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

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1. Introduction

1. Separation of Power is one of the basic structural principles of democratic societies. It is not an end in itself, nor is it a simple tool for legal theorists or political scientists. It is a basic principle in every democratic society that serves other purposes such as freedom, legality of state acts – and independence of certain organs which exercise power delegated to them by a specific constitutional rule.
2. The independence of constitutional courts is an objective of the separation of powers, independence is its result. Independence of constitutional courts is also a precondition for the separation of powers. It enables constitutional courts to effectively control the respect for the separation of powers.

2. Preliminary remarks on the scope of the topic

3. The Congress of the World Conference does not only deal with Constitutional Courts, but also with "equivalent bodies". This wording is clearly aimed against a narrow view on a certain type of constitutional justice, especially against a restriction to the "European type" of constitutional courts. Constitutional Courts in Europe have a number of common features, which distinguish them from other systems, such as the system of the US Supreme Court, which I will call the American type of constitutional justice. In Kelsenian constitutional thinking, the ordinary (criminal, civil or administrative) judge had no power at all to decide on the conformity of a law with the constitution.

4. A division into two groups of Constitutional Courts takes account of the context of constitutions: Courts in young democracies and courts in democracies with a longer democratic tradition. In this second group, we find a commitment to functional separation of powers, a certain constitutional culture and especially a high convergence of constitutional law and constitutional practice. Questions to both groups may be the same on an abstract level, but they must be put in different ways; the answers must be different anyway.

5. The access of the individual to the constitutional court has proven to be the most important ingredient for successful constitutional justice; examples of young democracies show this, as do established democracies, which have demonstrated it in the second half of the 20th Century.

3. Separation of Powers – a valid concept in today's constitutional theory

6. Separation of powers comprises functional, institutional and personal separation. The degree and the quality of separation of powers in a particular constitutional system can only be measured if one assesses the extent to which functional separation corresponds to institutional separation, i.e. whether different functions are fulfilled by different institutions and persons that are not directly dependent on organs of other institutions.

7. Judicial power that has given rise to much discussion within the separation of powers doctrine. It is true, that the ordinary judge had no limiting function *vis-à-vis* the legislator. The American type supreme courts and the constitutional courts can effectively limit the power of legislation to the boundaries of the constitution.

8. The separation of powers does not create the independence of courts in general and of the constitutional court in particular. The material requirement of independence is not replaced by an abstract principle. Its function is limited to assisting the material guarantee of independence

4. Independence of Constitutional Courts and the Legislature

9. As constitutional courts are empowered to set aside laws and statutes, legal theory describes them as "negative legislators". The constitutional judge is inevitably and on a permanent basis close to the powers of the legislator in a "positive" sense as well:
a) "Interpretation in conformity with the constitution": in many systems, constitutional courts have a certain discretion when they make a decision during norm control proceedings concerning the constitutionality of a legal rule on whether to annul the law or to interpret it in a way that makes it conform to the constitution.
b) Guidelines for new legislation: Sometimes constitutional courts present to the parties of the proceedings and above all to the legislature, guidelines for future legislation.
c) Constitutional courts supplementing Parliament: There may be situations where legislation was necessary according to the constitution or simply for practical reasons, but there was no consensus in Parliament for a solution.

10. Constitutional courts have to be aware of of the legislature's political discretion; it enjoys a "margin of appreciation" especially in complex situations involving technical questions of any kind. The extent of the judicial self-restraint will vary from country to country and from one field of legislation to another. Nevertheless, there are common lines in a comparative perspective, with areas where the member states enjoy a larger margin of appreciation and situations where there must be a stricter control by the international judge.

11. Decisions on human rights' questions often entail defining public and private interests, balancing these interests and making a choice of preference for one or the other. In a number of cases, human rights decisions reflect a social change, answers given by the legislature and ultimately by the constitutional court reviewing the legislation are in a certain sense "political answers".

12. In a number of constitutions, we find special contents that may be called "supra-constitutional" contents of constitutional law. This part of constitutional law cannot be altered by Parliament, not even by the qualified majority and the proceedings for "ordinary" amendments of the constitution. If the constitutional court is competent to define the content of "supranational" law and its limits, it decides directly on the field of action of the *pouvoir*

constitué, that means (i.e.) not only the "ordinary" legislator, but also the legislator competent to amend the constitution. Parliament remains in charge with the exception of "supra-constitutional law" it can change the constitution when it is of the opinion that the constitutional court has interpreted the constitution in a way that was not intended.

13. The effect and the possibilities of nominating judges depend largely on the national rules on nominating judges. From a comparative perspective, there is a wide range of requirements, procedures and other criteria, and one of the working groups will deal with this question in detail. From a general perspective, professional requirements, long terms of office and a fixed age-limit, the division of rights to present candidates among various state organs and qualified majorities in election proceedings will reduce the possibilities of influencing the composition of a constitutional court as a reaction to certain case law.

14. The constitutional judge who respects the separation of powers between legislation and the judicial control of legislation will take due account of the margin of appreciation, of political questions and of the democratic legitimacy of decisions of Parliament. In turn, it may expect the unlimited respect of parliament for its own decisions, which aim to enforce the supremacy of the constitution over legislation and the executive.

5. Independence and Separation of Powers - General conditions of an effective constitutional control in transitional systems

15. In transitional societies conditions of independence cannot be created by the constitutional courts; they can only contribute to a step-by-step development of the legal system and the societal environment. They have to be a role model for other constitutional organs in using the legal method when interpreting the constitution, strict obedience of rules of conduct, take account of international standards and thereby give support to the individuals when they are seeking the protection of their fundamental rights.

16. Today, constitutions and constitutional courts in transitional systems have much less time to develop and reach certain standards in comparison to the time institutions had in the 19th and 20th Centuries. However, from an international and a comparative perspective, today we find a rich experience of how to implement constitutional judicial review in situations of transition:

* In older democratic systems, the step-by-step-approach has proven to be the best way to improve judicial standards.
* Today there is a body of case law of regional human rights courts, practice of UN institutions and case law of national constitutional courts that is exchanged between the courts on a bilateral and on a multilateral basis. Learning from the experience of others and learning from each other's contributions to the quality of constitutional justice all over the world
* Constitutional courts have to gain faith, trust and self-confidence over a certain period of time. Trust by society and legal experts is gained by a predictable practice.
* Constitutional courts have to develop values behind the provisions of the constitution. In doing so, the constitutional court also has the possibility of establishing the consensus in a young democracy.
* It seems that the range of competencies must not be too small for a while and it must not be too large at the very beginning. Judicial courts that have a procedural law where the court was a neutral arbitrator between parties have proven to be successful.
* International and regional courts strengthen internal independence of constitutional courts, especially in systems of transition. Where there is still a lack of internal consensus, the

authority of a long existing international institution accepted by the large majority of states concerned will help to stabilise the system in general and the constitutional court in particular.

6. Five factors determining/supporting independence of constitutional courts

17. Ethical standards of judges: The extent to which independence of constitutional courts is respected by Government and Parliament highly depends on the political and constitutional culture of a given state. Very detailed regulations may not be worth much where there are subtle mechanisms of influencing judges or where pressure is actually exercised on them. Rather vague rules may be sufficient where the court and its judges are respected as ultimate guarantors of the constitutions. Ethical standards of and for constitutional judges support independence of constitutional courts.

18. Constitutional Culture: It is in the hands of Government, civil society including above all the media and not forgetting the judges themselves, to enhance the respect for the constitutional court and thereby also its independence. On the other hand, even under "mature" democracies, where the constitutional court has reached a strong position, confidence and independence may be in danger and may be hampered by Government, the media or the judges themselves. The election process for constitutional judges and a proper balance between confidentiality and transparency are important factor of constitutional culture.

19. The Role of the media: In modern society, the publication of decisions in official collections of judgments or in law journals is still important; but it is not decisive for the overall perception of the performance of a court. The media bear responsibility for the proper perception of court decisions, and it is a common feature in democratic societies that the media strengthen and support the independence of constitutional courts by giving them a voice in the public debate.

20. Judicial Protection of individual rights: In a comparative perspective, constitutional courts that have become strong and independent institutions in their countries have the competence to set aside or leave unapplied, official acts (judgments by ordinary courts, administrative decisions or laws) conflicting with the requirements of human rights, be it directly on individual application or following the referral by a court.

21. International Co-operation of Courts: Independence of constitutional courts may be assisted by international co-operation. There are three important ways of co-operating:
- co-operation between constitutional courts and international courts;
- bilateral co-operation between constitutional courts;
- multilateral co-operation between constitutional courts.

These forums have a twofold significance: first, they support the exchange of views on common problems of constitutional justice. Apart from this transfer, these initiatives assist the constitutional court to hold an independent position in the internal separation of powers.

7. Conclusion

22. The rich experience that is reflected by the national reports is not adequately dealt with if one reduces them to the pure legal perspective. Legal and factual aspects show the necessary circumstances for independence of a crucial institution in democratic legal systems governed by the rule of law.