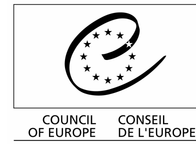


2nd Congress
of the World Conference on Constitutional Justice
Rio de Janeiro, Brazil, 16-18 January 2011

"Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies"

Draft Concept
14.5.2010

The separation of powers sets limits to arbitrariness and prevents abuse by the state that may arise from the exercise of its sovereign powers. This separation is essential in any democracy, as it is the opposite of despotism and constitutes an essential guarantee for the protection of the rights and freedoms of citizens.

The principle of the separation of powers should not be perceived as being rigid, as a summary reading of Locke and Montesquieu might suggest. Political reality shows that its original meaning has evolved since the 18th Century. Today, the separation of powers is understood as meaning mutual checks and balances of powers, which guarantee the limitation of any excess of power by other powers.

It is from this principle, which became universal, that a natural independence of constitutional courts and equivalent bodies was derived.

Constitutional justice, applied by a court or a constitutional council or a specialised supreme court (hereinafter, the "constitutional court") can only carry out its function of safeguarding the respect for the constitution and protecting human rights if it is genuinely independent from powers, the activates of which it controls.

However, doubts could arise about the actual existence of a separation of powers. For instance, if a same political party owns the majority of the executive and the legislative, this will – based on the majority rule - inevitably lead to bringing together the powers of the executive and legislative branches. In this case, the control function of the court is an excellent instrument in showing the court's true independence, but could also prove to be a dangerous one. But it may also happen that the legislature will be held by a majority hostile to executive power, which can be blocked in implementing its policies. In this case, the constitutional review can be even more perilous.

The efficiency of the constitutional review process, which is the constitutional court's responsibility, is therefore dependent on this court's degree of independence from the other powers.

This independence affects not only the institution, but also its judges and the procedures it uses to ensure compliance with the Constitution by the legally constituted government. Therefore, three levels of consideration can be identified, based on the principle of the separation of powers.

I. The independence of the constitutional court as an institution

At this level, a certain number of guarantees of independence should be considered, which are, according to various experiences, either enshrined in constitutions, laws or regulations, or the work of the court itself which created them by interpreting the principle of the separation of powers. The following guarantees are meant:

- the constitutional status of the constitutional court or constitutional review carried out by a supreme court offers greater stability to the court and strengthens its independence;

- regulatory autonomy gives the court, while respecting the principle of the separation of powers, the opportunity to organise itself and to develop its rules of procedure without it being subjected to the control of another power;

- its independent budget resulting from the separation of powers gives it the opportunity to develop and implement its budget;

- including its administrative autonomy, in particular in the appointment and career management of the personnel of the court, gives it the power to fully exercise its responsibilities and avoid external interference;

- disciplinary independence, when a judge seriously fails in his or her obligations, the penalty is applied by the court itself.

In spite of these safeguards, practice shows that in some cases, the independence of constitutional courts is under threat, particularly when the court makes rulings that are unfavourable to the other state powers. It may happen that the latter do not hesitate to use pressure tactics or to "punish" courts, for example by refusing to appoint new judges, which obviously affects their good functioning as they will lack the necessary number of judges to form a quorum. It is also important to note that in a few cases, constitutional courts have been threatened with closure and in some cases, this threat was carried out.

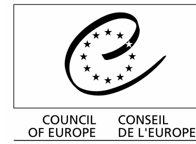
In this context, the question could arise whether in practice the decisions of constitutional courts are respected by their recipients. What is the relationship between the constitutional court and the media; is this relationship a positive one and does it reinforce the independence of courts (good examples in a context of tight budgets)?

II. The constitutional independence of judges

- According to individual experiences, the constitutional judge, appointed and/or elected by or within the three powers, and in some cases removed, must observe a duty of "ingratitude" to the appointing authority in order to preserve his or her independence.

- Professional qualifications, where they are liable to protect the constitutional judge from promotional “temptations”, may turn out to be the best guarantees for independence.

- Could the age criterion for holding an office induce the independence of a judge’s behaviour?



- Can material guarantees, in particular an adequate salary commensurate with the importance of the position, protect the constitutional judge from possible temptations?

- Can the non-renewal of a long-term and / or the term of office of a constitutional judge until retirement age (or for life as in the United States), constitute a guarantee of independence of the court?

- The incompatibility of the mandate of a constitutional judge with other functions, including parliamentarian functions, governmental functions and activism within a political party are based on the principle of the separation of powers. They must be seen as the requirement for constitutional judges to refrain from anything that might compromise their independence.

- What are the criteria and limits to the obligation to remove a constitutional judge?

- Immunity of the judge, full or limited to acts committed in the exercise of his or her judicial function.

It is important to note, however, that these guarantees have a textual basis and will never be sufficient without taking into account the constitutional judge's "state of mind", in the words of Doyen Vedel.

III. <u>Operating procedures of courts</u>

It might be useful to refer, in a non-exhaustive manner, to a number of ideas that might underline the independence of constitutional courts when they implement their constitutional competences.

- Does the mandatory referral by a parliamentary minority, by ordinary courts or directly by an individual allow the judge to decide on texts, the constitutionality of which are not necessarily questioned by the political majority?

- Does the nature of the referral before or after the enactment of laws (or both) influence the relationship between the court and other powers and what are the consequences for the supremacy of the Constitution?

- Does the oral and adversarial nature of the procedure serve to increase the transparency and therefore the independence of courts?

- Does the possibility or not of considering the constitutionality of a text *ultra petita* or after withdrawal of the claim, come close to an initiation *ex officio* or is it an element of the independence of the court?

- Where are the limits of the constitutional court as a "negative legislator" by Kelsen, what is the "margin of appreciation" of the legislator?

- Does the finding by the court of a lack of acts/laws, without being able to compel the legislator to legislate, jeopardise the independence of the court?

- Do dissenting opinions, according to individual experiences, guarantee the independence of constitutional judges?

- In certain systems, is the preservation of confidentiality with respect to the name of the *rapporteur member*, who is in charge of the investigation of the case which is entrusted to him or her and the privacy of the deliberation with a ban on the access to archives, likely to protect the constitutional judges from external pressures?

IV. Reference points with respect to our work

These three levels of consideration will be discussed in three separate workshops. Moderators and rapporteurs will be designated for these workshops.

A moderator and a rapporteur-general will also be appointed for the plenary.

The courts are of course not required to strictly follow the ideas suggested for discussion in this document. They can, in order provide for fruitful discussions, propose other ideas that are specific to their court.

The Congress will discuss problems encountered and solutions found in different regions and groups gathered together in Rio. The participating courts that wish to do so, are invited to prepare written reports, which will be distributed to the participants.

In a spirit of “cross-fertilisation” and for obvious reasons relating to the time available, participants are invited to present only the main idea of the problem or the solution to an identified problem in workshops and in the plenary.

In their reports, courts should avoid providing an overview of their court system. They are invited to address issues that may be of specific interest to other courts, which could find themselves in a similar situation.

The participating courts to the 2nd World Congress on Constitutional Justice are invited to submit national reports on the basis of this synopsis at the end of September 2010, at the latest. In this way, a summary could be prepared for the Congress.

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