

Cologne, February 24, 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 from Germany*

#### 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

- 1) 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 relevant articles of the German Constitution (Grundgesetz – Basic Law) read as follows:*

*Article 92: The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by federal courts provided for in this Basic Law, and by the courts of the Länder.*

*Article 95, para. 2 (referring to the supreme federal courts): The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a*

*committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag (i.e. the Federal Parliament)*

*Article 97: (1) Judges shall be independent and subject only to the law.*

*(2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.*

*Article 98, para. 4: The Länder may provide that Land judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges.*

*Article 101: (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.*

*(2) Courts for particular fields of law may be established only by a law.*

*As is well known, Germany as yet does not have High Councils of the Judiciary in the sense of an independent body of self-administration of the judiciary.*

*The responsible cabinet member at the level of the Federation as well as at the level of the Länder is the relevant minister of justice. In some of the Länder, judges are elected by parliamentary committees, sometimes these committees do not only consist of members of parliament but also of a number of judges or representatives of other relevant stakeholders (e.g. members of the bar).*

*At all levels, so-called staff committees do exist, for non-judicial staff and for judges (Personalräte, Richterräte). At the level of non-judicial staff, these staff committees have a right to be heard and also a power to consent or dissent in any staff decision (appointment, transfer, leave, retirement, disciplinary action, promotion etcetera). It is increasingly being discussed to introduce similar powers for staff committees of judges. The result would be that the court president or the minister would not be able to decide on any such measures without the consent of the committee.*

*In addition, Germany has a tradition of strict judicial control of any possible staff decision. If, therefore, a civil servant or a judge is unhappy with a decision concerning his or her status (appointment, promotion etcetera), he or she can always seek judicial review. There is a long line of leading cases establishing rather strict control of such decisions, under the aspects of administrative law but also under the aspect of independence of the judiciary.*

- 2) 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?

*Not really. In the last 10 years, a number of cases concerning adequacy of salaries of the judiciary have been brought before administrative courts. Some of these courts have referred these cases to the Federal Constitutional Court, where they have been heard late in 2014. A decision is expected in the next few months.*

- 3) 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?

*Not on the level of ordinary courts. There is always some discussion with respect to the Federal Constitutional Court and the other institutions like the legislature. The same applies to constitutional courts of the Länder. Legislature and executive power often feel that constitutional courts are excessively interpreting constitutional provisions. One prominent and actual example is the approach of the federal Constitutional Court with respect to European programmes and institutions, especially concerning measures in the wide field of financial crises. European institutions and German members of Parliament maintain that they alone should be responsible whereas the Court sees constitutional limitations which have to be observed despite the general Europe-friendly approach of the German constitution.*

- 4) 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?  
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.  
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)?

*There have been a few occurrences which may be regarded as of minor importance but which may be considered as examples of watchfulness on one side or as group pressure on the other side, whatever point-of-view one would prefer to take:*

- (1) *A few years ago, in the state of North-Rhine-Westphalia, the prime minister decided to merge the ministries of the interior and of justice. One single person was appointed both minister of the interior (responsible for the executive, especially the police) and minister of justice. The judiciary protested. The opposition brought the case before the constitutional court of the Land. The court held that such a merger was unconstitutional.*
- (2) *There has been some discussion whether some of the five branches of the judiciary (ordinary courts, labour courts, social security courts, administrative courts, tax courts) could be merged. The argument for such move would be to allow more flexible assignments of judges in general courts with special panels and to avoid that judges in one court would be overworked whereas other judges might not even have an average work load. Again, there has been wide spread protest by judges from the specialized branches of courts. It is argued that the Federal Constitution established five different federal supreme courts and that this implies that these five branches should be maintained at the level of the Länder. So far, in none of the Länder such a merger has been introduced.*
- (3) *Every now and then, ideas of closing smaller courts are being discussed in order to increase effectiveness of the judiciary. Usually, protests come from local authorities and local parliaments who want to keep "their court" in their city. Very rarely such plans are being effectuated. Recently, in Rhineland-Palatinate the prime minister had formed the plan to merge the two (ordinary) courts of appeal. This happened in the aftermath of a lengthy and severe controversy over the appointment of the president of the court of appeal in Koblenz where the minister of justice lost a long battle in the administrative courts. Political protests from the opposition and the judiciary were strong and the government found a way out by*

*establishing an expert commission which, in turn, recommended to keep both courts.*

- 5) 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".

- (1) Not really. General impression is that public opinion, especially the media, would defend the judiciary.*
- (2) On the other hand, criticism with respect to individual court decisions is not uncommon. Wrongful convictions, wrongful decisions on confinement for psychiatric reasons, decisions on child custody with severe outcome, child care cases etcetera are quite often subject of reports and criticism in the media.*
- (3) Sometimes there is rumour of political influence in courts and, even more so, in actions of the public prosecution. When it comes to criminal investigations against politicians such criticism is not uncommon. It is hard to say whether there is any foundation to it. It could be argued that prosecutors may be more inclined to prosecute politicians and to bring them to trial than to hush up such cases. Fear of media reaction may be one of the causes for this. Also that it is easier to turn responsibility for the outcome over to the courts rather than taking it for a decision not to prosecute. The case of former Federal President Wulff may be an example for this. He was prosecuted and eventually tried for corruption and lost his office. The charge which finally remained in the trial concerned an invitation in the value of about 700 €. Although there was considerable political and media pressure on him to admit to this charge he decided to stand trial and at the end of the day he was acquitted. Although there is always rumour that politicians may try to influence judges there has never in recent years come up evidence to this effect. Personal experience as a court president and a member of a constitutional court is that I have never encountered only the slightest approach to that effect.*
- (4) In the process of appointment and election of judges which is, as has been pointed out, subject to fairly strict judicial review, politicians sometimes complain that professional evaluations of judges set limits to a free and arbitrary choice of appointments. Recently, a politician is said to have stated that it was, in his view, not acceptable that appointments and careers, up to the highest judicial offices are predestined by marks reached in the evaluation process. From such statements, it may be deduced that some politicians would like to exert more influence into the judiciary if the law would permit them.*

- 6) 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 cour de compte, parliamentary investigations etc. or any other external influence by other powers of the state)?

- (1) The ministry of finance has strong influence because it prepares the draft budget also for the judicial administration.*
- (2) The ministry of the interior, in most of the Länder, is the responsible government ministry for information technology. The result is that quite often computer technology in the judiciary follows standards and is administered by the ministry of the interior. Only recently a discussion is beginning to arise with the argument that the third power of the state should have its own responsibility for its information technology. In North-Rhine-Westphalia, e.g., the judicial administration is now*

*introducing a central office for information technology at one court of appeal as a service unit for all courts and prosecutions. This office is being set up at the C.A. in Cologne and headed by a judge, vice-president of the court of appeal (who will be something like a chief information officer of the third power).*

*(3) The Data Protection Office, an independent institution, now and then tries to hold the judicial administration responsible and accountable as if it were an executive branch of government. Such discussions are sometimes difficult but so far the judiciary has maintained its independence also in this respect.*

*(4) Likewise the Cour de Comptes or budget control office frequently tries to criticize or recommend measures or organisational aspects of the judiciary. One recent example was that the office of budget control argued that stand-by judges for decisions on provisional detention or interlocutory applications etcetera should be positioned in larger cities only because, so they argued, this would reduce stand by time which to some extent counts as working hours. The courts refused such intrusion and replied that organising such judicial service was their prerogative. Budget control offices every now and then point to the fact that court costs (trial costs, legal aid etcetera) may vary significantly from one court to another. Although courts generally act quite cost-conscious they rejected such argument as an intrusion into their independence.*

7) 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?

*No comments of significant importance. It can be observed, however, that in political and social life the courts and their representatives go largely unnoticed. At the highest level, e.g. in state acts, funerals, state visits, it is quite common that the president of the Federal Constitutional Court is present as the representative of the third power. At regional or local level, court presidents are almost ignored.*