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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

REPORT ON THE COMPOSITION OF CONSTITUTIONAL COURTS

AND COMPARATIVE TABLE (APPENDIX)

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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 to ensure the constitutional court's independence and to maintain the representation and balance of different political and legal tendencies within the courts. At its 25th plenary meeting (November 1995), the Commission adopted a first version of the Questionnaire on the Composition of constitutional courts (CDL-JU (95) 15). A final version of the questionnaire was prepared in May 1996 (CDL-JU (96) 5) and sent out to members, associate members and observers of the Commission. The liaison officers at the various constitutional courts and equivalent tribunals were asked to comment on the draft report. In the rare cases in which both a member and a liaison officer submitted answers to the questionnaire, the members' comments involving an evaluation of the established practice were included in this report.

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 makes a distinction, on certain issues, between constitutional courts *proper* and superior courts which also exercise ordinary jurisdiction.[1] Basic differences in composition may generally be observed between these two types of court.

[1] 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. Some courts have only very recently been established, as in the case of Latvia and Ukraine as well as in Bosnia and Herzegovina. *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 1-4, and from material for the forthcoming volume.

Responses were obtained from members, associate members and observers of the European Commission for Democracy through Law in 40 countries.[2] The differences and similarities among them allowed the following trends to be recognized:[3]

1. Appointment of judges of constitutional courts

1.1. Systems of appointment[4]

There are generally two main systems of judicial appointment, plus the most common, which is a hybrid of the two.[5]

A – the direct appointment system:
The first is the **direct appointment** system, which does not involve any voting procedure[6] (*Canada*, *Cyprus*, *Denmark*, *Finland*, France, *Iceland*, *Ireland*, *Malta*, *Norway*, *Sweden*, Turkey).

Only in the case of the French Constitutional Council does the appointing authority have virtually complete discretion to appoint. The appointments are shared equally between the three presidents of the Republic, the Senate and the Lower House. As for the other courts of this category, the authority vested with the power of appointment must take particular proposals into account. The President of Turkey makes the judicial appointments, but on the basis of specific quotas from particular pools of professions.

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[2] These were the following members: Albania, Austria, Belgium, Bulgaria, Croatia, Czech Republic, *Cyprus*, *Denmark*, *Estonia*, *Finland*, France, Germany, *Greece*, Hungary, *Iceland*, *Ireland*, Italy, Latvia, Liechtenstein, Lithuania, *Malta*, *Norway*, Poland, Portugal, Romania, Slovakia, Slovenia, *Sweden*, *Switzerland*, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine. The following associate members of the Commission also responded to the questionnaire: Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Russia. The following observers of the Commission contributed to the study: *Argentina*, *Canada*, *Japan*. (For the responses to the questionnaire, see documents CDL-JU (97) 4, 4 Add, 4 Add.II, 4 Add.III, 4 Add.IV/Corr). For a schematic presentation of the responses, see the comparative table on the composition of constitutional courts, which is in the appendix of this report.

[3] 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.

[4] A note on terminology for these who make use of both versions of this report appears to be necessary. The English term "nomination" means "proposition" in French, whereas "appointment" corresponds to the French "désignation".

[5] The Greek Special Supreme Court does not fit into these three categories. It is composed of three *ex officio* members, i.e. the presidents of the Council of State, the Court of Cassation and the State audit court, and, on the other hand, four members of the Court of Cassation are appointed by drawing lots every two years. This procedure also applies for the appointment of the two law professors who form part of the bench in jurisdictional disputes or where the constitutionality of laws is in question.

[6] Except where a court proposes its candidate by vote (for example Turkey).

The common law systems typically involve a rubber stamp appointment by the Head of State or his/her representative pursuant to a binding executive nomination (*Canada*, *Ireland*) the power of nomination thus being decisive. Judges of the superior courts of *Malta*, from among whom the judges of the Constitutional Court are selected, are also appointed in the same fashion. *Ireland*, for its party, has a Judicial Appointments Advisory Board whose recommendations are taken into account.[7] All the nordic supreme courts are also part of this group. It is the Head of State who appoints the judges upon the nomination by the minister of Justice in *Denmark*, *Iceland*, and *Norway*. In *Norway*, Supreme Court judges are appointed by the King in Council upon the recommendation of the Ministry of Justice. The Supreme Court gives an informal expression of opinion to the Ministry of Justice. In *Denmark*, the Supreme Court has a *de facto* right to veto appointments. In *Finland*, the court concerned 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.

B – the elective system:
The second system is the **elective** system, which tends towards greater democratic legitimacy.

The electing authority is most often the sole chamber of Parliament (Azerbaijan, *Estonia*, Hungary, Latvia, Liechtenstein, Lithuania, Portugal, Slovenia, "the former Yugoslav Republic of Macedonia"), the Lower House of Parliament (Croatia, Poland), both Houses of Parliament (Germany) or a Joint Sitting of the two (*Switzerland*).

In the case of Germany, the *Bundestag* elects its half of the judges indirectly through its Judicial Selection Committee, which is a proportional representation of the political parties at the *Bundestag*. 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 Lithuania, proposals are made by the three presidents of the Republic, of Parliament and of the Supreme Court. 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: this is another example of a court's co-opting its members. Once Parliament has elected the judges of the Supreme Court, the Chief Justice of the Supreme Court is *ex officio* Chief Justice of the Constitutional Review Chamber, for which he proposes candidates from among the judges of the Supreme Court, who in turn elect the judges of the Constitutional Review Chamber.

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

C – the hybrid system:
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,[8] Spain). In some systems the elective component may be equal in weight to the appointment one but usually the elective component will be predominant (Albania, Armenia, Belgium, Romania, Spain).

In the hybrid category, nominating authorities such as judicial authorities or boards may also perform a direct appointing function (Bosnia and Herzegovina, Bulgaria, Georgia, Italy, Ukraine). In Bulgaria, Georgia, Italy and Ukraine, the power of appointment is split three ways between the President of the country, the parliamentary elective authority[9] and a judicial authority. Instead in Bosnia and Herzegovina, the power of appointment is divided between two elective authorities (the Lower House of the Federation and the Parliament of the Republika Srpska) and the judicial authority in the person of the President of the European Court of Human Rights after consulting the presidency of Bosnia and Herzegovina.

A second variant is a direct appointment which is, however, subject to approval by an electing authority (*Argentina*, Czech Republic, *Japan*,[10] Russian Federation). A similar style is one in which the elective authority (e.g. National Council, Slovakia) narrows down the short-list of candidates, from which the appointing authority may then choose.

1.2. 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 once the appointment procedure is over (Albania, *Argentina*, Belgium, Bulgaria, *Canada*, *Denmark*, Hungary, *Iceland*, Italy, Lithuania, *Malta*, Poland, 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 experienced** body of **judges** (Austria, Belgium, *Denmark*, *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. Furthermore, in Federal States,

[8] However, 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 (presently the issue is being examined, whether one or three candidates should be nominated by the competent organs to the President of the Republic).

[9] In Italy, the elective component requires a two-thirds majority of a joint meeting of the two Houses of Parliament, thus invariably including the opposition into the appointment procedure.

[10] In Japan the Cabinet appoints judges to the Supreme Court, then the electorate reviews the appointment by vote at the first general election of members of the Lower House of Parliament following the appointment, and subsequently at 10-year intervals.

the appointment procedure is also aimed at ensuring the **representation of the different entities**.[11]

According to the majority of countries surveyed, their appointment procedures make no express 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 (Belgium, Hungary, Italy, Portugal, *Switzerland*). This aim is seen as pursued in practice (Austria, Slovenia, *Switzerland*) or indirectly (Lithuania, Slovakia), e.g. 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 scholarly or legal career due to their political activity (Czech Republic).

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 Belgium, on the other hand, half of the court's judges must be former members of parliament.

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 (Spain), whereas in Georgia the procedure is geared at an *equal* balance among the branches.

Contributors' appraisals of the appointment procedure were mostly positive [Armenia, Belgium, *Canada*, Czech Republic, *Finland*, France, 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). Some contributors identified a power imbalance (Albania, Bulgaria, 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. Furthermore, it is currently being considered whether to introduce a hearing of candidate prior to their nomination. The most recent appointment of a judge to the Belgian Court of Arbitration was made following such a hearing.

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, Germany, Spain and Bulgaria, 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.

[11] Furthermore, in Austria, three effective and two substitute members are appointed upon the nominations of the Upper House, which is composed of representatives of the provinces (*Bundesländer*).

1.3. Conclusion

The evaluation of the appointment systems and of the realisation of their objectives, i.e. a composition of independent, competent and experienced judges and a balanced and legitimate composition and administration of justice was generally positive. The direct appointment system is notably most common among the supreme courts. The appointment procedure of the nordic and common law supreme courts, which does not distribute the power of appointment among the different public authorities, must be viewed in the context of the constitutional tradition and the personality of the constitutional judge in these systems. In France, each appointing authority makes his choice in full discretion, without any nomination being made by another authority. The elective system appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in case of a vacant position.

2. Selection of constitutional judges

2.1. Eligibility requirements

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, in most cases, entirely made up of lawyers (*Argentina, Canada, Denmark, Estonia, Greece, Iceland, Ireland, Malta, 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.[12] Another exception is *Switzerland*'s Federal Court (being also the final stage of appeal for ordinary jurisdiction), which does not require its judges to have had a legal education. In practice, however, the judges of the Federal Court are all lawyers. Up to five out of fifteen judges need not have professional legal qualifications on the *Japanese* Supreme Court.[13]

The general preference for lawyers may be observed in many constitutional courts as well (Albania, Austria,[14] Bulgaria, Germany, Italy, Latvia, Lithuania, Poland, 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 bring together the widest possible span of human experiences and to avoid an excessive

[12] In practice all the judges are lawyers at this court.

[13] In practice, only one or two judges are usually not lawyers.

[14] The Constitution requires all members of the Constitutional Court to have a university law degree and to have at least ten years of experience in a profession for which such a degree is required.

specialisation of the court (Armenia, France, Liechtenstein, Turkey). In practice, however, these courts are largely made up of lawyers. In Belgium half of the judges must be former members of parliament, though the overwhelming majority of them are lawyers.

Where legal qualifications are required, the kind of experience expected varies from long-standing service in the judiciary (Albania, *Estonia*[15]) to experience in any kind of legal profession (*Argentina*, Bosnia and Herzegovina, Bulgaria, *Canada*, Croatia, Czech Republic, Georgia, Hungary, Latvia, Lithuania, *Norway*, Romania, Russia, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Ukraine). In Belgium those judges who are not former members of parliament must be judges from the highest jurisdictions of the State, legal academics or auxiliary judges (assistants) of the Court. 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,[16] *Japan*[17]). Similarly in *Finland* the experience in the judiciary required for appointment to the supreme jurisdictions need not be long if it is supplemented by experience as a law professor or prominent advocate. In Austria, the president, the vice-president, three effective and three substitute members of the Court (nominated by the Federal Government) must be selected from among judges, high officials and university law professors.

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 (this was mentioned expressly in the answers of: Belgium, Bulgaria, *Canada*, Czech Republic, *Finland*, France, Georgia, Hungary, *Ireland*, Italy, *Japan*, Liechtenstein,[18] Lithuania, Romania, Slovakia, Slovenia, Spain, *Switzerland*, Ukraine[19]). Only in Bulgaria[20] 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 government interests carry too much weight in the present system.

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

[16] In Italy, fewer years of experience are required of law professors, too.

[17] Again, this principle only applies where legal qualifications are required at all.

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

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

[20] In Bulgaria a spirit of political confrontation reigned in the past between the authorities involved in the appointment of constitutional judges.

2.2. 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. For these reasons (*Argentina*, Armenia, Azerbaijan, Bulgaria, Czech Republic, France, Hungary, Italy, *Japan*, Liechtenstein, *Malta*, Romania, Slovakia, Ukraine) or for reasons not stated (Albania, Austria, Bosnia and Herzegovina,[21] *Denmark*, *Estonia*, *Iceland*, Latvia, *Norway*, Poland, Portugal, Slovenia, *Sweden*, Turkey), no provision is made for minority group representation.

Linguistic differences form the principal exception to this trend. *Switzerland*, *Canada* and Belgium, being countries which have more than one official language, cater for linguistic differences *de jure*. In the case of *Switzerland*, Article 107 of the Constitution requires that Parliament, when it elects the judges of the Federal Court, should ensure a balance in the representation of the country's different linguistic groups. Since decisions are handed down in the official language of the decision appealed against, and the judges express themselves in their mother language, it is necessary for candidates for the position of judge of the Federal Court to have at least a passive knowledge of the other two 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 European) law jurisdictions (this combination is particularly significant for private law). Three judges must be chosen from among the legal profession or the judiciary in Quebec and be of civil law training, whereas the remaining 6 judges must have had 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 national or 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 women do not form a minority group, several contributors mention women in this context. 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 Italy (one woman out of fifteen judges), Belgium (one woman out of twelve judges), Austria (two women out of fourteen effective, and one woman out of six substitute members), France, Armenia, Lithuania (each having one woman out of nine judges),

[21] In this country the representation of the different constituent groups is *de facto* ensured since four judges are elected by the parliament of the Federation and two are elected by the parliament of the Republika Srpska.

Canada, (two women out of nine judges), Slovakia (two women out of ten judges), Germany (five women out of sixteen judges) and Latvia (three women out of six judges, the seventh judge being yet to be appointed). 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 can arguably be 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.

2.3. Conclusion

The qualities required of a constitutional judge reflect in most cases the necessity of legal qualifications in order to ensure a competent court composition. On the other hand, an excessive legal specialisation could undermine the diversity of the composition of some constitutional jurisdictions. Nevertheless, a distinction should be made between the desire for a certain diversity and the creation of quotas in order to allow certain professions or minority groups to be represented on the court. The search for a balanced representation in order to redress inequality or discrimination may usually be formal in federal or multilingual societies, since these are particularly conscious of the issue of their different constituent groups' equal representation and access to the law.

3. The president of the constitutional court

3.1. Appointment of the president

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*, Belgium, Bulgaria, Croatia, *Denmark*, Georgia,[22] Hungary, *Iceland*, 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

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

(Azerbaijan, *Estonia*, Lithuania[23], Germany[24], Liechtenstein[25], Poland[26], *Switzerland*[27]), or by the country's Head of State (Austria[28], *Canada*[29], Czech Republic[30], *Finland*[31], Spain[32], France, *Ireland*[33], *Japan*[34], *Norway*[35] and 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, whereby the appointment procedure is simplified following a number of failed attempts. In *Sweden* the senior judge is appointed Chairman. In *Greece* the eldest of the two presidents of the Council of State and the Court of Cassation is *ex officio* the president of the Special Supreme Court.

The office of Chief Justice of the Supreme Court of *Canada* alternates between a francophone civil lawyer and an anglophone common lawyer. In Belgium the function of president is exercised by two presidents who alternate in the exercise of the effective presidency each year. Each president is elected from among his linguistic group within the Court.

3.2. Term of office, re-election and dismissal of the president

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 in the Questionnaire, this information was nevertheless provided in a number of responses.

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[23] All upon nominations by the President of the Republic.

[24] The power alternates between the Federal Council and the Federal Diet.

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

[26] Nominations are made by the judges of the Tribunal from among their number.

[27] The judges make nominations from among their number, then the Joint Chamber of the Federal Parliament elects the president.

[28] The federal Government nominates a candidate for the positions of president and vice-president.

[29] Nomination by the Prime Minister.

[30] Ratification by the Upper House of Parliament.

[31] Upon nomination by the Council of Ministers.

[32] Upon nominations by the Court.

[33] Upon the Government's nomination.

[34] By the Emperor as designated by the Cabinet; the Emperor is bound by the proposal.

[35] By the King in Council.

The presidential term ranges from 2 years (*Iceland*, Portugal, *Switzerland*), to 3 years (Albania, Bulgaria, Hungary, Italy, Latvia, Romania, Russia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia") to 4 years (Croatia, Turkey), to 5 years (Georgia), to 7 years (Slovakia), to 9 years (France) and sometimes with the right of re-election [Albania, Bulgaria, Hungary, Italy, Latvia, Portugal, Romania (albeit not expressly), Russia, Spain, Turkey). The presidential term is often indistinguishable from that of a constitutional judge (for example in Armenia, Austria, Belgium, *Estonia*, *Finland*, France, Lithuania, *Norway* and Slovakia). In *Finland* the presidents of the two supreme jurisdictions serve until retirement. In Austria, all the members (effective and substitute), including the president and the vice-president, are appointed until the age of 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). In *Norway* and *Malta* the president is appointed for life. In actual fact, they cease to serve on the court at the statutory retirement age (70). In the case of the Armenian Constitutional Court, the same rules as to term of office, re-election and dismissal apply to the presidency as to the other judges of the Court, i.e. the president remains in office until the age of 70.

3.3. Functions of the president

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*, Armenia, *Canada*, Czech Republic, *Denmark*, Germany, Hungary, *Iceland*, *Ireland*, *Japan*, Latvia, *Norway*, Poland, 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 (Belgium, Lithuania, France, Italy, Spain), or in most matters (*Finland*[36]). 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, Romania, Russia, Ukraine), or to distribute the cases to be dealt with individually by one of the judges as rapporteur (Armenia, Lithuania, France, Italy, Romania). In *Estonia*, the president of the Constitutional Review Chamber plays a part in the selection of the other members of the Chamber. In Belgium each president may submit a case to the plenum of the Court. For some courts the president will even be in charge of disciplinary action against the other constitutional judges (Czech Republic, Slovakia, Spain), or against collaborators of the court with respect to minor sanctions (Belgium).

The function of representative of the court, either in its domestic or its external affairs, was also noted on numerous occasions (Armenia, Belgium, Czech Republic, *Finland*, France, *Denmark*, Germany, Hungary, Italy, Latvia, *Malta*, *Norway*, Poland, Portugal, Romania, Russia, Slovenia, Spain,[37] *Sweden*, "the former Yugoslav Republic of Macedonia", Turkey).

[36] Exceptions are criminal or disciplinary matters, in which the opinion more favourable to the accused shall prevail.

[37] The president of the Spanish Constitutional Court is the fifth authority of the State; the president of the French

The president will often see to the administration or organisation of the court's activities (Armenia, Austria, Belgium, *Canada*, Czech Republic, *Denmark*, *Finland*, France, Germany, Hungary, Italy, *Ireland*, *Japan*, Latvia, Lithuania, *Malta*, *Norway*, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, *Sweden*, *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, Romania, Slovenia).

Ex officio functions may also be observed on occasion, eg as advisory to (*Ireland*), or co-representative of, the President of the State in case of absence, death or incapacitation (*Iceland*, *Ireland*), as depository of 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, *Junta del Gobierno*).

4. Age and terms of office

4.1. Age

The maximum age of constitutional judges ranges from 65 (*Malta*, Turkey, Ukraine), to 67 (*Finland*, *Sweden*), to 68 (Germany, *Switzerland*), to 70 (Armenia, Austria,[38] Belgium, Bosnia and Herzegovina, *Denmark*, Hungary, *Iceland*, *Ireland*, *Japan*, Latvia, *Norway*, Russia), to 75 (*Argentina*, *Canada*) and to no limit at all (Albania, Bulgaria, Czech Republic, France, Georgia, Italy, Liechtenstein, Lithuania, Poland, Portugal,[39] 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.

4.2. 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.

Constitutional Council is the fifth personality of the State.

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

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

A - appointment for an undetermined period:
Several countries do not fix a term for constitutional judges, thus allowing the judges to serve until the age limit set for the exercise of the function of constitutional judge, e.g. the age of retirement (*Argentina*, Armenia,[40] Austria, Belgium, Bosnia and Herzegovina,[41] *Canada*,[42] *Cyprus, Denmark, Estonia*,[43] *Finland, Iceland, Ireland, Japan, Malta, Norway, Sweden*, Turkey). The judges of supreme courts exercising constitutional jurisdiction may all serve until they reach this age limit. This also applies to the *Swiss* Federal Court, to which the judges are elected for a six-year term and re-election is virtually automatic, within the limits of the age of retirement; even if the possibility of non re-election exists *de jure*, re-elections are *de facto* ensured, which constitutes a guarantee of the judges' 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.

B - appointment for a non-renewable term:
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. Examples are as follows: 9-year terms: Bulgaria, France, Italy, Lithuania (though there *is* scope for a re-election if the term is interrupted and after an interval), Poland,[44] Portugal (after the 1997 revision of the Constitution), Romania, Slovenia, Ukraine; 10-year terms: Georgia; 12-year terms: Germany, Russia. Nevertheless, the renewal procedure may pose some problems.[45]

C - appointment for a renewable term:
The option of re-election may undermine the independence of a judge. Nevertheless, 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. Examples are as follows: Azerbaijan (15-year term, with a possible further term of 10 years) and Hungary (9-year term). 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

[40] In Armenia the members of the Court exercise their functions from the time of their appointment until the age of 70. There is no fixed term, nor is a re-appointment possible.

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

[42] Nevertheless, a judge may retire at any time.

[43] The judges may, however, remain in office for up to five years after they have reached the age of retirement.

[44] Prior to the constitutional reform, the term was for eight years and renewable.

[45] In Bulgaria, for example, a partial renewal of the Court takes place every three years by drawing lots to select the post of the judge who is to be replaced. The judges appointed at the previous renewal could be included in the drawing of lots. These judges might, therefore, be replaced after only three years of service even though the judges should normally serve for a 9-year term. This problem has been avoided: the judges appointed at the first renewal three years after the establishment of the Court did not take part in the second drawing of lots, six years after the establishment of the court.

introducing a 12-year term in order to increase the stability of the Court.

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). 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. 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 recognised that its constitutional judges' fixed term of 9 years with no possibility for renewal effectively prevents the Court's composition from ageing excessively.

4.3. Mechanisms for appointment by default

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 to adopt the system in place in Bulgaria, Germany, Portugal and Spain, which allows judges to continue to serve after their term of office has ended and until their successor has been appointed. Three months prior to the expiration of a judge's term, the president of the Bulgarian Constitutional Court calls upon those responsible for nominating and electing constitutional judges - the National Assembly, the President of the Republic and the presidents of the Supreme Court of Cassation and the Supreme Administrative Court - to nominate or elect a new judge. A judge whose term has expired continues to serve on the Court until his or her successor enters office. In *Greece*, if an effective or substitute member of the Court leaves office or dies, then another member is appointed, always by drawing lots. Until the appointment of the new member, the Special Supreme Court can function with the remaining members. The drawing of lots always takes place within the Council of State, in plenary session.

In Romania a new judge must be appointed at least a month before the expiration of a judge's term of office. Where the term has ended prior to the expiration of the period for which the judge was appointed and the remaining time exceeds three months, the president of the Court will call upon the authority which had appointed the judge to appoint a new one. The term of this new judge expires at the time the predecessor's term should have ended. Where the new judge's period of service is shorter than three years, he or she may be appointed for a full 9-year term when the renewal procedure of the Court takes place.

The absence of such a mechanism is criticised in Italy and is also a cause of instability of the Constitutional Court of Hungary. Nevertheless, the possibility for a judge to continue to serve until the appointment of a successor is not a long-term solution. In Spain, for example, delays in electing constitutional judges have become more and more common; a possible solution would

be to allow the Court itself to propose candidates to a House of Parliament which fails to elect a candidate to be appointed by the King.

4.4. Conclusion

The possibility of re-election may well be such as to undermine the independence of a judge. In order to avoid this risk, it appears advisable to provide for long terms of office or for appointment until retirement. In the former case, reappointment would be possible either only once or even not at all. Where no appointment has been made, default mechanisms should be put in place in the interest of the court's institutional stability. It is true that not every possible failure requires a special remedial provision and that it may normally be resolved by a constitutional system capable of assimilating conflicts of power. Nevertheless, default mechanisms already exist in certain elective (Germany, Portugal, Spain) or semi-elective (Bulgaria) appointment systems, in which the importance of the stability of the court is such that a possible political failure to appoint a constitutional judge would be prevented from affecting this stability. This contingency should be seen as an exception, so as to prevent it from becoming an institution.

5. 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 an incompatibility between the office of constitutional judge and another activity 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, Italy, Spain, "the former Yugoslav Republic of Macedonia", Turkey) except occasional expertise with the court's permission (*Switzerland*), teaching [Armenia, Azerbaijan, Belgium, Czech Republic, *Estonia*, Georgia, Germany, Hungary, Latvia, Lithuania, Portugal, Romania, Russia, Slovakia, Slovenia, *Switzerland* (always subject to authorization by the Court), Ukraine], research (Armenia, Azerbaijan, Czech Republic, *Estonia*, Georgia, Hungary, Latvia, Portugal, Russia, Slovakia, Slovenia, Ukraine), creative activities (Armenia, Azerbaijan, Hungary, Latvia, Lithuania, Russia, Ukraine), or the management of personal assets (Czech Republic, Slovakia) or business activities that are not at the executive level (*Estonia*); sometimes no remuneration for these exceptional activities is allowed (*Ireland*, Portugal) or remuneration exceeding a specified amount must be turned over to the court (*Switzerland*). Members of the Supreme Court of *Japan* may only hold another salaried position if the Court gives them permission. In the case of the judges of the *Danish* superior courts, such permission must be obtained from a special council of the presidents of the High Courts and the Supreme Court. Armenian and Polish constitutional judges may not hold a public office or exercise an activity that could be detrimental to a judge's independence or impartiality. In some cases the only explicitly stated incompatibility is with the office of

Member of Parliament (*Finland*[46]) or with any political (France) or public office (*Sweden*). Constitutional judges of Liechtenstein may be members of parliament or other courts but where a matter before the State Council is one in which the judge was involved during the exercise of this other function, the judge will be precluded from participation. In Austria, members of the Constitutional Court hold offices in federal or regional government, in the national or regional parliament or in a municipal council. The president and vice-president cannot have held such an office during the four years preceding their appointment.[47]

Membership of a political party is not allowed in many countries (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). However, past political involvement is often permissible either expressly or implicitly (Armenia, Belgium, *Finland*,[48] France, *Iceland*, *Ireland*, "the former Yugoslav Republic of Macedonia", *Norway*,[49] *Sweden*, *Switzerland*, Turkey). Active political involvement by such judges after their appointment is unlikely to come about, since this would be generally seen as inappropriate. Sometimes there is only a bar from taking an executive, leading or professional role in a political party (Germany, Portugal, Spain), but even then judges must show some restraint in their enjoyment of this freedom. In Austria, public officials and employees of a political party cannot be members of the Constitutional Court (for the president and vice-president this incompatibility extends to the four years preceding their appointment).

One criticism of strict incompatibility requirements was that they tend to produce a court composition of *retiring* members of society (France).

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[46] However, the general restrictions forbidding judges from exercising activities that would compromise judicial impartiality would also apply.

[47] In Hungary, constitutional judges cannot have held the office of Minister or Head of a political party at any time during the 5 years preceding their appointment.

[48] In *Finland* it is being officially discussed at present whether the availability of judges to act as arbitrators should be restricted.

[49] In *Norway* there are no formal rules on the question of incompatibility with other offices. In practice the problem does not seem to arise much. However, a Commission which has been appointed for this purpose, will also examine the nature and extent of tasks and supplementary duties undertaken by judges, assess them according to the criteria of independence and autonomy, and consider other questions of principle and of a practical nature. The Commission will assess the need for guidelines regarding the types of tasks, etc., that the judges should be permitted to undertake, and, if appropriate, present a proposal for such guidelines. It will also assess whether an official registration of extra activities or income should be introduced.

6. Constitutional judges' immunity

Rules on immunity serve the main purpose of protecting the judge against pressure exerted through unfounded accusations raised in order to influence his or her judgment. On the other hand the judge is required to observe a very high standard of professional but also private behaviour. As Article 6 of the Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 1960 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 at least partial immunity from prosecution of their members (Albania, *Argentina*, Armenia, Bulgaria, Croatia, Georgia, Lithuania, Poland, Portugal, Romania, Russia, Slovakia, "the former Yugoslav Republic of Macedonia", Turkey), except perhaps where the judge is caught in the act of committing an offence (Hungary, Italy, Poland, Russia, Slovenia) or where a crime attracting a heavy prison sentence is involved (Turkey, Slovenia). In *Switzerland* a magistrate may find any other judge, including those of the Federal Court, incapable of filling his or her office for lack of trustworthiness for being found guilty of an offence. Complete criminal and civil immunity is also available in several countries (Azerbaijan, *Estonia*, Latvia, Lithuania). In Lithuania, this blanket immunity is afforded to judges even in a state of war or emergency. In Romania the judges of the Constitutional Court cannot be held responsible for opinions and votes expressed in the course of performing their judicial functions and they enjoy criminal immunity, including for summary offences. Some constitutional judges do not enjoy criminal immunity (Belgium, *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 offenses may also be conditional (Czech Republic) or qualified (Ukraine).

Judicial immunity may normally be lifted by the court itself (Albania, Bulgaria, Croatia, Georgia, Hungary, Italy, Lithuania, Poland, Portugal, Russia, Slovakia, *Switzerland*, "the former Yugoslav Republic of Macedonia", Turkey) and sometimes only by application of the Attorney-General (Bulgaria, Lithuania). Other authorities with the power to revoke a judge's immunity are the original appointing authority, eg. either the National Assembly or the President of the Republic, upon a conclusion delivered by a two-thirds majority of the Constitutional Court's members (Armenia), the Council of the Judiciary (*Canada*), the Legal Chancellor with the consent of a parliamentary majority (*Estonia*), the House of Representatives (*Argentina*, Ukraine), the Upper House of Parliament (Czech Republic[50]), the single chamber of Parliament (Latvia, Slovenia[51]), the President or a Permanent bureau of the Lower House or the Senate, whichever authority originally appointed the judge in question, and only by application of the

[50] This applies only with respect to the conditional immunity against prosecution for indictable offenses.

[51] However, here the National Assembly shall take into consideration the opinion of the Constitutional Court.

Attorney-General (Romania) or by act of Parliament or consent of the President of the Republic (Azerbaijan).

In several jurisdictions no special provision is made for judicial immunity (Austria, *Finland*,[52] France, *Iceland*, *Japan*, Liechtenstein, *Malta*, *Norway*, *Sweden*). 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). In Belgium constitutional judges are given the same jurisdictional privilege as all members of the judiciary: they are judged at first and last instance by the Court of Appeal. In *Sweden* criminal proceedings against members of the Supreme Court and members of the Supreme Administrative Court for offences committed by judges in their official capacity shall be brought before the Supreme Court by the Parliamentary Ombudsman or Justice Chancellor. In *Norway* such cases are dealt with by a special Court of Impeachment, which pronounces judgment on Supreme Court judges in the first and last instance.

7. Dismissal

Rules on the dismissal[53] 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 the President of the Republic, if authorised by a two-thirds majority of the Court in plenary session 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 in the appendix of this report.

[52] However, charges for offences committed by judges of the supreme jurisdictions in their official capacity may be brought to the High Court of Impeachment only by the Chancellor of Justice or the Parliamentary Ombudsman, thus preventing private complainants from bringing directly any charges in such matters.

[53] The term 'dismissal' denotes all the possibilities of putting an end to a judge's office.

The dismissal of a judge by an authority other than the court itself is impossible in most jurisdictions (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, *Denmark*, Germany, Hungary, *Iceland*, Italy, Latvia, Liechtenstein, *Malta*, Poland, Portugal, Romania, Spain, *Sweden*,[54] *Switzerland*,[55] Turkey). In France dismissals can be made by the Constitutional Council. 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, Lithuania, Slovakia, "the former Yugoslav Republic of Macedonia"). In other responses the dismissing authority was the House of Representatives (Poland, Slovenia), the Senate upon an accusation by the Lower House (*Argentina*) or the Lower House and the Senate (*Canada*).

In *Ireland*, the President of the Republic may dismiss a judge following a resolution by both Houses of Parliament calling for his or her removal.

Impeachment proceedings may also form part of the dismissal process (*Denmark*, *Finland*,[56] *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 the Czech Republic *Estonia* and *Iceland*, constitutional judges may be dismissed by the ordinary courts.[57] However, a sentence for disciplinary proceedings will sometimes require the consent of the court (*Estonia*).

Only in one response was a case of dismissal registered (*Iceland*). 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 supported by the electorate's confidence in the court, in its role as guardian of the Constitution and of constitutional rights.

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

[55] In *Switzerland* a magistrate may find any other judge, including those of the Federal Court, incapable of filling his or her office for lack of trustworthiness for being found guilty of an offence. Nevertheless, this provision has never been applied to federal judges.

[56] However, impeachment proceedings may only be held in cases of misconduct in office, whereas each supreme jurisdiction is responsible in the case of illness or incapacity of its members.

[57] 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.

8. Relationship between the nature of composition and the powers exercised

The most obvious link between the composition of a court and its powers is the number of judges required to handle the workload resulting from the exercise of these powers. 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*).

In a selection of responses a direct causal connection was 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 of court members (*Argentina*, Poland, Russia), the high status of its members (*Canada*) or the qualifications required of judges (Armenia, Germany).

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.[58] On the other hand, there are the supreme courts, that is the final appellate courts which exercise ordinary jurisdiction.[59] Turkey's Constitutional Court only has constitutional jurisdiction. *Estonia* has a Constitutional Review Chamber within its Supreme Court. Usually, constitutional courts proper which do not have power to hear individual appeals tend to have a considerably lower caseload (e.g. Armenia, France, Turkey) than supreme courts (*Finland, Ireland*) and constitutional courts with individual appeal (especially in Austria and Germany), cf. Belgium. In the latter cases the need for a large bench is often urgent.

Furthermore, one might expect the possibility of individual complaint as opposed to jurisdiction only with respect to institutional complaints to warrant a difference in composition with regard to representation. Presumably, it would make sense for courts which can hear individual complaints to have a composition reflecting a wide spectrum of society, whereas the appointment procedure of courts without the possibility of individual appeal would tend to reflect a balance in representation of institutions.

An interesting observation can be made in regard to Russia where a sufficient number of staff is identified as a means to cope with the workload. The requirement of leave to appeal was also identified as stemming from the need to control or reduce the Court's workload (*Finland*, Germany, *Sweden*).

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,

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

[59] *Argentina, Canada, Cyprus, Denmark, Estonia, Finland, Greece, Iceland, Ireland, Japan, Malta, Norway, Sweden, Switzerland.*

for example, the powers of a constitutional court proper may be limited by the fact that it can only exercise constitutional control by *a priori* judicial review of laws *before* they are finally passed and proclaimed by Parliament (*Finland*, France) or by the fact that citizens cannot appeal directly to the court (Bulgaria, France, Portugal), as opposed, for example, to the German Federal Constitutional Court, which is not limited by either of these factors, but, as a consequence, receives around 5000 applications per year and has a considerable backlog of cases; cf. Belgium.

In *Finland*, the competencies of the supreme jurisdictions (Supreme Court and Supreme Administrative Court) are modest compared to the role of the President of the Republic or the Parliamentary Constitutional Committee; the supreme jurisdictions apply preventive measures of constitutional control.

The fact that the Austrian Constitutional Court is to uphold, *inter alia*, the federal system is related to the requirement that three effective and two substitute members must be domiciled outside the capital, Vienna.

9. 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 (Georgia, Romania, *Switzerland*), calling, in particular, for reform of the court's statute (Albania, *Estonia*, Liechtenstein, Russia), for their decision-making powers to be widened (Hungary, 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, *Iceland*, *Ireland*, Spain). In Spain, for example, it has been suggested to raise the number of judges to fifteen. The odd number would also prevent the problem of a tie and a controversial 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 an amendment of the Constitution. In *Estonia*, too, it is suggested that an entirely separate constitutional court should be instituted. Conversely, some critics in Spain have voiced the wish to create a Chamber within the Constitutional Court to deal with cases of individual recourse.

10. Conclusion

Notwithstanding the complexity of the various systems of the composition of constitutional courts, three main fields of legislative concern could be identified. These are balance, independence and effectiveness.

Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute

towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions.

Constitutional jurisdictions may, by some of their decisions, appear to curb the actions of a particular authority within a State. The Constitution will often confer to the constitutional court the power to deliver its opinion on issues concerning the separation of powers or the relationships between the organs of the State. Even though constitutional courts largely ensure the regulation of these relationships, it may well be appropriate to ensure in their composition a balanced consideration of each of these authorities or organs.

The pursuit of these balances is limited by the indispensable maintenance of the independence and impartiality of constitutional court judges. **Collegiality**, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes a fundamental safeguard in this respect. Even though the rules on the composition of constitutional courts may reflect the coexistence of different currents within a given nation, the guarantees of independence and the high sense of responsibility attaching to the important function of constitutional judge effectively ensure that constitutional judges will act in such a way as to dismiss all grounds of suspicion that they may in fact represent particular interests or not act impartially.

Given the diversity of constitutional justice systems, it is difficult to identify a set of minimum guarantees of independence to be provided in the composition of constitutional courts. Broadly, the following points may provide some guidance, though specific circumstances in a State may well justify a variation of these measures.

- A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all;

- The rules of incompatibility should be rather strict in order to withdraw the judge from any influence which might be exerted via his/her out-of-court activities;

- Disciplinary rules for judges and rules for their dismissal should involve a binding vote by the court itself. Any rules for dismissal of judges and the president of the court should be very restrictive.

Furthermore, special provision might be necessary in order to maintain the effective functioning of the court when vacancies arise:

- Rules on appointment should foresee the possibility 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 case of prolonged inaction by this authority, the

quorum required to take decisions could be lowered.

- The effectiveness of a constitutional court also requires there to be a sufficient number of judges, that the procedure not be overly complex and that the court have the right to reject individual complaints which do not raise a serious issue of constitutional law.

All of these points remain necessarily vague and will have to be adapted to each specific case. Taken together, they can, however, provide an idea of some issues to be tackled in order to create a balanced, independent and effective court.