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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 - SLOVENIA

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?**

According to the Constitution of the Republic of Slovenia (hereinafter: the Constitution) Slovenia is a state governed by the rule of law (Article 2). Judges are independent in the performance of the judicial function and are bound only by the Constitution and the laws (Article 125) as well as by the general principles of international law and ratified and published international treaties (Article 8). An important prerequisite of the independent judicial system is a constitutional rule against ad hoc tribunals (Article 126, Paragraph 2). The Constitution also enshrines the standard (lawful, natural)-judge principle (See Article 23 of the Constitution: “Everyone has the right to have any decision regarding his rights, duties

and any charges brought against him made without undue delay by an independent, impartial court constituted by law. Only a judge duly appointed pursuant to rules previously established by law and by judicial regulations may judge such an individual”) and the principle that judges must not be part of the executive branch of power or bodies of political parties (See Article 133 of the Constitution: “Judicial office is not compatible with office in other state bodies, in local self-government bodies and in bodies of political parties, and with other offices and activities as provided by law.”) The principle requiring post-decisional independence of a judgement and its respect by other branches of power is proclaimed by Courts Act (hereinafter: CA). According to the Article 2 of CA, any natural or legal person in the Republic of Slovenia shall respect a final decision of judicial authority. The decisions of judicial authority shall be binding on courts and all other state bodies of the Republic of Slovenia. The enforcement of a court decision cannot be hindered by a decision of another state body.

Status of judges is governed by Articles 125 to 134 of the Constitution and by the Judicial Service Act (hereinafter JSA). Judges are elected by the National Assembly on the proposal of the Judicial Council and their office is permanent until retirement, no later than upon reaching 70 years of age. They have the status of public officials but are independent in the performance of the judicial function and are bound only by the Constitution and laws. Judges enjoy immunity for opinions expressed during decision-making in court. If a judge is suspected of committing a criminal offence in the performance of judicial office, s/he may not be detained or subject to criminal proceeding without the consent of the National Assembly (Article 134 of the Constitution).

The CA and the JSA both address the issue of the independence and impartiality of judges, e.g. by proclaiming that judges must always act in such a way as to safeguard the impartiality and independence of their office and the reputation of the judicial service (Article 2 JSA). The JSA also contains provisions on incompatibilities (Articles 41 to 43) and a prohibition to accept gifts (Article 39).

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?

The independence of the judiciary in Slovenia is guaranteed by the Constitution as well as the aforementioned laws, preventing any unconstitutional or unlawful interference with the judiciary by the other two branches. In theory, the representatives of the executive and the legislative branch are committed to the principle of the independence of the judiciary. However, in practice the perception of this principle differs, mostly due to misunderstandings and ignorance of the status and role of judges and the judiciary itself. One can argue that in Slovenia a serious academic discussion on this topic is missing, as, at least so far, most debates have been more or less interest-oriented if not outright populist.

Some discussions have been held within the judiciary to determine whether the Constitution needed to be amended with a view to eliminating the role of the National Assembly in the appointment procedure of judges and increasing the role of the Judicial Council. These discussions did not result in a proposal to change the current system. It is important to stress that the initial election within the judicial service does not raise particular issues, since a single candidate is proposed for election to a post and in practice the National Assembly, who elects the candidate, generally follows the proposals made by the Judicial Council. The role of the National Assembly is therefore mostly of a symbolic nature.

However, the National Assembly also appoints the President of the Supreme Court of the Republic of Slovenia on the proposal of the Minister of Justice, after previously acquiring the opinion of the Judicial Council and the Plenary Session of the Supreme Court, for the period of six years with the possibility of reappointment. The two latest elections to the post of the President of the Supreme Court, when the National Assembly has refused to elect the proposed candidates (two candidates were refused and a third candidate was apparently subject to a smear campaign) have been the occasion of heated political debates in Parliament, which were widely relayed in the press and have fuelled the perception existing in Slovenia that judges could be subjected to political influence.

Bearing in mind that in Slovenia judges may be members of political parties, this role of the National Assembly in the election of higher judges could well be seen as problematic in relation to their necessary independence from the executive and legislative power. The independent position of the judiciary can at least be symbolically weakened by the competence of the legislative branch in cases where certain proposed candidates for higher judicial positions might not be acceptable to the ruling political option.

- 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?**

Regarding the judicial intervention in government activity, it is worth noting that the legislative and the executive branch, in particular Ministry of Justice, often request the opinion of the judiciary on the draft laws (prior to being passed in the Parliament) and applicable laws as well. Judiciary regularly gives opinions on drafts of the new legislation, with the aim to improve the weaker elements of the legislation as are seen from the judge's perspective. Judges and representatives of the judiciary also often participate in working groups, established by the Ministry of Justice, which are responsible for drafting new legislation. Although the opinions given by the judiciary are taken into consideration they are (too) often not included in the final version of the new legislation.

As mentioned above, judges are often asked to participate in assignments that have a strong association with the executive branch (as explained, they are appointed to the working groups of the Ministry of Justice to study the possible solutions to improve legislation and there are also judges seconded to work to the Ministry of Justice). Although this situation is temporary it could be inconsistent with the judicial function, which requires total independence and impartiality of the judge in adjudicating disputes, so the judges involved should always act with restraint and should always keep in mind the position, that the judiciary must be separated from the other two branches and cannot assume legislative or executive functions.

This extra caution is not needed when law expressly provides that a judge should exercise a certain extra judicial function, such as serving as members or presiding over commissions (e.g. in Slovenia a president of the National Electoral Commission and his deputy must be Supreme Court judges)

Recently there were some discussions over the election of a district judge to a position of a member of National Assembly. She was a candidate on the list of a political party which won

the latest elections in Slovenia. According to the provision of the Article 40 of JSA a judge who is elected a member of National Assembly shall have his judicial office, and all rights and duties deriving from judicial service suspended. But this situation nevertheless raised some questions of what will occur if the judge wants to return to the judicial office, since the appearance of independence and judge's impartiality may be affected in the eyes of the public due to her performance as a member of National Assembly. It has to be mentioned that in Slovenia no cooling-off period between the end of service in a legislative (or executive function) and (re)assuming a judicial office is required, which might serve the purpose of separating of powers in the eyes of public.

Finally, it should be noted that the Constitutional Court has been under public scrutiny in this context far more often than the regular courts. It was repeatedly criticized for its excessive activism, in terms that some of its decisions excessively interfered with the competence of the legislative branch.

- 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)?

In 2013 Ministry of Justice has proposed an amendment to the Courts Act (CA), which following their formal explanation "aims to achieve greater efficiency of courts and judges by strengthening the autonomy and responsibility of the courts". In the context of these changes it proposed to set up "judicial inspection" to monitor the implementation of judicial administration by the presidents of the courts. Despite sharp (severe) opposition of the Slovenian Association of Judges, Judicial Council and the Supreme Court the original draft was only slightly mitigated. After the National Assembly (Parliament) had adopted amendments to the CA they entered into force on 10th August 2013. This amendments triggered a lot of negative reactions by the judiciary.

Pursuant to the new amendments the CA introduces a new Article 65a, in which the Ministry of Justice establishes a department of the Ministry of Justice with a task to supervise the organization of management of the courts.

The scope of jurisdiction of the department is:

- to exercise control over the administration of justice, in particular with regard to the organization of the management of the courts,
- control of the fulfilment of quality standards of the courts in carrying out matters of the administration of justice,
- to carry out inspection concerning the application of the Courts Fees Act,
- to supervise the application of the Court order and carry out administrative supervision in accordance with the Court order.

As far the latter task is concerned, inspectors (who shall not be judges, but officials - their qualifications are yet unknown) in dealing with these matters shall be authorized to have an insight not only into registers and documents relating to the management of the courts, but also into open files of pending cases. Accordingly, the president of the court may be required or recommended to take certain measures (also not defined yet).

It is true that Article 65a paragraph 5 provides that the department must not infringe the independence of judges, the presumption of innocence and fair trial guarantees, but based on previous bad experiences (when the Ministry of Justice could inspect only files of non-pending cases and only with regard to the application of the Courts Fees Act), the judiciary is convinced that such provision is not a sufficient guarantee.

The judiciary believes that the establishment of this department which is not consistent with the Constitution and the principle of separation of powers leaves the door wide open to the influence and control over concrete cases and presidents of courts by the executive branch. In the grounds of the proposed amendments the Government stated that it is the objective of the department to establish control over the operation of the courts and to enhance the accountability of the courts. Based on the findings of the department, the Minister of Justice may propose the dismissal of presidents of courts or initiate (disciplinary and other) proceedings against a judge. The introduction of such control is not only contrary to the Constitution, but also to the basic principles on the independence of the judiciary, separation of powers and the rule of law as enshrined in numerous international documents. The change of the law coincided with the time when the Slovenian courts convicted several politicians and businessmen of corruption and abuse of office. It should be stressed that the view of the Legislative and legal service department of the parliament supporting the opinion of the judiciary was not taken into account.

Another way in which the executive branch through its majority in the legislative tried to undermine the independence of the judiciary was the decision on the salaries of judges. The issue has given rise to controversy in Slovenia over the past few years. Judges' salaries are set out by the JSA, in accordance with the Public Sector Salary System Act. Changes to the legislation were proposed, which were challenged by judges before the Constitutional Court, mainly for reasons of alleged dis-proportionality between judges' salaries and salaries of officials in other branches of power. The Constitutional Court ruled in favour of the judges, stating that the government had not given convincing reasons for this dis-proportionality, which therefore breached the principle of separation of powers. The government then introduced some changes, which were again challenged, this time by the Administrative Court, before the Constitutional Court. The Constitutional Court declared them unconstitutional, repeating that judges should be treated in a manner comparable to officials of the two other branches of power. As a result, judges' salaries were aligned with those of comparable officials in the legislative and executive powers in 2009, according to a new version of the Public Sector Salary System Act. Following the second decision of the Constitutional Court the new government prepared a new version of the Public Sector Salary System Act in 2009 that significantly changed the classification of salary classes for judges in order to be in line with the requirement of the separation of powers. These classifications were opposed by the opposition in parliament that wanted a referendum on the issue of salaries of judges. The Constitutional Court determined that a referendum on these matters could have unconstitutional consequences. However, due to the current economic situation, the law, which adjusted the salaries of judges with the other two branches of power has been 'frozen' until the economic situation improves, so de facto the salaries of judges remain at an unconstitutional level. Since 1 June 2012, the remuneration of the officials of all three state powers (including judges) has been reduced by 8% for reasons of economy and this will remain in force until economic growth reaches and exceeds the rate of 2.5 % GDP.

- 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”.

It should be noted that Slovenian judges live in a society where criticism of public institutions is the norm. Excessive popular pressure and irresponsible journalists, hungry for sensational pieces, have too often put judges in an unbearable position which threatened their independence. Direct criticism from the media, government or parliamentarians might risk compromising the independence of the judiciary. However, the level of influence is always a question that has to be resolved individually, by the judge deciding upon the individual case. Public expectations about the outcomes of specific cases might have a bearing on the decision of the judge, but this can hardly be proven. Generally, it can be said that so far government action or inaction has only indirectly affected the independence of the judiciary in the sense that there are no known cases, where the decision-making of the judge was directly influenced by the executive.

What is very common and at the same time very problematic, is the general attitude of dissatisfaction with the work of courts and judges. Politicians constantly repeat the fact that the public trust in the judiciary is very low and use this theme to gain political points. Directly, this does not influence the independence of judges, but it might undermine it even further in the long run. The judiciary very rarely responds to criticism. Mainly it does so in cases, where the information used by the critics is manipulated or taken out of the context. In practice, this is done by official statements of the president of the Supreme Court or the Judicial Council.

On the other hand, the lack of trust by the public seems also to be a result of judicial backlogs in the recent past, weak internal management of courts and lack of a public relations policy. Society expects the courts not only to ensure procedural fairness, but also to be efficient. It can be assessed that Slovenia, in spite of current positive trends in this field, is still suffering from excessive duration of litigations and backlogs in civil and criminal justice. This undermines the reputation of the courts in public opinion as well as the legal certainty. Both, the European Court of Human Rights and the Constitutional Court delivered numerous judgements stating that there is a structural defect in the functioning of Slovenian civil and criminal justice and that the right to trial within reasonable time is too often violated.

The level of the political culture in Slovenia still does not meet the standards which exist in democratic states. This was clearly visible in the last few months when severe attacks on the judiciary and judges occurred due to the criminal proceeding in which the leader of the main opposition party was accused of corruption and then sentenced to two years of prison. A part of the political opposition argued in the media that the trial was unfair and illegitimate, politically motivated, and used to abuse the judiciary for political purposes, without presenting any facts or evidences to support their claims. The leader of the main opposition party was pictured as the victim of a legal fiction and it was stated that the Slovenian judiciary has never been properly reformed and that numerous judges and public prosecutors simply continue to work as they did when they began working in communist Yugoslavia. In this context, the judiciary was shown as ineffective, incompetent, politicized, and strong and inappropriate language was also used for describing judges.

This kind of demonization of the judiciary, on the basis of one individual decision could have led to the demolishing of the legitimacy of the judiciary, resulting in paralysis of decision-making process and intimidation of judges. The attacks, especially because they were coming from the representatives of politics, threatened to compromise the independence of the judiciary as a whole, since they exceeded tolerable limits. In this context, questions and several debates were raised on how far the politicians criticism on the judiciary can go in

terms of freedom of expression not to interfere with the integrity and the fundamental principles of independence of judiciary.

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)?

Since the scope of the executive and legislative branch's control over budgeting of the judiciary is a great indicator of the judicial independence it is important to stress here that Slovenian judiciary is not able to determine its own budget. The main coordinator, proposer and negotiator for the budget of the judiciary and Judicial Council is the Supreme Court of Republic of Slovenia, but the amount of financial resources for the salaries of judges and other judicial personnel and for the operating costs of the courts is in the end determined in the state budget, which is adopted by the General Assembly on the basis of proposal of the Ministry of Finance. The legal basis for the procedure for adoption of the budget are the Public Finance Act and the Regulation for the Basis and Procedures for the Preparation of the Proposal State Budget.

The establishing of the budget may be shown through an eight step scheme:

- Establishing of a macroeconomic framework
- Specifying of the development priorities and tasks of the Government
- Setting up of a framework cross section of the budget in accordance with the program and the plans
- Budgetary Manual of the Ministry of Finance
- Preparing of detailed financial plans of direct budget users
- Negotiations with the Ministry of Finance
- Governmental proposal of the state budget
- Discussion and adoption of the budget and the Law on Execution of the Budget, within Parliament.

The Supreme Court as the entity proposing the financial plans of all the courts has a specific role in this process. Although the Courts Act provides that "the volume of financial resources for the salaries of judges and judicial personnel, and for the operation costs of courts, shall be provided within the framework of the state budget of the Republic of Slovenia for all courts on the basis of financial plans of individual courts at the budget user, the Supreme Court of the Republic of Slovenia", the Supreme Court has limited access to the first four phases, which are crucial. Once the priorities are set, it is impossible to reach important changes in the volume of financial resources during budget negotiations. During these four phases it is only the Ministry of Justice that can influence the decisions of the Government, but it has not sufficient knowledge of the needs of the courts, so the Supreme Court has some influence only by informal ways. The Supreme Court enters the process between the fourth and fifth phase. It proposes a cross section of the budget quota specified by the Government, regarding the judiciary for the following two years. The budget quotas are determined on the level of individual courts, whereby in addition to the initial rules determined by the budget manual, the following criteria are also taken into consideration:

- level of the financial plan of the user for the current year;
- semester realization of the financial plan of the user in the current year.

The Supreme Court also prepares internal manuals for the users as well as internal forms for budgetary items, which may reflect any additional needs for funds along with a short explanation, which is used as a basis for subsequent negotiations with the Ministry of

Finance. Then, each court prepares its own financial plan within the framework of the assigned quota in line with the budget items up to the level of a sub-account and submits it to the Supreme Court.

In addition, a complex analysis is prepared of the budgetary expenses and a dialogue is established between the users in regard to a concept for future negotiations. The negotiations with the Ministry of Finance may occur in several phases depending on the divergence between the posed requests on one hand and the possibilities or the constraints posed by Ministry of Finance. If the Ministry of Finance agrees, the additionally provided funds shall be distributed among the courts in line with the proposed priorities. However, if no agreement is reached, the proposed budget of the courts shall be submitted to Parliament, which takes the final decision.

The government's austerity package in 2013 imposed deep spending cuts on the judicial system as a result of fiscal consolidation of public finances. Representatives of the judiciary complained that the cutbacks were decided in a hurry and without proper understanding of the judiciary's needs or the potential consequences of the cuts. The reduction of funds could have seriously jeopardized the already set priorities and objectives of the judiciary, because it was not based on realistic assessments of the needs of the judiciary. The adopted budget for 2013 among others measures also reduced funding to the judiciary by 7.5 percent and lowered the average wage of judges and public officials. Most of the wage cuts affected the Project Lukenda (a temporary project aimed at improving efficiency in the judicial system and reducing court backlogs), which the Government chose not to extend.

Budget cuts can have a significant impact on the functioning of the judicial system, since the reduction of funds can negatively affect the position of the judiciary, as well as long-term efforts to stabilize the judiciary personnel issues. From this point of view the judiciary is in much worse position than the executive or legislative branch. A prerequisite for the implementation of the objectives set in the judiciary is that courts have sufficient human and material resources. Ensuring basic conditions for the work of the court must be one of the priorities of the Government and the National Assembly.

One of the important aspects of indicators of independence of judiciary is also the judicial training. The judges should be provided with theoretical and practical initial and in-service training, entirely funded by the state and an independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programs meet the requirements of openness, competence and impartiality inherent in judicial office. The Judicial Training Centre in Slovenia is established within the Ministry of Justice and organises training events for judges and prosecutors. Current situation is that the Judicial Training Centre does not have its own budget and its programmes have suffered from a budgetary decrease, as a result of the economic crisis.

The annual public budget funds allocated to investments in new (court) buildings is also not part of the budget allocated to the Supreme Court, but to the budget of the Ministry of Justice.

The computerisation of the judiciary is in the authority of the Supreme Court which means that investments in hardware are included in the financial plan of the latter. Considering information technology, the Supreme Court is fully in charge of the computerisation of the judicial system and has been introducing new technologies in courts.

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?**