

Strasbourg, 6 January 2015

## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

### Questionnaire for the preparation of CCJE Opinion No. 18 (2015):

**“The independence of the judiciary and its relations with the other powers in a modern democratic state”**

**ANSWERS AUSTRIA**

### Introduction

The following questionnaire aims at gathering essential information on constitutional provisions and other laws (whether statutory or otherwise) concerning the relations between the three powers of state: judicial on one side, and the executive and legislative powers on the other. Where appropriate, the answers to the questionnaire should also provide information on specific issues and concerns in the respondent country on this topic. Answers will provide important material for the CCJE Opinion No. 18 to be prepared in 2015 as well as for the CCJE's next Situation Report.

### Questions

How does the Constitution, or the other laws of your country, if there is no written Constitutional document, regulate relations between the judicial power on one side, and the executive and legislative powers on the other side ?

The constitution states that judiciary and executive power are separated. Judges are independent in their jurisdictional tasks. They are also independent in tasks of the administration of courts if tasks of this kind are entrusted to panels of judges by ordinary law. But this possibility was used by the legislator only in a very restrictive way. (assignment of cases, evaluation of judges, non binding proposals for the appointment of judges to vacant judges posts.).

The role of administrative courts and the Constitutional Court has the usual impact on acts of the executive power. Ordinary laws adopted by the legislator could be challenged at the Constitutional Court regarding their constitutionality.

There is no decisive influence of the judiciary on the budget and the allocation of resources.

Is there now, or has there been in the last 10 years, any important discussion in your country on this topic, either in the political/legal field, in university/academic circles, by NGOs, or in the media?

There were only few debates.

- The judges association tries whenever possible to raise the problem of the strong structural dependency of the judiciary on the other powers of state. On the occasion of a convention to debate on amendments of the constitution initiated by the parliament, where initially nobody wanted to debate about the position of the judiciary but mainly on other constitutional questions like the federal system of the state, the judges association raised once again the concept of creating a council for the judiciary. The initiative was supported by a conference with the participation of the working party of the CCJE. After some positive reports in the media on this conference the topic disappeared again. Politicians of all parties were not interested at all. Their arguments were that this will lead to a state within the state on the one hand and judges don't have management skills on the other.
- Till the beginning of 2014 Austria had no first instance administrative courts. In general there was a remedy within the administration to a higher instance ( e.g. ministry or government of the Bundesland) and from there a restricted remedy to the Supreme Administrative Court (Verwaltungsgerichtshof) which decided as a court of cassation in administrative court matters. The debate to introduce first instance administrative courts lasted decades. It was evident that politicians, especially politicians in some of the Bundesländer were afraid to lose influence. This became also evident in the drafts of several ordinary laws of the parliaments of these Bundesländer. A substantial argumentation pro and contra was missing.

Has there been any significant debate on the issue of “judicial restraint” or “judicial moderation” with regard to the exercise of the judicial function vis-a-vis the other powers of the state? In particular, are there examples where public opinion and/or the other powers of state have suggested that the judiciary (or an individual judge/court in a particular decision) has impermissibly interfered in the field of executive or legislative power or discretion?

Decisions of the Constitutional Court which declare acts of the legislator or the executive power unconstitutional by their nature provoke such reactions, the most severe of which occurred when decisions against the discrimination of homosexuals were taken or when the state was condemned to refund taxes.

Regarding criminal procedures there were (are) several cases, where politicians were/are involved. Whatever the outcome of such procedures is, courts are blamed either by one or by the other political party that the decision is politically biased. When elections are scheduled and a procedure of such kind is scheduled as well courts are blamed to exercise undue political influence.

a) In your country, in the last 10 years, have there been any changes in the constitution/law regarding the judiciary (in the widest sense: structure, courts, judges) which have, arguably, affected the relationship between the judiciary and the other powers of the state or the separation of powers in your country?

First instance administration courts have been introduced in 2014 (see above).

b) In your country, are there any current proposals for changes in the law as referred to under a)? In each case, please indicate the “official” reason for the changes or proposed changes.

The only proposals are those of the judges association regarding a Council for the Judiciary (see above) or to make the proposals for the nomination of candidates for a vacant position

binding. But such proposals are not content of public debate or reflected in academic studies or debates.

c) In your country, are there any serious discussions or debates (in political circles, by the public generally or in the media) with a view of introducing changes in the law as referred to under a)?

See under b)

In your country, have there been any significant comments by politicians or other relevant groups with respect to the role of the judiciary/courts in their capacity as the third power of the state? If so, please briefly identify their nature and content and indicate the reaction of the public or media reporting of "public opinion".

See above regarding restrains. But there is almost no debate on the structure , relation, balance etc of the powers of state.

To what extent, if at all, is the proper administration of justice affected by the influence of the other state powers (e.g. the ministry of finance with respect to administering budgets, the relevant ministry with respect to information technology in courts, the court de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

The judiciary has no say regarding the budget. The law on the budget is prepared by the minister of finance who negotiates with the other ministers,, regarding the judiciary with the minister of justice. The allocation of resources is determined by the concept of the minister of justice, who also decides of the major organizational issues e.g. use and equipment of IT.

Do you have any other comments to make with regard to the relations between the judiciary and the other powers of state in your country?

Judiciary works quite well. Therefore nobody outside the judiciary sees any need for structural changes. At the moment the deficit of structural independence is not misused. If any political party wants do take advantage of these deficits it would be easy to do so. As everywhere the situation has its (long-lasting) historical roots. One may be that judges are seen as special qualified public servants and not as office holders of a separate state power. Austrian politicians tend to kill any attempt to strengthen the structural independence with the argument that the individual independence of the individual judge in exercising his/her judicial duties is guaranteed by the constitution, everything more endangers democracy, which foremost empowers the parliament and not the judiciary.

Gerhard Reissner  
1210 Wien, Gerichtsgasse 6  
[gerhard.reissner@richtervereinigung.at](mailto:gerhard.reissner@richtervereinigung.at)