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# "Guarantees of independence of constitutional justice and interference of the constitutional courts on public practice"

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and Influence of Decisions of the Constitutional Court on Public Practice"
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**Summary**

The text makes the following points, which are linked by the following argument:

- Judges cannot (and should not) be fully independent of every outside influence. Judicial independence refers to the ability to reason and to decide independently
- While independence is a prerequesite to activism, it does not determine the degree of judicial activism. There is no general rule as to how active CCs should be
- In the first stages of transition, CC activism makes sense, since CCs have a preceptorial (educating) function and, against the backdrop of generally low levels of qualification, only CCs can engage in state-of-the-art protection of human rights

The international community (relevant IOs and NGOs) has to harmonize efforts to support the CCs as the "beacons of democracy". Criticism of legal abuse and violations of human rights should be commensurate and constructive.

**1.** This contribution will focus less on the technical and legal aspects of judicial independence and judicial activism, but tries to highlight the political and social conditions that make a correct implementation of relevant statutory law possible. It is a truism that the most perfect legal regulations alone can provide no sufficient guarantees against systematic abuse of legal principles, but it remains unclear, what exactly the international community can do to support practices heeding rule of law principles. The recommendations I would like to propose address also international community (and maybe in the first line, since its leeway to act is much larger than that of the recipients of technical assistance). The observations in this paper draw extensively on relevant experience gained from work in the OSCE Missions to Georgia and to the FRY. I will discuss the issues of judicial independence and judicial activism as well as their mutual relationship, the specific problems encountered in societies in transition, and derive a set of proposals that are designed to upgrade the role and the impact of Constitutional Courts in these societies.

**2.** States in transition belong to two groups: realistic candidates for EU membership and others. The first group is in no way "better", the peoples in the other group are as talented, good willing, diligent, and motivated as any other people, but they live under social, economic and political arrangements that do not conform to the standards defined in the relevant documents. This distinction has important consequences for legal practices and the attempts to bring them closer to the European model. To begin with, the shared conviction of the elites in 1989 that closing up to Europe was the only available option facilitated the peaceful regime change enormously (and, significantly enough, in those cases, where this issue was controversial, the regime change was far from smooth and often came with open violence, as the Rumanian or the Yugoslav cases demonstrate). There is an underlying tit-for-tat philosophy that explains the difference: The more the EU can offer (and full membership is certainly the best offer one can get), the more genuine commitment will be generated by the political elites bargaining with the Union or other IOs. If the offer is considered too insignificant, "obnoxious" strings attached are simply disregarded, as the fate of the good governance clauses in the Lomé Agreements demonstrate. One does not have to resort to overseas examples, cases abound in the CoE area as well. An instructive example in this respect is the Georgian criminal procedure code, which was okeyed as a draft by CoE experts, but readapted to the needs of the Georgian Ministry of the Interior during the

parliamentary procedure. Needless to say, the Georgian Constitutional Court did not bother to rock the boat. Compare to this the notable activism of the Hungarian Constitutional Court under the chairmanship of L. Solyom (some observers call it the most active court in the world) and the general state of legal institutions and procedures in Hungary and you will arrive at the conclusion that the differences among transitional societies are staggering. These examples demonstrate that the behavior of the international community and specifically, the EU makes a difference. Of course, this is no one-way street and extending or not extending membership offers or other gratifications is a political, not a technical decision. But it is a complex interactive process, in which the country rapporteurs, who assess the degree to which a given government has implemented its commitments, play a major role.

**3.** Complete judicial independence is, just as complete judicial restraint (judges are only subjected to the law), a fiction in all sountries. The ideal is that judges are to form their opinion on specific cases independently, free from any attempts from whatever side to influence the process of reasoning.There is an abundance of internationally agreed and accepted standards such as the Universal Declaration on the Independence of Justice (Montreal 1983) that seek to guarantee this ideal.

- Judges may not be moved to other service postings or recalled without their consent
- Length of service, adequate remuneration, conditions of service must be regulated by law
- Right to tenured position, no preliminary or probational judges
- No action against judges concerning their judicial activity (immunity)
- Right to refuse testimony about matters concerning professional secrets
- Specific cases (classes of cases) are assigned according to fixed criteria established by the court (not by outside authorities)
- Professional promotion on the basis of qualification criteria
- Fixed jurisdiction, no ad hoc tribunals
- Publicity
- Separation of powers: the administrative power may not control justice, suspend or discontinue judicial action, "administrative restraint" the administrative power is to refrain from any action that is apt to influence judicial action, rulings may not be overturned neither by law nor by administrative decree or order
- Right to collective protection for judges
- Ethical code for judges
- Freedom of religion, speech, assembly, belief for judges
- Qualification and (continuous) educational standards
- No discrimation in recruitment
- Representativity in relation to society
- Incompatibility clauses

As a rule, any reduction of dependence improves the chances for democracy and the rule of law. There is still a lot to be done even in the most advanced systems. However, there are legal and practical limits to an infinite increase of judicial independence. Thus, it seems obvious that one cannot keep the courtroom free of politics or social conflicts. The judicial branch is a part of society and reflects its basic structures and cultures. Courts are elitist institutions that are governed by the current values of the intellectual and cultural elites, but come easily under the pressure of populist opinions. A "clash of civilizations" is inevitable, as the oscillations in the US Supreme Court jurisprudence in abortion and death penalty issues demonstrates.

Another peculiar dependence which is largely overlooked is the dependence on the law; a contradiction in itself, as it would seem. The point of this argument is that judges may enjoy a larger or more narrow leeway in their decision making. This is basically a political decision and reflects the amount of trust that the courts enjoy with the political elites. Only high-trust systems accord a high degree of judicial autonomy. The case in point is the US (and generally common law systems) - for example, the US Supreme Court can refuse to decide a case because of its political implications. Judges have to enjoy a certain amount of independence from the law, the density of legal regulation may stifle judicial activity.

A new type of dependence is generated by the beginning demise of the nation state and the formation of supranational political-legal units. On a more general level, there is an increasing impact of international standards such as gender equality minority protection or political correctness - a kind of globalisation of justice. Speaking practically,not only do European judges have to heed European law, but national justice is also subordinated to central European courts, whose rulings limit the decision-making autonomy of the national judges and justices. This process is only in its incipient stages and has far-reaching consequences.

Critics of the formal conception of the law and the rule of law are right in their insistence that legal and constitutional guarantees cannot safeguard correct compliance and implementation. Even the constitutions of totalitarian dictatorships had the most perfect constitutional safeguards for judicial independence and the rule of law. To bring a constitution to life, however, requires both the willingness of the political elites to abide by the wording of the constitution as interpreted by the courts as well as judicial self-restraint to avoid a usurption of political roles by the judges. In other words, the rule of law is dependent on the compliance with civic rules of conduct and mutual respect. Civic rules of political conduct emerge as the result of long-term experiences and cannot be created by administrative fiat. The amount of trust invested in judges by politicians must increase with the political importance of the courts involved. The factual independence of the judges is directly dependent on political trust. The evolution of the Austrian Constitutional Court since 1945 illustrates this point very clearly.

Courts, and Constitutional Courts in particular must be trusted both by the political leaders and by the population in order to be effective. This creates specific dependencies. A Constitutional Court will loose the trust if it tries to change the existing order by a "legal revolution", or if it behaves like a select legal caste that pays no heed to the practicalities of the political process or "real life" on the ground. In other words, if it wants to be successful, it has to take the expected impact of its decisions into account.

Corporate identity can spill over into caste identity, when the activity of judges not under public control. Corporate identity is a powerful safeguard against political interference, but it safeguards the rule of law only if the mechanisms of recruitment and promotion do not harden into carapace, if the system remains open and flexible. The judicial corps in a democratic society should be as egalitarian as possible; the only hierarchical elements should be based on knowledge, experience and qualification. Bottom-up criticism should be possible.

Judicial independence, viewed in a democratic context, refers not to the absence of every outside influence. The concept can only be meaningful, if it is understood as a moral commitment to decide according to the judge´s best knowledge and to his/her conviction. This translates directly into recruitment standards: Judges, and CC justices should be mature personalities, who are capable if independent reasoning and judgement.

**4.** For societies in transition, the judicial system poses a specific problem. Transitional societies expose, like in a magnifying glass, all the problems that also occur in Western societies, of course with a large amount of regional variation. In addition, they have specific problems arising from the heritage of real Socialism. I would like to thrash out three or four problem areas, which have the potential to threaten their otherwise prospective developmental trajectory towards the rule of law and a civil society

1) corruption: Imagine a judge with a monthly salary of US$70 that has to deal with litigation sums exceeding millions of US dollars. Corruption has become a socially accepted means of getting by and the moral inhibitions are likely to crumble in such a context. The EU has started to pay Georgian judges a monthly salary without visible effect to this point.

2) Justice is a low-paid female reserve and has a very bad image. Trust figures are down and the role of formal procedures is minimal. To work for often illegal business as a lawyer or solicitor is becoming a preferred carreer path.

3) The negative impact of the yellow press in societies in transition poses a specific problem: There is a large factual impunitive leeway for tabloids and electronic media in societies that had never known freedom of the press. Media law is insufficient and ineffective, to say the least.

4) The economic impasse which many societies in transition face implies formidable barriers, eg. If all severance pays to which laid off workers are entitled were paid out, all firms would go bankrupt.The most dramatic threat to judicial independence in societies in transition, in my eyes, comes from the financial and infrastructural deficiencies, not from political pressure or illicit interventions (the heritage of "telephone law"). The problem of justice in societies in transition is multifaceted and complex and it may well wind down to a vicious circle. The political place value of the judicial system is generally low (with the possible exception of constitutional courts) and corresponds to the role of law as a genuine mechanism of conflict resolution in general. The prestige of the judicial profession as well as trust in impartial justice is equally low, a fact which is reflected in the feminisation of the profession, the lack of infrastructure, low salaries and bad working conditions. The administrative branch uses its overweight to drain the judicial branch of necessary resources. It is much closer to politics and economics and not really interested in an effective judicial review or limitations of its flexible decision making.
Large areas such as police, the military and intelligence services are factually exempt from the control of judges. An important contribution to judicial independence can be made by the political leadership. If the political leaders demonstrate that they are willing to accept court rulings that run counter to their interests, the image of justice will be greatly enhanced. Surveys in Hungary show that the trust in ordinary justice is quite low, but as a result of resolute action by the Constitutional Court trust in this institution soared (in April 1995, the Court actually struck down parts of the "Bokros package", legislation introduced to balance the state budget by slashing social expenditure. The Minister of Finance Bokros resigned. Other landmark rulings included the abolition of the death penalty at the behest of 4 university professors, which is a good illustration of both the accessibility of the court as well as of its responsiveness. In both cases the political leaders abided by the rulings).

**5.** This said, it becomes clear that there is an intimate relationship between judicial independence and the degree of judicial activism. Judicial activism is impossible without the independence of judges, but the reverse is not true: Activism may increase or decrease their dependence.

In a comparative perspective, there are 3 models or traditions of judicial activism/passivism, namely the

- Common law tradition
- Continental-monarchic tradition
- "Telephone law"-tradition in the post-Communist societies

All models are a result of a specific dynamic trajectory of social and political development. In Western societies this process generated shared moral beliefs in the freedom and superiority of individual (not the family) which in turn necessitates specific constitutional arrangements (separation of powers, checks&balances). Transitional societies show different patterns of individualism, but here, the development has not led to a vibrant civic society that relies on the principle of free association. The step from status to contract has not (yet) been taken, or contracts are not honored because of a weak state authority.

The degree of judicial activism (independence) and its acceptance depends also on concrete political arrangements, including the personal composition of the Court (for example Court packing).

In the common law countries, judges enjoy a high amount of reverence, they are key social figures of the constitutional arrangement (although there is no Constitutional Court in Great Britain, but the legal and political system relies on shared common sense values and traditions, which are made explicit bu the judges in their rulings). In the US, everybody knows the names of the Supreme Court justices, but nobody can name all members of the US government. The point was that despite much criticism, active Constitutional Courts were just as accepted as more restrained courts. Their resolve to take the lead in on or the other issue (such as civil rights legislation in the US, which was enforced against the strong resistance of state and local courts and adinistrators) was resented, but accepted as a prerogative of justice.

In contrast, judicial activism has been largely absent on the continent. Judges had enjoyed no independence from the absolute monarchs, which bred distrust in the entire profession. The prevailing image of constitutional courts in Europe is that of a "guardian of the constitution". To some extent, tendencies toward judicial activism were reinforced as a response to the experience of dictatorship in the interwar years and more recently, by the transition of the classical law-governed state (rechtsstaat) into a state governed by human rights (menschenrechtsstaat). The increasing volume and the strong impact of international human rights documents which as a rule, have to be transformed into national law and executed as such, have made the role of constitutional courts as the protagonists of human rights more pronounced.

The modern state is built on a vibrant civil society, a society in which individuals are not fixed to certain roles, but can choose between social roles. The emergent medieaval state provided an external reference point for individuals by spelling out equal subjection, the modern state state guarantees equality in the execution of rights. The importance of CCs has therefore grown rapidly and inexorably, and typically, modern legal systems have introduced the institution of the individual constitutional complaint. A modern Constitutional Court operating in pre-individual and individualizing societies lacking a strong civil society cannot respond adequately to the need to defend human rights (e.g. womens' rights…)

In Communist countries, judges were nominal independent, their rulings had a nominal impact, the courts became, together with other governmental institutions, "privatized" by interest groups

that captured them or by the office incumbents themselves. Most post-Soviet countries are still fighting to come to grips with this heritage. By and large, the judicial branch is affected by corruption, low qualification levels, and political interference (e.g. through lustration campaigns). The Constitutional Courts hold a specific position. For one thing, they are, in most cases, a new institution that symbolizes the re-integration into the Western value community. But they are also institutions that straddle the divide between law and politics. From the perspective of the political leaders, the Constitutional Court should play the role of an arbiter, it should consist of wise men and women who do not question the rules of the game, but should resolve conflicts instead. The experience of three different Courts, which have operated in vastly different contexts and taken various approaches in relation to judicial activism is instructive.

The Hungarian Constitutional Court has been criticized for its exceptional activism that significantly broadened the spectrum of human rights granted by the constitution. The criticism was largely based on the fact that its Chairman, Justice Laszlo Solyom had been a member of the Communist Party, but also on the fact that it mixed up entitlements and fundamental rights. Solyom went as far as talking about an "invisible constitution" or a "common constitutional law of Europe" and was committed to a jurisprudence of principle that give little attention to new center of power in Hungary, namely the parliament. Justified criticism aside, one must bear in mind that the Court´s expansive jurisprudence was also a reponse to the virtual lack of institutions that protected the constitution under Communism. With the benefit of hindsight, we can say today that the type of activism that the Hungarian court engaged in helped to pave the way for the acceptance of the judicial branch as a state power and a salient factor in politics. This happened regardless of the fact that a few, many or even all its rulings might have been wrong or flawed. Under its new Chairman Mr. Nemeth, the Court has taken a much mor defensive line and has approached the "guardian" model.

Yugoslavia´s Constitutional Court was operative until shortly after it ruled that the extradition of Milosevic was unconstitutional. It had for all intents and purposes been an instrument of the ruling political clans (for example, only a few days after it had declared Kostunica´s election victory on 24 September 2000 null and void, it reversed its ruling on 4 October, obviously following a "working instruction" (radni nalog) which were widespread in the entire judiciary under Milosevic. While the old guard was not exchanged (which is the prevailing pattern on the Federal level) the Serbian Constitutional Court was, according to the liberal press was deliberately left unstaffed in order to keep it from putting brakes on reform legislation. The latter partly had taken the form of government decrees in order to avoid obstruction and filibustering in Parliament. As a recent example, the decision to introduce compulsory religious instruction in Serbian schools (veronauka) was not passed in the appropriate statutory form. It is interesting to note in this context that rule by decree started in 1992, shortly after the introduction of sanctions against Yugoslavia. The Yugoslav and Serbian courts have a potential to evolve into a kind of mediator between partisan groups. It must be understood that the entire body politic is still divided by deep political cleavages between "patriots", "democrats", "allies" and "enemies", so that it is important that the Courts assume the mediation and reconciliation function.

The Georgian Constitutional Court, although it consists of highly respected lawyers, has had little political impact. The number of complaints lodged has been decreasing over the years as has the number of complaints satisfied. This reflects the perception of the Court as powerless as well as the general decay of the Georgian state. While the majority of cases deal with property rights violations, taxation, apartments, confiscations, the Court has remained silent in the face of outrageous human rights violations especially during pre-trial detention, concerning religious minorities or womens´rights. This is despite the fact that it enjoys full constitutional guarantees

of independence. It is interesting to note that the Court seems to be no partner for Georgia's thriving civil society. It seems, however, that the perceived leeway for a more active posture may be broadened.

**Conclusions & Recommendations:**

- In societies in transition, the Constitutional Courts have a specific position . Given the poor level of training and the political recruitment criteria in the judiciary in general, they are (or should be) an enclave of legality and constitutionality as well as professional jurisprudence which can serve as a model for the whole branch (beacon function).

- Therefore, Constitutional Courts should, as a rule be active and outgoing, at least during the first stages of transition. Not in the sense that they have to mingle in politics. But they must be adamant to defend human rights as laid down in the relevant international documents. Almost all these countries have signed the ECHR, and there is a legal and constitutional basis. They have to be determined in defending rights of the individual (not of "the people") in the This cannot be left to defense lawyers who are poorly trained and paid or to human rights groups who enjoy little legitimacy, are interest groups in their own rights (often family businesses) or Ombudsmen, whose impact is very limited and whose independence is questionable. Constitutional Court justices should develop an identity as part of the civil society: they should defend the constitutional order in a critical way. They must raise their voice in public, warn of dangerous trends, commend positive developments. They must become (or remain) respected and trusted public figures.

- Constitutional Court justices enjoy the highest independence, at least on paper. They must seek national and international publicity as a group with corporate identity, not as individuals. The international community should tune its expectations and claims to the concrete context: it is ultra vires for the Constitutional Court in Azerbaidjan (or in Georgia, for this matter) to act like the US Supreme Court.

- No political recruitment criteria. The average age of Constitutional Court justices makes it highly probable that they have made their carriers under Socialist regime, where it was imperative to be a Party member. The only criterium (apart from professional qualification) should be the commitment to constitutional value system and human rights.

- On the other hand, the major blind spots in law enforcement (military, police, secret services) must be gradually subjected to court control. This problem also exists in the West, but not to that extent. It might make sense to recruit to the Courts independent and prestigious lawyers that have served in these bodies.

- Constitutional Courts in transitional countries have to be opened towards the control and support of the international community as well as towards the population at large: direct access for popular complaints supports and protects the CC from political interference. A wide jurisdiction for CCs is essential, it can be monitored much easier than the entire judiciary, it represents the elite of the legal profession, it is in the public eye and its rulings can be expected to exert control and moderation on politics. The approach must be top-down as long as general educational and qualification levels have not become adequate.

- Last not least, the international community must adopt a much more comprehensive approach. Recommendations by International Organizations are often unrealistic, criticism by international

NGOs unconstructive. Efforts of IOs and NGOs should be harmonized, criticism of human rights abuse and other violations of constitutional principles should be commensurate and constructive. Political pressure on recalcitrant member states is negligible, especially if such states are backed by other powerful members (as in the case of Georgia). Criticism should be constructive and concrete, which is relatively easy and less threatening to political elites regarding concrete human rights violations. In any case, the Constitutional Courts provide an ideal interface between the international value community and post-Communist realities.