

JUDGES AND ASSISTANT-MAGISTRATES WITHIN CONSTITUTIONAL COURTS

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Tudorel TOADER¹
ttoader@uaic.ro

Marieta SAFTA²
marieta.safta@ccr.ro

Summary

This study brings together the decision component into the constitutional jurisdiction (constitutional judge) and the one supporting the decision-making process (assistant-magistrate/referendary/legal assistant/adviser etc. of the constitutional judge). The analysis regarding the appointment/entry requirements into the profession, the duties and the status of the constitutional judge and respectively of the assistant-magistrate, aims at emphasizing, in particular, the complementary roles of the two analysed offices and their importance for the exercise of the constitutional justice.

Keywords: *constitutional courts; constitutional judge; assistant-magistrate; adviser; referendary*

I. Introduction

In 2011, the Constitutional Court of Romania hosted the XVth Congress of the Conference of European Constitutional Courts with the topic “*Constitutional justice. Functions and relationships with the other public authorities*”. On that occasion, we prepared the National Report and the General Report for the Plenary session I of the Congress, with the topic “*The Constitutional Court’s Relationship to Parliament and Government*”³. In these two Reports, we approached, among others, the involvement of the above-mentioned authorities in the appointment of constitutional judges, in the general context of their appointment/status/role. The Reports of the Congress have

¹ Professor PhD, Rector of “Al.I. Cuza” University of Iași, Judge of the Constitutional Court of Romania (October 2006-July 2016).

² Lecturer PhD, Faculty of Law of “Titu Maiorescu” University of Bucharest, First Assistant-Magistrate of the Constitutional Court of Romania.

³ National Report of of the Constitutional Court of Romania, Part I – *The Constitutional Court’s relationship to Parliament and Government*, General Report of the Conference, Part I – *The Constitutional Court’s relationship to Parliament and Government*, authors Professor PhD Tudorel Toader, Lecturer PhD Marieta Safta – <https://www.ccr.ro/uploads/congres/raportgeneralro.pdf>.

been published and they are available in electronic format on the website of the Constitutional Court, which includes a section dedicated to this Congress.

In 2016, the Constitutional Court of Romania hosted the Conference on the topic “The Role of Assistant-Magistrates in the Jurisdiction of Constitutional Courts”, held on 31 May and 1 June. The participants, representatives of constitutional courts and equivalents in Albania, Austria, Belgium, Czech Republic, Cyprus, Korea, Croatia, Georgia, Germany, Israel, Italy, Latvia, Lithuania, Macedonia, Moldova, Poland, Portugal, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Turkey, Ukraine, Hungary and of the Court of Justice of the European Union presented reports on the role of the Assistant-Magistrate/of the representatives of this profession equivalent in the states of origin, focusing on the entry requirements to this profession, the involvement in the institution’s activity (specific duties), the professional status. The conclusions of the Conference were formulated by Mr. Schnutz Rudolf Dürr, the representative of the Venice Commission, Head of Constitutional Justice Division and Secretary General of the World Conference on Constitutional Justice. The Reports of the Conference are also published⁴.

Gathering information on the appointment/role/status of constitutional judges or assistant-magistrates/equivalent professions provides a better understanding of the work of the constitutional courts, its specific processes, mechanisms for construction, development, but also for ensuring the stability of the case-law of these courts.

Starting from the recent event organized and refreshing the information of the previous event to which we referred, this study brings together the decision component in the constitutional jurisdiction (constitutional judge) and the one supporting the decision-making process (assistant-magistrate/referendary/judicial assistant/adviser etc. of the constitutional judge). For the preparation of this study, we were particularly interested to emphasize the complementary roles of the two analysed offices. Moreover, the incident regulations are under the sign of change, as a result of the evolution of the organization and functioning of the constitutional courts and of the enhancement of their role, implicitly of the workload. For the preparation of this study, we took into account the presentations within the Congress or Conference, namely the participants in both events, meaning that there was not an exact overlap of the constitutional courts for the two categories of offices.

II. The appointment of constitutional judges *and* the entry requirements into the profession of assistant-magistrates/equivalent offices

1. Constitutional judges

In the states considered in carrying out the analysis of comparative law, the law of reference – Constitutions or laws of organization and functioning of the Constitutional Courts/Constitutional Tribunals/Supreme Courts – provides that judges shall be

⁴ The role of Assistant-Magistrates in the Jurisdiction of Constitutional Courts, Universul Juridic Publishing House, Bucharest, 2016.

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appointed/elected by the representatives of the highest authorities in the state, usually by political bodies par excellence.

Thus, the appointment shall be made by **the President of the State⁵/the King⁶, upon the proposal or the opinion of other constitutional bodies in States such as:** *Albania* (the President of the Republic, with the consent of the Assembly); *Austria* (the Federal President, who is however bound⁷ by the recommendations made by other constitutional bodies, namely: the proposals for the appointment of the President, of the Vice President, of six of the members and of three alternates shall be forwarded to the Federal Government; another three members and two alternates shall be appointed upon the recommendation of the National Council; the other three members and one suppleant shall be appointed upon the proposal of the Federal Council); *Belgium* (the King, from a list which is presented to him/her alternately, by the House of Representatives and Senate, list which contains two candidates and has been voted by a qualified majority of two-thirds of the present members); *Czech Republic* (the President of the Republic with the consent of the Senate); *Cyprus* (members of the Supreme Court, who in this state exercise powers of constitutional review, shall be appointed by the President of the Republic, seeking the opinion of the Court, which he usually follows it); *Denmark* (the Queen, through the Ministry of Justice, but the Minister acts upon the recommendation of the Council which is in charge with the appointment of judges); *Ireland* (after selecting candidates, the Government notifies the President of Ireland on the nomination and the President is to proceed to appointment); *Luxembourg* (President, Vice-President and the seven advisers shall be appointed by the Grand Duke, five advisers with the joint opinion of the Superior Court of Justice and of the Administrative Tribunal; the President of the High Court of Justice, the President of the Administrative Tribunal and the two advisers of the Court of Cassation are members of the Constitutional Court); *Malta* (the President of Malta shall appoint all members of the judiciary, upon the proposal of the Prime Minister); *Slovakia* (the President of the Slovak Republic, upon the proposal of the National Council); *Spain* (twelve assistant-magistrates of the Constitutional Tribunal of Spain shall be appointed by the King, upon the proposal of four constitutional bodies, namely: Parliament shall appoint eight judges, four of which – the Congress of Deputies and other four – the Senate; the Government shall appoint two judges and the other two judges shall be appointed by the General Council of the Judiciary).

The appointment of constitutional judges shall be made by **Parliament** in states such as: *Croatia*; *Germany* (Constitutional Court shall consist of two chambers, each composed of eight judges; half of the judges of one chamber shall be elected by *Bundestag*, and the other half – by *Bundesrat* – namely by the popular representation

⁵ States organised as a republic.

⁶ States organised as a monarchy.

⁷ Article 67 B-VG.

assembly and by the representatives of the *Länder*); *Latvia* [Parliament shall validate the judges of the Constitutional Court, based on the proposals made by: at least ten MPs (three of the judges), the Cabinet of Ministers (two judges), the Supreme Court, sitting in plenary (two judges)]; *Lithuania* (the proposals of candidatures for the office of judge of the Constitutional Court shall be made by the President of the Republic, the President of the Seimas and the President of the Supreme Court. The judges of the Constitutional Court shall be appointed by the Seimas, by decision, and the President of the Constitutional Court shall be appointed by the Seimas among judges, upon the proposal of the President of the Republic); *Macedonia*; *Poland* (first Chamber of Parliament – the Sejm, by an absolute majority of votes in the presence of at least half of the total number of deputies after the Commission of Justice and Human Rights has given its opinion on the candidates); *Portugal* (Constitutional Tribunal consists of thirteen members⁸. Parliament shall be entitled to appoint ten judges, who are elected by a majority of two-thirds of the present deputies, provided that this percentage is higher than the absolute majority of the deputies who are actually in the exercise of their office. As concerns the other three judges, they shall be co-opted by their colleagues (cooptation procedure); *Slovenia* (elected by the National Assembly of the Republic of Slovenia, upon the proposal of the President of the Republic, by a majority vote of the deputies); *Hungary* (Parliament, with the opinion of the Legal Committee for administration and justice, and by a majority vote of two-thirds).

The appointment of constitutional judges shall be made by **Parliament and the President of the State** in countries such as *France* (one member shall be appointed by the President of the Republic, another one by the President of the National Assembly and a third one by the President of the Senate⁹) and *Romania*¹⁰ – the Constitutional Court shall consist of nine judges, three of them shall be appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania¹¹).

The appointment of constitutional judges shall be made by *Parliament, President, courts of law* in states such as: *Italy* [Constitutional Court shall consist of fifteen judges, five of whom shall be elected by Parliament, five by the highest courts, and five shall be appointed by the President of the Republic¹²; those appointed for the judiciary shall be appointed by the Court of Cassation (which is responsible for the appointment of three out of five), by the Council of State and by the Court of Auditors (which may appoint one judge) and they usually come from the judiciary]; *Serbia* [the National Assembly shall elect five judges from among 10 candidates nominated by the President of the Republic; the President shall appoint other five constitutional judges of the 10 candidates

⁸ Article 222-1 of the Constitution.

⁹ Article 56 of the Constitution of France.

¹⁰ Thoroughly in the National Report of the Constitutional Court of Romania, Part I – *The Constitutional Court's relationship to Parliament and Government, cited paper*.

¹¹ Article 142 para. (3) of the Constitution of Romania.

¹² Article 135 of the Constitution of Italy.

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nominated by the National Assembly and the Supreme Court of Cassation shall appoint five judges of the 10 candidates proposed during the joint session of the High Judicial Council and the Council of the State Prosecutor's Office].

This presentation reveals the concern of the national legislatures to identify certain mechanisms in order to ensure either the involvement of several constitutional bodies in the appointment procedure of these judges (being regulated in this respect various procedures of approval, proposal, appointment etc., which often involves reaching an agreement between the representatives of the three powers of the State), or the expression of a broad political majority upon the approval of candidates for the office of judge at the Constitutional Court.

We can conclude that:

- there are two main systems that establish the composition of constitutional courts: the direct appointment of judges and respectively their election; there is also a hybrid system that combines both;

- two or even three representative authorities of the state powers concur at the appointment/election of constitutional judges, in the sense that, even if the appointments are made by a single authority, the proposals are formulated by several such authorities;

- orientation is found towards the regulation of certain procedures for appointments at infraconstitutional level in order to ensure its transparency, involving certain bodies for the analysis/approval of proposals; in some cases, such procedures are more complex;

- it is also found the concern for finding a balance, both politically and legally, respectively the regulation of certain procedural guarantees in this regard. For example, in *Italy*, a relevant feature of the judges appointed by the President consists in trying to balance the composition of the Court, both in terms of ideology *lato sensu*, and in terms of professional qualification. Those appointed by Parliament shall be appointed in the joint session of the two Chambers and they usually originate (but not as a general rule) from among professors and lawyers who were previously engaged in politics (even as parliamentarians). However, it is important to underline that they do not represent the political powers which have appointed them or Parliament itself, but they are completely independent. Several rounds of voting are established for their election; the first three rounds require a two-thirds majority of the total number of MPs and then a three-fifths majority (of the same total number); such a high threshold ensures the fact that the appointed one is not elected only by the vote of the governing powers. In *Germany*, the existing legal mechanisms are doubled by the presence of certain customs which constitute the genuine guarantees of the constitutional judges' independence. Thus¹³, in practice, there is a tradition, even if informal, that the representatives of the

¹³ The National Report of Germany, presented at the XVth Congress of the Conference of the European Constitutional Courts, Part I, author Professor PhD Gertrude Lübke-Wolff, judge of the Federal Constitutional Court – www.ccr.ro.

two major parties - the Christian Democratic Union (CDU) and the Social Democratic Party of Germany (SPD) – shall nominate each half of the candidates, and where one of the two parties is in a governing coalition with one of the small parties, the former shall grant the latter the right to make proposals for an office. As a result of this practice, and of the fact that the ascertainment of the unconstitutionality of a measure requires a majority – five of eight votes – of the judges of a Chamber, the Federal Constitutional Court does not reach the situation where a certain group of judges, affiliated to a political party or to any political orientation, whatever the case may be, or at least closer to one direction than the other, shall automatically make form a majority and be able to dominate the case-law of the Court until power relationships overturn as a result of a new election. Therefore, including for issues of constitutionality where political assessments play an important role, voting is always required to be obtained on the basis of arguments and approaches to reach a consensus, thus being fostered a culture of dialogue within the Federal Constitutional Court, aimed at identifying certain balanced solutions based on all the aspects at stake – which lie, moreover, the authority enjoyed by the decisions of this Court. In *Belgium*, it has been held that the rule regarding the existence of two-thirds of the votes regarding the proposals for the appointment of the judges of the Constitutional Court “shall oblige the parliamentary majority to obtain a broad consensus on the proposed candidates”¹⁴. In practice, for the appointment of judges, the parliamentary assemblies put into practice the principle of proportionality so that the composition of the Court reflects *grosso modo* the composition of the assemblies. This means that “a candidate will not have the chance to be introduced unless it has the support of the political group which holds that position”.

As concerns the conditions for the appointment, we shall identify: **citizenship** (a condition which is usually implied); **linguistic or geographical origin** [in *Belgium*, six judges belong to the Dutch language group, six to the French language group; in *Switzerland*, the geographical origin appears as a selection criterion); **profession/career/professional reputation** (as a general rule, it is found that the person concerned must have legal studies and a very good professional reputation. For example: the members of the Constitutional Court of *Albania* should be lawyers, Albanian citizens well known for their professional skills or professors at the faculty of law; in *Austria*, all members of the Constitutional Court must have a law degree; in *Croatia*, the judges shall be appointed from among renowned legal practitioners, especially judges, prosecutors, lawyers and law professors; in *Slovenia* – legal expert; in *Belgium*, each language group shall consist of three judges appointed on the basis of their legal experience and three judges who had at least five years of experience as MP; in *Portugal*, at least six of the thirteen judges must be chosen from among judges of other courts, while the rest must be legal practitioners – *i.e.* holders of a university degree;

¹⁴ C. Courtoy, *La formation et le renouvellement de la Cour d'arbitrage en Belgique* [“Formation and renewal of the Court of Arbitration in Belgium”], C.D.P.K., 2000, p. 540.

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in *Serbia*, the judges of the Constitutional Court shall be appointed from among prestigious legal practitioners, at least 40 years old and with at least 15 years of experience in legal work; in *Spain*, the judges of the Constitutional Court shall be elected by constitutional mandate among renowned legal experts who shall independently exercise their duties; in *Poland*, among persons distinguished by their knowledge of the law; in Romania, the constitutional requirement aims at high judicial knowledge, high professional competence and at least eighteen years' experience in legal work or academic activities in law; **moral reputation** (this is an implied condition attached to the idea of professional reputation, or an explicit one – for example, the Albanian law explicitly refers to a “high moral reputations”).

2. Assistant-magistrate/referendary/judicial assistant/adviser etc. constitutional judge

In this regard, we have firstly found the variety of names under which we practically find the exercise of the same specialized competences, which we will mention according to the semantic “approach” to the status of magistrate: Judge-Rapporteur (Turkey), judge in charge of research (South Korea), assistant-magistrate (Israel, Latvia, Romania, Russian Federation), referendary (Belgium, CJEU), judicial assistant (Italy, Lithuania), assistant (Czech Republic, Poland, Spain, Ukraine), legal adviser (Austria, Cyprus, Croatia, Georgia, Germany, Moldova, Portugal, Slovakia, Hungary), adviser (Albania, Czech Republic, Latvia, Portugal, Serbia, Slovenia), research consultant (Ukraine).

As concerns the access to the profession/office, in all reports we identify as common points the condition regarding the legal studies and the high professional education. However, a legislative development can be found in this respect, in the sense that, even where, at the beginning, the requirements on professional qualification were relatively “low”, they were “tightened”, especially given the practical need to allow constitutional judges to benefit from the services of highly experienced and highly qualified legal practitioners. Sometimes, recommendations shall be needed/requested (for example: Israel, Germany).

Recruitment conditions are still very various, starting from a full freedom granted to judges regarding the appointment/election of the person occupying this office and ending with a thorough regulation of certain competitions aimed at ensuring a rigorous selection based on the same criteria applicable to all candidates. One aspect which is often underlined refers to the relationship of trust/loyalty between the judge and his assistant (for example: Austria, Belgium, Israel, Italy).

We have noted that the employment process by competition is specific to fill positions on indefinite period, while selection at the discretion of the judge (namely based on “trust”) is regulated where the offices of assistant/equivalent are temporary, usually corresponding to the judge's term of office or less.

At some constitutional courts, we have noted a combination of the two methods of recruitment, since there work, under various names, both assistants employed on indefinite period and external collaborators or employees for a definite period, both involved in the judicial activity/supporting judges. Some reports show the legislative concern for ensuring permanent offices (Albania¹⁵), and others show that although it is a temporary office, the contracts are often renewed/a new appointment is made (Czech Republic, Italy, Korea).

Thus, as an example of the first category, we should mention *Germany*¹⁶, where judges shall decide the employment, and they often choose legal practitioners with whom they are familiar from their previous work experience. The main recruitment method is to contact the ministers of state for justice, presidents of the state superior courts or HR departments or the heads of personnel from these institutions, who shall recommend one or more persons they deem suitable for the office of legal adviser at the Constitutional Court. The employed person must be an expert in the field of competence of that Court's judge. Selection shall be made based on an interview with the judge. Most legal advisers are judges, prosecutors and sometimes government officials delegated to the Court. Similarly, in *Italy*¹⁷, appointment takes place directly and the constitutional judges themselves require to the elected persons to occupy the office of assistant, without a formal selection procedure. Subsequently, it follows a meeting of the President's Office in order to verify the qualifications and competences of the appointed person, being obtained the official acceptance of the office. The only limitation consists in the obligation to appoint magistrates or members of academia. Another such example is *Hungary*. In *Turkey*¹⁸, to occupy the office of judge-rapporteur of the Court, the candidate must be a judge in an ordinary or administrative court, prosecutor, auditor of the Court of Accounts, chief auditor or specialist auditor who has successfully worked for at least five years or has been a research assistant specialized in law, economics or political science in higher education institutions where he/she completed his/her studies as associate professor or doctoral studies or be assistant judge-rapporteur who performed his/her activity for at least five years (except the internship period.) Admission to the profession shall be based on a request submitted to the President's Office and, on the basis of its favourable opinion, the candidate shall be delegated by the institution where he/she works. Similarly, in *Korea*¹⁹, judges in charge of research shall be appointed by the President of the Court, by a resolution of the Council of Justice among those who correspond to the categories set forth by law

¹⁵ Noela Ruco, *The role of the adviser within the Constitutional Court of Albania*.

¹⁶ Dr. Fabian Scheffczyk, *The role of legal advisers within the Federal Court of Germany*.

¹⁷ Teresa Grieco, *The role of judicial assistants within the Constitutional Court of Italy*.

¹⁸ Recep Kaplan, *The role of judges-rapporteurs within the activity of the Constitutional Court of the Republic of Turkey*.

¹⁹ Sunhong Min, *The judges of the Constitutional Court of Korea*.

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(for the beginning, that person shall be appointed as assistant-judge for a three-year period, then he/she becomes eligible for the office of judge in charge of research).

As concerns the selection only for the contest, we should mention the example of *Belgium*²⁰, where, in fact, there was an interesting development in the sense of (awareness) acceptance of the fact that, if the functioning of the Court is wished to be continued with competent legal practitioners specialized in constitutional law, the Statute of the referendary shall be definitive, which materialized into an appropriate legislative amendment. Thus, referendaries shall be appointed for an indefinite period, following a contest in two phases: written exam (theoretical test regarding an issue of constitutional law) and practical test (the preparation of a draft decision on which the Court has already been notified and on which it has not yet delivered any decision) and oral exam (questions on constitutional law). Most referendaries have completed academic studies and master or doctoral degree. The contest is very difficult, so the percentage of success is very low. Likewise, in *Slovakia*²¹, the selection process includes a written test focused on specialized knowledge, the translation of a legal text in a foreign language (usually English, German or French, depending on the preferences of the candidate) and an interview with the contest commission. In *Romania*²², the selection of the assistant-magistrates selection shall be also achieved only through contest, including language exam and computer skills, written and oral examination.

As for the mixed systems, we should mention *Slovenia*²³ where alongside legal advisers employed through contest for an indefinite period, external collaborators also work there, elected *intuitu personae* by judges. External legal advisers cannot perform duties relating to the preparation of cases, so their collaboration with judges or legal advisers is limited only to draft the decisions of the Court or to express their specialized opinions on the cases brought before the Court. Likewise, in *Italy*, besides the judicial assistants employed for a definite period, there is also the office of “consiglieri” (high officials of the Court). They are members of the staff recruited through a public contest, permanent, have the highest rank in the Court’s staff and perform duties related to the organization, administrative management and general support for the Court’s activities. Similarly, in *Spain*²⁴, there are two categories of assistants: those who belong to a permanent body (recruited through contest) and the temporary ones (elected on trust). In the *Russian Federation*²⁵, there are assistant-magistrates employed for a definite period and employed staff in the Secretariat of the Court, employed through contest,

²⁰ Lien De Geyter, *The duties of referendaries within the Constitutional Court of Belgium*.

²¹ Igor Mihalik, *The role of legal advisers within the Constitutional Court of the Republic of Slovakia*.

²² Claudia Krupenschi, Ramona Marițiu, *The assistant-magistrate of the Constitutional Court of Romania – legislative landmarks*.

²³ Marcela Lukman Hvastija, Jerica Trefalt, *Legal Advice Department of the Constitutional Court of the Republic of Slovenia*.

²⁴ Patricia Rodriguez-Patron, *Legal advisers (letrados) of the Constitutional Court of Spain*.

²⁵ D.G. Nokhrin, A.V.Ilyin, *The role of assistant-magistrates and of the Secretariat of the Constitutional Court of the Russian Federation for the support of constitutional justice*.

for an indefinite period, both involved in the judicial activity. Likewise, the situation of Latvia²⁶ is also similar, as the assistant-magistrates' term of office shall last during the term of office of the judges with whom they work, while advisers and the head of legal department shall be employed under a contract concluded for an indefinite period. In *Czech Republic*²⁷, assistants can be divided into three basic groups: recent graduates (aged approximately between 24 and 30 years), who consider this office as a starting position and who can pursue any time his/her career as a judge or lawyer; relatively elder lawyers (generally over the age of forty and fifty years), who are considered "permanent" assistants as they are usually transferred to another judge when the term of office of the previous judge has ceased; teachers from faculties of law, who, unlike the previous categories, work as part-time assistants.

As a specific method of recruitment, we should mention the case of *Israel*²⁸, where approximately at every six months the Supreme Court holds a shortlist of candidates. After the submission of the applications, a threshold of medium specialization shall be established and the candidates who are above this threshold shall be called for an interview with a committee composed of four members, namely a clerk of the Supreme Court, an experienced senior assistant-magistrate, a representative of the Ministry of Justice and a representative of the Civil Service Commission. Candidates who pass the interview with the Commission shall be included in a database so that when a judge seeks a senior assistant-magistrate, he/she may interview only the candidates included in the database. Each database "expires" every two years, so if a candidate wishes to re-enrol, he/she may take up the whole process. As a particular case, we should also remember the one where the recruitment procedure is not exclusively carried out by the constitutional courts/judges and other bodies/authorities are also involved. Thus, for example, in *Macedonia*, because state councillors are employed to a procedure governed by the Law on administrative officials, the Administration Agency also participates therein. In addition, for the employment of a state councillor, the Constitutional Court must obtain an agreement from the Ministry of Finance, showing that the financial resources in order to occupy the office are provided by the state budget²⁹. Likewise, in *Cyprus*³⁰, the nomination/appointment process begins with a written or oral exam with the Advisory Committee, composed of the Chief Clerk, who is the Director of the Legal Department, as chairman, and three senior legal advisers as members. Thereafter, candidates shall be included on a shortlist drawn up by the

²⁶ Kristaps Tamužs, Rihards Veinbergs, *Practical aspects on the activity of the legal staff of the Constitutional Court of Latvia*.

²⁷ Robert Jakubiček & Ladislav Vyhnaněk, *The role and responsibilities of assistant-magistrates and advisers of the Constitutional Court of the Czech Republic*.

²⁸ Noa Zakin, Roi Grossberger, *The role of assistant-magistrates within the Supreme Court of Israel*.

²⁹ Tatjana Janjić Todorova, *The role of state advisers within the activity of the Constitutional Court of the Republic of Macedonia*.

³⁰ Eleftheria Araliou și Louis Mixides, *Legal advisers of the Supreme Court of Cyprus*.

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Advisory Committee and invited to a more general second interview conducted by the Civil Servants Committee in order to assess their personality, apart from their knowledge.

III. Specific duties

In this regard, the constitutional judge is distinguished from his/her assisting staff by the decision aspect. Thus, although both offices are directly involved in the judicial proceedings of preparing the cases brought before the constitutional courts, the final decision belongs to the constitutional judge. The judge performs a mentoring/verification activity, and has final responsibility over the acts he/she manages/signs, no matter who prepares/drafts them. As revealed, and where the most part of the workload of the assistants consists of drafting decisions and some judges give their assistants instructions clear enough regarding the solution and reasoning of the judgment, others give them at the beginning, a certain degree of freedom, the ultimate responsibility for the project (if the decision is delivered collegially) or for the decision (for the decisions issued by a single judge) is taken by the judge (for example: Czech Republic).

As for the activity of “assistance” to the judge, as a general characterization resulted from the quasi-unanimity reports of the latest Conference, it means that this activity practically concerns every aspect of his/her work. In some states, the greater part of involvement lies in the research and preparation of cases, while in others it consists in drafting decisions. In some states, the assistants/advisers etc. work directly with the judges, following their instructions, while others are part of a group or department. We will further underline those situations which we consider to have notable features.

Thus, for example, in *Germany*, the adviser draws up a report on the case, presenting relevant facts, the author’s arguments, the legal constitutional regulations and he/she shall suggest the solution, presenting arguments in support thereof. The report (between 2 and 100 pages), signed by the Judge-Rapporteur, was submitted to the other two members of the Chamber, and if they had no objection, the decision was delivered in the form suggested by the adviser. In the proceedings before the Senate, the documentation/report are more complex and they can reach 1.000 pages with dozens of folders and files. Usually, the report shall be reviewed by the Judge-Rapporteur. In the proceedings before the Senate, the advisers shall prepare the debates upon the request of the Judge-Rapporteur, review the opinions of other judges-rapporteurs or they help him/her to prepare the deliberations of the Senate. Likewise, in *Austria*, the main duty of advisers is to provide information and ideas to judges regarding the cases to be settled (relevant legislation, case-law of the Court, case-law of national and supranational courts, specialized literature). In particular, legal advisers are the only persons with whom the judges-rapporteurs can discuss cases in a

climate of competence, trust and openness before communicating them to other members of the Court, so that legal advisers can have considerable influence on the decision-making process of the Court³¹. Essentially, the same duties reveal the report of *Italy* which also emphasizes the close relationship and the loyalty between the judicial assistant and the judge-rapporteur. Similarly, in *Belgium*, the mission of the referendary is to preliminarily examine the application, to prepare the draft decision, the necessary reports and the legal research. The reports of *Georgia*³², *Israel*, *Lithuania*³³ reveal the same involvement in the research activity, the preparation of the works, and the assistance of the judge on the assigned cases. In Cyprus, we meet a very various range of duties where, in addition to legal research, collection and classification of the main elements of cases as draft plans of decisions, translation of laws, decisions and opinions from Greek into English and vice versa or in any other European language, depending on the needs of the Supreme Court, judges may occasionally establish other secondary duties, such as revision of the Court's acts, updating legislation, indexes of case-law, assistance in drafting speeches, in filling in the questionnaires received from European institutions and various administrative duties etc.

In Romania, the assistant-magistrate assigned to the Judge-Rapporteur draws up the draft report which is to be submitted to him/her for final form and signature, prepares the session, attends public and deliberation sessions and draws up the draft decision which the Court shall deliver in the case assigned to him/her, which he/she also signs it. The duties of the research consultant in *Ukraine*³⁴ are also similar. In addition, in *Turkey*, duties such as hearing witnesses or experts or other similar duties can be assigned to judges-rapporteurs.

In the *Czech Republic*, the duties of assistants and those of legal advisers shall be distinctly established. Thus, the specific content and the nature of the assistants' activity depend almost exclusively on the instructions of the judge. As concerns the advisers (a category distinct from that of assistants), their duties can be divided into two categories: "permanent duties" which do not depend on the judge's request (the management of the database comprising the Court's decisions, permanent research, such as summaries and updated case-law of ECHR, CJEU, foreign constitutional courts etc., annotating reviews and relevant reviews on national and external law which shall be then distributed to the Court's judges and their assistants), "reactive" (preparation of analyses of certain legal issues upon the request of a judge or the Plenum of the Court). Advisers, unlike assistants, are not usually involved in making decisions, but occasionally (usually when a certain adviser prepares an analysis on a specific case), they may be

³¹ Dr. Stefan Leo Frank, *The role of legal advisers within the Constitutional Court of the Republic of Austria*.

³² Ana Papuashvili, *The role of assistant-magistrates in the jurisdiction of constitutional courts*.

³³ Vaidas Lubauskas, Ieva Saudargaite, *The role of judicial assistants within the constitutional jurisdiction: the case of Lithuania*.

³⁴ Bohush Victor Valeriyovych, Irha Yuriy Bohdanovych, *The office of research adviser and of assistant-magistrate for the judges of the Constitutional Court of Ukraine: nature, duties and importance*.

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partly responsible for the development of the decision. We may identify a division of the activity according to its specific within the Constitutional Court of *Korea*, where Research Department is divided into the Assigned Research Section (research judges assigned in addition to judges in cases and who are responsible for the preliminary verification of the constitutional complaints and cases which have many similar precedents and may be rejected) and the Specialized Research Section (for thorough research; many sections operate within this section on broad categories of law). Similarly, in *Moldova*³⁵, one may distinguish between assistant-judges (who assist directly the Court's judges) and judicial assistants (having the statute of civil servant and subordination to the Secretary General of the Court).

As a peculiarity resulted from the report of *Croatia*³⁶, we should hold the possibility of the legal advisers of the Constitutional Court that, if they do not agree with the draft decision, ruling or report prepared in accordance with the instructions of a judge-rapporteur, they may submit a written dissenting opinion which shall be submitted to the President of the Constitutional Court or to the President of the competent Chamber, together with the draft decision, ruling or report.

Also as a peculiarity, in *Slovenia* we note the involvement of advisers in the process of "filtering" of cases brought before the Court. Thus, for each case, as a general rule, the adviser assesses whether it could possibly raise an issue of violation of human rights or fundamental freedoms. If the cause is not problematic, the adviser prepares a summary report proposing a solution for the settlement of the case. Failure to comply with procedural requirements (for example, delayed challenges or rejected as inadmissible, challenges made under the consideration that legal remedies have not been exhausted etc.), results in a rejection of the constitutional challenge. If there is no violation of human rights, the adviser suggests that the constitutional challenges shall not be taken into consideration. Three judges – members of the panel to which the case has been assigned – vote on such a report in an appropriate session. If they agree with the proposed decision, an order signed by the president of the panel shall be prepared and if no common solution is reached, the case is submitted for examination in the plenary session of the Constitutional Court. If the adviser believes that the case raises or may raise an issue of violation of human rights or fundamental freedoms, he/she prepares a full report. Such report can also serve as a report for the preliminary examination. In such a case, judges – members of the panel – gather in a session where the advisers report on the case, and the judges decide whether to accept the case for settlement or not. Again, an appropriate order shall be prepared. If the challenge is accepted for examination, the adviser prepares a draft decision, and if necessary, also an additional report. Then, the case is submitted to the plenary session of the

³⁵ Rodica Secrieru, *The role of judicial assistants in the jurisdiction of the Constitutional Court of the Republic of Macedonia*.

³⁶ Dubravko Ljubić, *The role of legal advisers of the Constitutional Court of the Republic of Croatia*.

Constitutional Court. The adviser shall be present during the plenary session, but he/she does not participate in the deliberations, only in exceptional cases. Once a decision is taken, the adviser prepares the final text of the decision. The Analysis and International Cooperation Department is in charge of drafting and copy-editing. Then, all corrections shall be discussed and harmonized during a meeting of the Drafting Committee, and the decision shall be ready to be communicated to the parties. In *Albania*, the adviser presents his viewpoints on meeting the conditions of admissibility of the application, and when these conditions are met, he/she prepares a viewpoint on how he/she believes that the case should be settled and, with the approval of the judge-rapporteur, he/she develops the solution proposal and participates in debates in the Plenum.

In *Serbia*, the Law of the Constitutional Court provides that there is a specialized department for the performance of professional duties and of other kind, which is managed by the Secretariat of the Court, where civil servants perform their duties of preliminary examination of legal constitutional issues which fall under the jurisdiction of the Court. This department includes the following basic internal units, with specific tasks: 1) Department of regulatory review and other procedures; 2) Department of constitutional appeal and settlement procedures; 3) Department responsible for case-law. In addition, the Department of constitutional appeal and settlement procedures includes a smaller internal unit, namely the Department for preliminary review of constitutional appeals³⁷.

We also note the involvement of assistant-magistrates/assistants/equivalent offices in the development of the Court's work (for example, *Slovakia*, *Slovenia*, *Romania*, drafting summaries of the Court's acts for the Bulletins of such courts).

As concerns the referendary of *CJEU*³⁸ (it has been exemplified by the settlement of a preliminary question), he/she is involved as follows, depending on the procedural stages specific to the settlement of such challenges: once registered with the Clerk Department of the Court of Justice, the President shall assign the new case to a judge-reporter while, in parallel, the first advocate general shall assign the same case to an advocate general; they in turn would assign the "law clerk" to assist its settlement; the notification regarding the preliminary questions is published in the Official Journal of the European Union and the parties to the main proceedings, Member States, EU institutions, the EEA states and EFTA Surveillance Authority are directly notified and have the opportunity to submit written observations to the Court in their national language; after the translation of the observations, the Judge-Reporter has six weeks to draw up a preliminary report, which is prepared by "legal secretary" responsible under the guidance and supervision of his/her judge and, when it is completed and signed by

³⁷ Olivera Kovačević, Snežana Labus, *The office and role of official servants in carrying out their professional duties in the exercise of the powers of the Constitutional Courts established by the Constitution* (Serbia).

³⁸ Andrei Ionuț Florea, *The referendaries of the Court of Justice of the European Union*; Matthew Radley, *The referendaries within the President's Office of the Court of Justice of the European Union*.

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the latter, it shall be communicated for approval, to the advocate general's office assigned to the case settlement; if the preliminary report is approved by the advocate general, which usually happens, it can be presented to the General Assembly that, in most cases, also validates the proposals made by the judge-reporter; the legal secretaries who are responsible for the case will help his/her members to prepare the hearings; the legal secretary of the advocate general's office responsible for the case must develop, under the guidance and supervision of the advocate general, the opinion of that advocate general, which shall be published before the delivery of the decision; during deliberations, the "legal secretaries" of the Judge-Reporter responsible for the case must prepare, under the guidance of their judge, the first draft decision which will be submitted to be examined by the other judges and legal secretaries of the assigned panel of judges, and if the other judges disagree with this first draft decision or if they have only some suggestions, the legal secretaries responsible for the case shall draft notes covering these suggestions or proposals; after the Judge-Rapporteur receives all proposals or suggestions of the judges of the Chamber in question, his/her legal secretary prepares, under his/her guidance and supervision, an amended draft decision reflecting, to the possible extent, all proposals or suggestions made by his/her colleagues; in the end, the judges shall meet for a formal oral deliberation in order to discuss the amended version of the draft decision and, if they agree, they will approve a final version of the decision which will subsequently be translated into all official languages and published. The referendaries of the President's Office have a different role, determined by the specific duties of the President of the CJEU.

IV. The role of constitutional judges and assistant-magistrates

The activity of the constitutional courts' judges is subordinated to the desire to ensure the supremacy of the Constitution, and their status is configured in order to achieve this goal. Thus, the status of constitutional judges, starting from the legislative consecration, the powers of public authorities regarding their appointment, the possibility of the same revocation authorities and the reasons for the possible revocation, the length of the term of office and the possibility to reinvest for another term of office are factors which determine their independence, forms and probably the limitations in fulfilling the term of office that has been granted to them. In order to eliminate the risk of politicization of constitutional courts, all jurisdictions to which we have referred are provided, by Constitutions or by the laws of organization and functioning of the Courts/Constitutional Tribunals/Supreme Courts, a number of mechanisms that do not concern only the appointment of constitutional judges, but also their entire activity.

As regards their assistants, the reports submitted have suggestively revealed its essence, showing, among other things, that, in order to carry out their institutional duties, the judges and the president of the Constitutional Court shall count, in

particular, on the collaboration with their assistants (*Italy*). This is a vital role as the judges can control the huge number of cases and can focus on their judicial duties by delegating advisers to carry out all the preparatory work and to manage the case (*Slovakia*). It is considered a prestigious office and very demanding (*Israel*), a highly important and respected status (*Slovakia*).

It has been also noted the contribution of assistants to the final wording of the constitutional court's decisions. Thus, knowledge and experience acquired by judicial assistants contribute "physiologically" to the formation of the constitutional judges' beliefs. Through permanent personal relationships with their judges, which they help not only through their specific legal knowledge, but also by their "professional opinion", the assistants participate – even if from "inside" – in the formation of the constitutional case-law, often to a great extent (*Italy*). Since most legal advisers undertake duties involving a high specialization and participate in the decision-making process of the Court, they affect the Court's case-law which serves as an example for the ordinary courts and other authorities (*Slovakia*).

It has been also emphasized that the only stability factor in the practice of the Constitutional Court is those who know and accept its standards and procedures, regardless of the way in which the role of the Constitutional Court is regulated by norms and the legal advisers of the Court form such a stability factor. This can be acquired based on a wealth experience, excellence and superior knowledge in constitutional law of legal advisers. Even though sometimes it may seem difficult, this is the only way by which the legal advisers of the Constitutional Court can carry out its role in order to strengthen constitutional justice, the main reason for the existence of their profession (*Croatia*).

The special role enjoyed by the constitutional judges, on the one hand, and their assistant-magistrates, on the other hand, is reflected in difference between the status and the legal protection. Moreover, some of the reports submitted revealed the aspiration to regulate a clearer status and certain guarantees on stability/continuity/access in other legal professions for the office of assistant-magistrate/equivalent offices within the constitutional courts.

V. Conclusions

The constitutional judge achieves the constitutional justice under the supremacy of the Constitution. As regards the activity of assisting the constitutional judge, we should mention suggestive statements contained in the reports presented at the Conference: "assistants are «ghost» writers" (*Spain*), respectively, they represent the "memory" of the Court (the conclusions of the *Venice Commission*). Their work is incorporated into each of the acts of the constitutional courts, whose quality largely depends on the experience of each of them. Not incidentally, in *Germany*, advisers who assist judges are

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often appointed called the “third Senate”, both domestically and in the scientific publications, emphasizing precisely their elitism.

Responding to issues concerning the relationships between judges and their assistants and the power exercised by this professional category, the conclusions of the Venice Commission at the Conference emphasized, *inter alia*, two recommendations: the judges shall be assisted by qualified staff, whose number shall be determined according to the number of cases brought before the Court³⁹; the reports on the inadmissibility can be prepared by judicial assistants, but the actual decisions must be delivered by the judges themselves⁴⁰.

No doubt the increasing role of the constitutional courts requires their continuous adaptation, including in identifying qualified staff that shall “preserve” a precious experience, a continuity and development factor in the constitutional jurisdiction. Essentially, this involves high professional competence, but also regulations in order to ensure protection and stability, as well as development opportunities aimed at stimulating the preservation of the highest professional standards. Thus, amendments to laws on the organization and functioning of the constitutional courts are put into questions, aiming, *inter alia*, at a clearer determination of the legal status of advisers/assistants etc., as separate and permanent structures, and the status of judges to be able to enter the magistracy due to their experience and.

It is noteworthy that, precisely in consideration of these standards, legal advisers/assistants/referendaries qualified in important offices in other fields, such as judges, law professors, senior administrative officials (Austria), as the period spent at the Court had a positive impact on their careers (Germany) or they may become/became judges of these Courts, as the reports Belgium and Portugal reveal (two former advisers are currently constitutional judges).

³⁹ CDL-AD (2008)030 – Opinion on the bill regarding the Constitutional Court of Montenegro.

⁴⁰ CDL-STD (1995)015 – The protection of fundamental rights by the Constitutional Court, Science and Technique of Democracy.