech Republic[26]), a Permanent bureau of the authority which originally appointed the judge in question, and only by application of the Attorney-General (Romania) or by act of Parliament or by consent of the President of the Republic (Azerbaijan).

In several jurisdictions no special provision is made for judicial immunity (Austria, *Finland*,[27] France, *Japan*, Liechtenstein, *Norway*). In *Norway*, judges may be sentenced by ordinary courts, whereas in other jurisdictions the Supreme Court hears criminal cases against members of the Constitutional Court (Lithuania, Spain).

Dismissal

Rules on the dismissal of a judge are very restrictive. It is not permissible for political bodies which perceive themselves to be disadvantaged by the opinions or decisions of a judge to put pressure on the judge. Stringent rules on dismissal can effectively protect the judge from this kind of pressure.

The possible reasons for the dismissal of a judge will vary considerably from one jurisdiction to another. In general, the more dishonourable the cause 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. For detail on the various grounds for dismissal, see the Comparative table CDL-JU (97) 9 rev.

The dismissal of a judge by an authority other than the Court itself is impossible in most

[24] here the Supreme Court is the competent forum for judges of both the Supreme Court and the Supreme Administrative Court.

[25] though here the National Assembly shall take into consideration the opinion of the Constitutional Court.

[26] But only with respect to the conditional immunity aganist prosecution for indictable offences.

[27] Though charges can be brought to the High Court of Impeachment for acts or omissions committed in the judge's official capacity.

jurisdictions (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, *Finland*,[28] Germany, Hungary, Italy, Latvia, Liechtenstein, Portugal, Romania, Spain, *Sweden*,[29] *Switzerland*, Turkey). In France dismissals can be made by the Constitutional Council or the Council of Ministers on the Constitutional Council's proposal. 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 other responses the dismissing authority was the Lower House (Lithuania), Slovenia; the Senate upon an accusation by the Lower House (*Argentina*); either the Lower House or the Senate (*Canada*).

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 may also form part of the dismissal process (*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 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 Ukraine the Constitutional Court has competence over dismissals except when incompatibility or the violation of the judicial oath is concerned: these issues are the competence of the Parliament.

In *Norway*, the Czech Republic and *Estonia*, constitutional judges may be dismissed by the ordinary courts.[30] However, a sentence for disciplinary proceedings will sometimes require the consent of the Court (*Estonia*).

There were no cases of dismissal registered in the responses. This seems to confirm that in general constitutional judges are worthy of the onerous responsibilities they bear and that their position is respected by the competent authorities. Another consideration is the importance of the image of constitutional justice. The fact that justice must not only be done, but also seen to be done stresses the need for transparent, credible justice confident that the electorate will trust it in its role as guardian of the constitution and of constitutional rights.

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[28] Each supreme jurisdiction has competence with respect to its own members.

[29] Though the Supreme Court has competence with respect to the dismissal of both Supreme Court and Supreme Administrative Court judges.

[30] However, for reasons other than the commission of an indictable offence, judges of the Croatian Constitutional Court may only be dismissed by the Court itself.

Relationship between composition and powers exercised or workload

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.[31] On the other hand, there are the Supreme Courts, that is the final appellate courts which exercise ordinary jurisdiction.[32] Turkey's Constitutional Court only has constitutional jurisdiction, unless it acts in its capacity as Supreme Court. *Estonia* has a purportedly independent Constitutional Review Chamber within its 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 jurisdictions may only exercise *a priori* constitutional control of legislation. Its competencies are modest compared to the role of the President of the Republic or the Parliamentary Constitutional Committee: they apply 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, Italy, Lithuania, Romania, Turkey, Ukraine), 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 (Czech Republic, 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).

[31] Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, France, Georgia, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine.

[32] *Argentina*, *Canada*, *Estonia*, *Finland*, *Ireland*, *Japan*, *Norway*, *Sweden*, *Switzerland*.

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, Georgia, *Switzerland*), calling, in particular, for reform of the Court's statute (Albania, *Estonia*, Liechtenstein, Russia), for their decision-making powers to be widened (Hungary, Romania, Slovakia), for the appointment procedure to be made more workable (Hungary, Italy, Portugal, Spain), or for the problem of their workload to be solved (*Argentina*, Germany, *Ireland*, Spain). In Spain, for example, an increase in the number of judges to 15 has been suggested. The odd number would also prevent the problem of a tie and a controvertial casting vote by the President of the Court. In *Argentina* and *Sweden* there is talk of instituting a Constitutional Court with exclusive constitutional jurisdiction. However, this would require a reform of the constitution. In *Estonia*, too, it is suggested that an entirely separate Constitutional Court should be instituted, however, this is not a realistic prospect for the time being. Conversely, some critics in Spain voice the wish to create a Chamber within the Constitutional Court to deal with cases of individual recourse.

Conclusion

Constitutional justice has a key role to play in the system of checks and balances in a State. Often the constitution attributes to the constitutional court the task of deciding on matters of conflict of power between state bodies. Consequently, these bodies may have a considerable interest in influencing the composition of the court with a view to obtaining judgments in their favour. Thus, a prime goal of laws relating to the composition of the constitutional court is to guarantee the independence of the judges *vis à vis* their considerable powers.

On the other hand, the legislator often strives for a balanced representation within the court of various interests, be they political, ethnic, religious or legal tendencies or a balance between the executive and legislative branches of power.[33] This can be explained by the need to include judges providing their specific expertise or viewpoint to the court. Often this will also be a matter of trust by these groups in the court composed of judges some of whom they perceive to represent their interests.

[33] Evidently, this conflict is more pronounced in Constitutional Courts proper as opposed to Supreme Courts exercising constitutional jurisdiction. Here, the constitutional jurisdiction, although very renowned, is often an annex to the daily work as the highest appellate court. Their daily work will in general be less prone to political influence. Furthermore, supreme courts are on the top of a pyramid of ordinary courts from which they draw their new members.

Prima facie, a judge having been appointed in view of such an interest might indeed be inclined to favour this interest in his judgment. A means to remedy this conflict is a series of measures intended to strengthen the position of the constitutional court judge *vis à vis* the State powers in general but in particular also towards these interest groups. Such measures include long single terms without the possibility of reappointment or lifetime appointments, rules of incompatibility, very restrictive procedures for dismissal but also immunities.

It is probably these guarantees of independence and the sense of responsibility that goes with such an important position which causes constitutional judges to act in a way which clears any doubts that they would 'represent' particular interests in abuse of their position.

A direct tradeoff can be observed between the influence interest groups can have on the appointment of constitutional judges and the guarantees required for them to steer free from just this influence in their later work at the court.

Given this tradeoff it is difficult to name a set of minimum guarantees to be provided. The following may apply generally, though specific circumstances in a state may well justify a different set of measures.

- The term of appointment of constitutional judges should either be for life time or until retirement or be very long (at least two parliamentary terms). In the latter case reappointment would be possible either only once or even not at all.
- Rules on appointment should foresee cases of inaction by the nominating authority and provide for an extension of the term of office of a judge until the appointment of his/her successor. In the worst case the quorum for a decision could be lowered.
- The rules of incompatibility would be rather strict in order to withdraw the judge from any influence which might be exerted via his/her out of court activities.
- Rules of dismissal for judges and the President of the court should be very restrictive and involve a binding vote by the court itself.

These criteria are evidentlyvague and will have to be adapted to each specific case. They can, however, provide an idea of some issues to be tackled in order to create an independent constitutional court.