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

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1. The independence of the Constitutional Court as an institution

1.1. The modern, democratic, constitutional state is based on the idea of the supremacy of the constitution. It regulates the organisation of the state, the scope of action of its state organs as well as the fundamental rights of the citizens *vis à vis* the state. The supremacy of the constitution also implies that any state action - with regard to legislative, judicial or executive power (including government acts) - must be based on the constitution and be in compliance with the constitution.

The scope of action of legislature, judiciary and executive is determined by the principal of separation of powers. Its basic idea requires that the exercise of political power must not lie in one hand only, but has to be distributed to different state powers. These powers should mutually limit and control each other. Therefore, in systems based on this principle always also elements of a certain interconnection between these powers exist. Strict separation of state powers without compromise would inevitably lead to a paralysis of any state action. Moreover, interconnection of powers is an essential element of control with regard to the relations between the various state institutions and functions ("system of checks and balances"). However, only elements serving as control mechanisms, provided for in the constitution itself, comply with the principle of separation of powers.

The supremacy of the constitution must not exist on paper only; it has to become effective in practice as well. In order to achieve this goal, the democratic constitutional state needs institutions guaranteeing it. In this respect, the most important institution is the Constitutional Court. It is the "guardian of the constitution".

Constitutional justice itself possesses a very distinct interconnecting function. It is judiciary in the juridical sense of the word. Its task, however, is to control acts of legislature and executive (in many systems also of the ordinary judiciary). The political forces represented in constitutional justice must therefore not be identical with the powers to be controlled. Constitutional justice must be independent from the powers to be controlled.

1.2. Because of its primary function to control especially the executive and the legislature power, it poses a serious problem if the Constitutional Court is dependent on them. For instance, in practically all constitutional systems one of the mentioned state powers or both play an important role in the selection process of constitutional judges. As a consequence, it may happen and it happens that executive and/or legislature fail to nominate judges when necessary and often no legal consequences or sanctions are provided for in the respective constitutions. One answer to this problem could be that constitutional judges remain in office until their successors have been appointed, as is for instance the case in the Federal Republic of Germany. In Austria, six substitute judges exist in addition to the 14 constitutional judges who replace them in case of absence, but also in case of a vacancy.

In this context, also the question arises how far the Constitutional Court's independence should go. Of course, a Constitutional Court must have constitutional status, its own independent budget, administrative and regulatory autonomy, and disciplinary independence. The relentless and consequent realization of total independence from executive and legislature, would, however, entail that Constitutional Courts have to select and nominate their judges themselves. It is evident that this goes too far since it would lead to a "state of judges" which the legal doctrine often considers to contradict the principles of a democratic state and a state based on the rule of law, because without the involvement of parliament or government in the selection process the judges would lack any democratic legitimacy.

1.3. However, the worldwide, triumphal diffusion process of constitutional justice is not necessarily an indication for the worldwide efficiency of Constitutional Courts, although they have often proved to be an efficient instrument to control power.

This is a difficult problem and it is no coincidence that the topic of separation of powers and the independence of Constitutional Courts has been the subject of many conferences, seminars and studies in the recent past.

For obvious reasons there is a considerable difference between long established Constitutional Courts which have stabilized their position among the constitutional organs and Constitutional Courts in young democracies that are in a very different situation because the constitution-making process, the period of regime change and the political transition to democracy are still close.

Although the constitutions of most countries provide for independent Constitutional Courts, with clearly defined and significant powers, and with constitutional guarantees to protect their independence, evidence suggests that not all of them are truly independent and able to work without substantial interference from political or governmental agents. The independence and even the existence of many recently created Constitutional Courts has been and is being threatened.[1]

One reason may be that in many countries, after having suffered authoritarian regimes, the period of time when former dissident politicians held the highest state functions was comparatively short. Populist politicians followed who did and do not have a proper sensation for the moral limits of their powers.

History shows that a long democratic tradition and an established and consequent case law over many years are the major factors for guaranteeing the strengthening of Constitutional Courts' independence.

However, it is a fact - and this must clearly be emphasized - that any constitution must be based on the unexpressed assumption that state organs have to fulfil their tasks as provided for in the constitution, following the principle "*pacta sunt servanda*". Only if this is the case decisions of Constitutional Courts will be respected and duly implemented. If state organs fail to act in compliance with the constitution, not only constitutional justice but the entire state is in danger.

1.4. If a same political party or more political parties in the form of a coalition own the majority of the legislative and the executive, the independence of the Constitutional Court may be endangered. If the parliamentary majority is large enough to enact constitutional provisions the situation may be even be worse.

For instance, in Austria (as well as in many other countries), the Constitutional Court principally does not have the power to review constitutional provisions because the constitution itself serves as the Court's standard of review. In the years 1986 - 1999 the two major political parties formed a coalition, thus disposing of a two thirds majority in parliament. This majority is necessary to create constitutional law. The partners of the coalition repeatedly used their majority to avoid consequences of Constitutional Court judgements by which legal provisions had been annulled for violation of fundamental rights and to re-establish the *status quo* by enacting the abolished provisions again in the form of formal constitutional law.[2] This practice results in a "correction" of the Constitutional Court's case law by the constitutional legislator and has been severely criticised. Sometimes also statutes containing

[1] E.g. in 2010 a Constitutional Court in Central Asia has been dissolved and in Central Europe the cutback of the powers of a Constitutional Court is currently being discussed.

[2] E.g. VfSlg 9950/1984, 10394/1985 - reaction of the constitutional legislator: BGBl. 106/1986 - reaction of the Constitutional Court: VfSlg. 11829/1988

unconstitutional provisions have been enacted as constitutional amendments in order to immunise them *a priori* against constitutional review.

The Austrian Constitution contains certain "structural principles" (the democratic, the federal, and the rule of law principles, but also the republican, the liberal and the separation of powers principles). They rank above constitutional law in the hierarchy of norms. Constitutional law must therefore be in compliance with them. The abolishment or the substantial alteration of any of these structural principles is considered to be a "total revision" of the constitution, which may only be effected by a constitutional amendment passed in Parliament and subsequently approved by a popular referendum.[3]

In a democratic system, the (constitutional) legislator must be allowed a considerably wide margin of appreciation. On the other hand, constitutional justice is a key element of the rule of law principle. If parliament systematically overrules Constitutional Court judgments it tends to paralyse constitutional justice. Therefore, the Constitutional Court gave a clear sign to the legislator in several judgments by pointing out that such legislative measures in sum might entail a "gradual total revision" of the constitution, even if each individual measure regarded upon alone would not yet exceed this limit. In one case the Constitutional Court even annulled a constitutional provision for violence of the democratic and the rule of law principles.[4]

Although generally duly respecting the margin of appreciation of the legislator, in these judgments the Austrian Constitutional Court has emphasized that it claims to have the last word if it really matters.

2. The independence of individual judges

Although constitutional justice does not form part of the ordinary judiciary, the guarantees traditionally attributed to judicial independence (i.e. independence in the exercise of the office, irremovability and non-transferability) must also apply for constitutional judges. Especially the following issues are of crucial importance with regard to their independence.

2.1. Selection of constitutional judges

In democratic constitutional systems all over the world the selection procedure of constitutional judges has a political touch since in a democratic state the constitutional organs entitled to select constitutional judges are composed of representatives of political parties. It is evident that Constitutional Courts are constitutional organs positioned on the border between independent courts and political constitutional

[3] Article 44.3 Federal Constitution Act
[4] VfSlg. 16327/2001

organs. Usually parliament plays an important role either in the selection or in the election process, in many countries the executive (Head of the State, government) is additionally involved, sometimes also the judiciary.

By conceding considerable influence to the organs subject to the Constitutional Court's review the tension potential inherent to any relation between controller and the institution to be controlled (especially the legislative power) may be reduced. If parliament whose laws may be annulled by the Constitutional Court is given considerable influence on the selection of constitutional judges it is most probable that this could noticeably increase its preparedness to accept the Constitutional Court's judgements. Insofar, this mode of "political" appointment has a pacifying function.

As regards the political influence on the selection of constitutional judges it has to be emphasized that political forces and circles are well entitled to select personalities in whom they have confidence. It is, however, very important to stress that, on the one hand, political influence must end at this very point and, on the other hand, that the once appointed constitutional judge has to keep distance to the political forces that have acted in favour of her/his selection. Notably, there is a considerable difference between the situation before and after the appointment which is also characterized by the judge's obligation not to disclose confidential information. For both sides the principle applies: "Independence must not only be done, independence must also be seen to be done."

In Austria[5], all constitutional judges are appointed by the Federal President who acts upon proposal by the Federal Government (President, the Vice-President, six judges and three substitute judges), by the National Council, the deputy chamber of Parliament (three judges and two substitute judges) and by the Federal Council, the chamber of Parliament representing the provinces (three judges and one substitute judge).

Candidates must have completed their legal studies and for at least ten years have held a professional appointment which prescribes the completion of these studies. Consequently, they have to be selected from among law professors, judges of the ordinary or administrative judiciary, lawyers and civil servants (who have to be exempted from all their official duties after their appointment)[6].

Except for civil servants, all other judges may continue to exercise also their original juridical profession. This is another essential element to strengthen their independence.[7]

[5] Article 147 Federal Constitution Act
[6] Article 147 Federal Constitution Act
[7] Article 147 Federal Constitution Act

2.2. Period of office

Constitutional judges may either be appointed for lifetime (US Supreme Court) or until they reach a certain age limit. Or they may be appointed for a certain not renewable or renewable term of office.

Appointment for lifetime without an age limit is very rare. The appointment with an age limit often has the consequence of long periods of function thereby securing the continuity of the jurisprudence of the Constitutional Court. In this model the "carrier perspective" after leaving the Court is obviously negligible for age reasons. It therefore guarantees maximum independence. The argument that this model may possibly favour the "petrifaction" of the Court's case law (because judges possibly lose the ability to adapt themselves to new constitutional and political developments) is not convincing because the age structure of a Court following this model is inhomogeneous and not all judges will approach the age limit at the same time.

European standard is to appoint constitutional judges for a limited term of office. This model combines the advantages of guaranteeing a continuous renewal of the Constitutional Court, and of avoiding a possible inflexibility of the case law.

Excluding the possibility of reappointment guarantees a large degree of independence to the judges. However, a problem may arise if the constitutional judge has not yet reached his pension age at the end of his term of office and still wishes to achieve another adequate professional position.

In Austria, constitutional judges are appointed for lifetime with an age limit: They must leave the Constitutional Court at the end of the year in which they complete their 70th year of life.[8]

This fact, combined with the requirement of professional experience of at least 10 years, incompatibility provisions and the disciplinary power over the judges only by the Constitutional Court itself, the Austrian system guarantees a maximum of independence to constitutional judges.

2.3. Incompatibility[9]

Members of the Federal or a Provincial government, members of a general representative body or the European Parliament, persons who are employed by or hold office in a political party may not become constitutional judges in Austria. Anybody who has exercised one of those functions during the preceding five years may not be appointed President or Vice-President of the Constitutional Court.

[8] Article 147 Federal Constitution Act
[9] Article 147 Federal Constitution Act

Persons who are employed by or hold office in a political party cannot belong to the Constitutional Court. The mere membership to a political party is not harmful.

2.4. Disciplinary power[10]

In Austria, constitutional judges may only be removed from office by a judgment of the Constitutional Court itself, for grounds specified in the Constitutional Court Act (occurrence of incompatibility, absence from deliberations without excuse, conduct - in office or otherwise - unworthy of the respect and confidence required by their office, gross disregard of the obligation of non-disclosure of confidential information, or physical or mental incapacity with regard to their office). A decision to remove a constitutional judge (or a substitute judge) from office can be rendered only with a majority of at least two thirds of the judges.

2.5. Material guarantees[11]

Generally, it is important for the independence of constitutional judges to dispose of an adequate salary commensurate with the importance of the position. However, any other material privileges whatsoever have to be strictly avoided.

In Austria, starting with the first day of the month following their appointment, the constitutional judges receive a remuneration calculated as a percentage rate from the remuneration of a deputy to the National Council[12] . The president receives 180 %, the vice-president and the reporting judges 160 % and the other judges 90 % thereof. The total remuneration and other salaries, retirement benefits and fees a constitutional judge draws from a legal entity subject to control by the Audit Office must not exceed the salary of a Federal Minister. When this is the case, the remuneration paid by the Constitutional Court is reduced.

3. Court procedures as a guarantee for independence

3.1. Mandatory referral - Initiation ex officio[13]

The Austrian Constitution does not provide for mandatory referral by a parliamentary minority or by an individual. Any ordinary court of second instance as well as the Supreme Court, the Administrative Court, the Asylum Court and other institutions are obliged to initiate norm review proceedings before the Constitutional Court if they

[10] Section 10 Constitutional Court Act
[11] Section 4 Constitutional Court Act
[12] Section 1 Federal Constitution Act on the Limitation of Salaries of Holders of Public Offices, BGBl. I 64/1997
[13] Article 140 Federal Constitution Act

have doubts as to the constitutionality of a legal provision which they have to apply in a concrete case.

In these cases the Constitutional Court is bound to the wording of the application. Only if the entire statute has been passed by a legislative authority unqualified in accordance with the allocation of competences in the federal state or published in an unconstitutional manner, the Constitutional Court may annul the whole statute.

On the occasion of cases pending before it the Constitutional Court itself may initiate norm review proceedings *ex officio*. If the applicant receives satisfaction in the case that has caused the norm review proceedings, the latter shall nevertheless be continued.

3.2. Constitutional Court as negative legislator

Without any doubt, the interest of constitutional policy in constitutional justice focuses on its power to review the constitutionality of statutes. Thereby it has to be taken into consideration that often there might not always be an unambiguous answer to the question whether a statute is in accordance with the constitution or not. It is, however, the Constitutional Court's task to give a binding answer also to ambivalent questions by exercising well-balanced judicial discretion. When doing so, the Constitutional Court interferes with the margin of legal policy otherwise inhered to the legislator. This shows that norm review - in recognition of the necessary judicial self restraint - always has a political function.

In the light of these considerations, the organisation of the Constitutional Court gains essential significance, especially under the aspect of the political independence of its justices.

3.3. Margin of appreciation of the legislator - Judicial self restraint

Until the late seventies of the past century, the case law of the Austrian Constitutional Court had been marked by distinct judicial self restraint. The judgments had formal character, especially in the field of human rights. Correspondingly, the margin of appreciation of the legislator was comparatively wide. In connection with two politically sensitive norm review procedures in the seventies (concerning abortion[14] and university organisation[15]) the Court dismissed the applications for norm review. These judgments have been severely criticised by the conservative opposition party and by legal doctrine. The reproach was that the Court did not to properly implement its constitutional competences and, thus, not fulfil its task to protect constitutionally guaranteed rights. The critics pointed out correctly that "judicial self restraint" may

[14] VfSlg7400/1974
[15] VfSlg 8136/1977

also have a political function, notably the legitimacy of the political majority party presently in power.

Since the end of the seventies, the case law of the Austrian Constitutional Court gradually changed to a more and more value-oriented position by giving considerably more material significance to human rights. The Court developed its case law with regard to the principles of protection of confidence and of proportionality inherent to the case law of the European Court of Human Rights. Although the always respected margin of appreciation of the legislator continued to exist, it became much narrower. It is not amazing that also this development gave reason to criticism.

It is difficult to answer the question how far the scope of the margin of appreciation should go, especially with regard to human rights. Within this scope the legislator is undoubtedly authorised to enact also contradictory provisions.

The question as to the limits of the margin of appreciation is closely connected with the problem of judicial self restraint. The Constitutional Court should exercise self restraint where opinions may differ over the question whether a legal problem has to be considered under aspects of human rights or not.

When interpreting human rights, a Constitutional Court should hold the view that its competences as interconnecting elements in a system of separation of powers should be interpreted in a wide sense. An interpretation of human rights which leaves a maximum of freedom to the individual realises the guiding idea on which the principal of separation of powers is based.

3.4. Dissenting opinion

In many Constitutional Courts judges who have been overruled are entitled to formulate dissenting (or concurring) opinions. Legal doctrine often favours this instrument since it makes the decision-making process within the Court more transparent and shows that the Court has also dealt with counter-arguments in its deliberations which cannot be found in the reasons of a decision which often reflects only the smallest common denominator. On the other hand, the instrument of dissenting opinion may also be used to weaken the Constitutional Court's decisions. Decisions to which dissenting opinions are attached might be regarded as "less valuable" than seemingly unanimously taken ones.

Dissenting opinion is unknown to the Austrian legal order. However, political circles have discussed its introduction repeatedly in the past. It is most probably mere chance that this has always occurred at times when certain political circles were dissatisfied with the case law of the Constitutional Court. Opinions may certainly disagree on instrument's principal usefulness, it should, however, not be forced on a Constitutional Court in which the majority of the judges are against it. This is still the case in Austria.

Closely related hereto is the question whether or not the result of the voting as such or even the voting behaviour of the single judges should be disclosed. It is evident that especially the latter might possibly endanger the judges' independence.

In Austria, where decisions are made by simple majority, the result of the voting remains secret, thus suggesting that the Constitutional Court's decision has been taken unanimously.

3.5. Rapporteurs

The Austrian Constitutional Court elects rapporteurs from among its judges for a renewable term of three years.[16] The President distributes the cases filed with the Court to them. Once assigned the case may not be withdrawn from a judge without her/his consent.

Presently, ten judges (including the Vice-President) act as reporting judges. Principally, the name of the reporting judge is not kept secret.

4. Conclusion

The principle of separation of powers implies also elements of interconnection of powers. An extremely important such element is constitutional justice, controlling acts of legislature and executive. Because of this task, constitutional justice must be independent from these powers, although they themselves usually play an important role in the selection process of the judges.

A long democratic tradition and a long established and consequent case law are major factors for guaranteeing the independence of constitutional justice.

The constitution must be based on the unexpressed assumption that all state organs will fulfil their tasks as provided for in the constitution. Often no measures for imposing sanctions exist if these obligations are violated.

Who has the last word with regard to norm review - the Constitutional Court or Parliament? This question has to be answered on the basis of the individual constitutions.

Most important issues for guaranteeing the independence of constitutional judges are the state organs - composed of representatives of political parties - involved in the selection process and the duration of their term of office. Once a judge is appointed political influence from outside must end, and also the judge has to keep distance to the political forces having acted in favour of his selection.

[16] Section 2.1 Constitutional Court Act

Initiation *ex officio* of norm review proceedings by the Constitutional Court on the occasion of a case pending before it is desirable since it strengthens the Court's independence.

Constitutional Courts have to respect the margin of appreciation of the legislator - the limits of which are not always easily to identify - and insofar exercise judicial self restraint. However, when interpreting human rights the Courts should make use of its competences in a wide sense. An interpretation of human rights which leaves a maximum of freedom to the individual realises the guiding idea on which the principal of separation of powers is based.