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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**REPORT BY THE VENICE COMMISSION
ON THE COMPOSITION OF CONSTITUTIONAL COURTS**

NOTE OF THE SECRETARIAT

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 this study is to identify beyond a simple description of rules governing composition, the techniques employed by constitutional laws to ensure and maintain the representation and balance of different political and legal tendencies in constitutional courts.

On the basis of information available within the Documentation Centre on constitutional justice, and with the assistance of liaison officers and Commission members, the Secretariat has prepared a preliminary information note in the form of a synoptic table on the composition of constitutional courts (CDL-JU (95)5). The information set out in the table relates to the appointment of constitutional judges, eligibility criteria, term of office, incompatibilities of function, and dismissal. This information should be completed with a view to examination, which raises a certain number of questions:

In the first place, a comparative analysis of the information provided will serve only a very limited purpose if the powers which are exercised by the several courts are not the same.

In consequence, it will be necessary to distinguish constitutional courts properly speaking from superior courts which exercise ordinary jurisdiction, the composition of which often differs from constitutional courts.

In addition, the number of appeals capable of being brought before the various courts can be a determining factor in the number of their members. Thus a court having jurisdiction to hear individual complaints could reasonably have a different composition to a constitutional court which can be seized only by State organs.

Secondly, whereas the concerns and political compromises entailed by the composition of a constitutional court are mainly evident in the procedures for appointment (whether by nomination, election, or by a mixed system), the importance of certain other elements for ensuring an appropriate balance of juridico-political tendencies in constitutional courts – notably the term of office of members, whether they can be re-elected, their qualification for office, and their incompatibilities of function – should not be overlooked. It therefore appears inappropriate to compare isolated features of the composition of constitutional courts: the comparison must be made as between the different systems taken as a whole.

Finally, the textual position must be supplemented by a description of the practice followed and of the effectiveness of the chosen system. The end result should aim at a functional appraisal of the strengths and weaknesses of the system establishing and governing the court.

It follows that it is necessary, on the one hand, to ask Commission members to furnish supplementary information especially on the question of whether, positively or negatively, the desired balance is achieved in the composition of the constitutional court and, on the other hand, to appoint a Rapporteur (or a Working Group) responsible for proceeding to an examination of the information obtained and for drawing up a draft report.

The supplementary information should address mainly questions connected to the procedure and practice for appointment. It could be furnished by reference to the draft questionnaire appended to the present document.

Evidently, having regard to the complexity of the subject, members should be invited to furnish all other information which they consider relevant.

DRAFT QUESTIONNAIRE

1. Does the procedure for appointing constitutional judges aim to guarantee a representation of different political and legal tendencies in the composition of the constitutional court?
 - 1.1. By what means does the law attempt to ensure such representation? How are these measures implemented? What is the role, if any, of political organs (Parliament, President, government, political parties)?
 - 1.2. Is there an established practice particularly concerning the manner in which candidates are proposed to the authority or authorities called upon to appoint (whether by election or nomination) the judges of the constitutional court?
 - 1.3. To what extent does the procedure followed succeed in ensuring a balanced representation, as desired?
2. What are the legal constraints imposed on the institutions which appoint constitutional judges?
 - 2.1. In particular, must the constitutional court be composed wholly or in part of lawyers or judges?
 - 2.2. In practice, is a certain representation of lawyers or judges ensured even in the absence of a legal obligation to that effect?
 - 2.3. What are the reasons for such regulation or for such a practice?
3. Must the constitutional court include members of linguistic, religious, ethnic or other groups?
 - 3.1. In practice, is a certain representation of such groups ensured even in the absence of a legal obligation to that effect?
 - 3.2. What are the objectives sought to be achieved by any such regulation or practice as seeks to ensure a representation of these groups on the constitutional court? Are these objectives met in practice?
4. How is the President of the Court appointed? What are his or her functions?
 - 4.1. To what extent does the mode of appointing the President (whether elected from among the court's members or appointed by another State organ) aim to establish a balance between the different political and legal tendencies represented on the Court?

5. Is the function of constitutional judge incompatible with membership (either past or continuing) of a political party?
6. Do the terms of office of members, and the question of whether they can be re-elected, aim to establish or to maintain a certain balance of representation?
7. Do members benefit from an immunity from prosecution? What is the competent body for lifting such immunity?
8. Can members of the constitutional court be dismissed from office against their will? Which is the competent authority for deciding upon such dismissal? Have there been cases of dismissal?
9. To what extent is the composition of the highest court in your country attributable to the powers which it exercises (in particular the exercise of ordinary jurisdiction) or to the number of appeals which it hears?