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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”

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?

In Sweden the Constitution consists of four fundamental laws, the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. These laws take precedence over all other laws. The organisation and working procedures of the Riksdag (the Swedish parliament) are regulated in more detail in the Riksdag Act, which occupies an intermediate position between fundamental law and ordinary law.

The relationship between the judicial power and the executive and legislative powers is mainly regulated in the Instrument of Government chapter 11. According to art. 3 of that chapter neither the Riksdag (the Swedish parliament), nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule

of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges. Art. 4 stipulate that no judicial function may be performed by the Riksdag except to the extent laid down in fundamental law or the Riksdag Act. According to art. 6 permanent judges are appointed by the Government. A permanent judge can only be removed from office when one of two criterions, as set forth in art. 7, are at hand. The first criterion is that when the judge by criminal or gross/repeated neglect is manifestly unfit to hold office, the second is if he or she reached the applicable retirement age or is otherwise obliged by law to resign on grounds of protracted loss of working capacity.

In the aspect of parliamentary control, art. 6 in chapter 13 of the Instrument of Government states that the Riksdag elects one or more Parliamentary Ombudsmen who shall supervise the application of laws and other regulations in public activities, under terms of reference drawn up by the Riksdag. An Ombudsman may institute legal proceedings in the cases indicated in these terms of reference. Courts of law, administrative authorities and State or local government employees shall provide an Ombudsman with such information and opinions as he or she may request. Other persons coming under the supervision of the Ombudsman have a similar obligation. An Ombudsman has the right to access the records and other documents of courts of law and administrative authorities. A public prosecutor shall assist an Ombudsman if so requested. More detailed provisions concerning the Ombudsmen are laid down in the Riksdag Act and elsewhere in law. There is also a Chancellor of Justice (see art. 8 chapter 11 and art. 1 and 6 chapter 12), a non-political civil servant, that comes under the Government. The Chancellor of Justice is an independent authority mainly tasked to act as the Government's ombudsman in the supervision of authorities and civil servants, represent the state in legal disputes, ensure that the limits of the freedom of press and other media are not transgressed and to act as sole prosecutor in cases concerning the freedom of the press and the freedom of expression. An ombudsman can however never change a court ruling or in any way retry a court ruling or dictate how a court or a public agency should act in a particular case.

- 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 relationship between the judicial power and the executive/legislative powers has been a more or less constant subject of debate among scholars in university/academic circles. This relationship has also been a subject of debate in the political/legal field. Amongst others, individual judges, representatives for the Swedish Bar Association have written articles in legal journals. Popular subjects have been the extent of judicial review in the Swedish legal system and the possible introduction of a constitutional court. The debate in the daily press/news coverage has been of a more limited degree. NGO:s, such as Centrum för rättvisa (Centre for Justice), have contributed to the public debate and through litigation brought attention to questions on the rule of law, the Swedish constitution and the basic human rights enshrined there in.

- 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?

Sweden has a long tradition of democratic parliamentary rule. Following this democratic tradition, judicial restraint, have always had a major influence on the relationship between the judicial and the legislative powers. As mentioned above, this has been a subject of debate, especially on the issues of a possible introduction of a constitutional court and other questions concerning judicial review. The latest significant debate centred on the Working Committee on Constitutional Reform's work to conduct a concerted review of the Constitution. The Working Committee was, apart from the traditional inquiry remit, instructed to stimulate debate and encourage public discussion on constitutional issues and on Swedish democracy. The work of the Working Committee resulted in a Swedish Government Official Report containing several proposed amendments to the constitution, several of which were later introduced. However there has been little, if any, debate or situations where public opinion or other powers of the state has suggested that the judiciary has impermissibly interfered in the field of executive or legislative power or discretion.

- 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?

In 2010 several amendments to the constitution were introduced. The judicial power, i.e. the courts, were given a chapter of it's own in the Instrument of Government, chapter 11. This amendment was carried out in order to further emphasise the independence of the Swedish courts. Judicial review in the sense of a court examining acts of law and other regulations in a specific case and their compatibility with rules higher up in the norm hierarchy, such as the constitution, was prior to the 2010 constitutional amendments limited in the way that the courts were only to refrain from applying an act or ordinance if the error was manifest. This requirement was abolished through the 2010 amendments. The appointment of permanent judges has also been subject to change. The possibility for the Government to delegate the matter of appointing judges was removed. Furthermore, a criterion stating that provisions concerning the grounds for the procedure for appointing permanent salaried judges should be laid down in law was introduced. Other changes in the appointment procedure were also introduced, all with the objective of securing a system for appointment that cannot, with regards to the independence of the courts, be called into question. For example, all posts as judges must be announced as vacant and the former procedure, in which higher posts as judges were directly appointed, was abolished.

- 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.

There are at the moment no proposed changes of that nature.

- 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 are at the moment no major discussions taking place in political circles, the public generally or in the media with a view of introducing changes in the relationship between the judiciary power and the other powers of the state.

- 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”.

There have been no significant comments, on the role of the judiciary as the third power of the state, which has sparked any major reactions in the public or in the media reporting of public opinion. Discussions on these matters have mostly taken place in legal journals, and only occasionally in the daily press.

- 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)?

The administration of justice is, in a practical matter, affected by the annual budget, as proposed by the Government and approved by the Riksdag. This budget determines the overall budget frame for the courts in Sweden. Following the Swedish tradition of strong independent government agencies the distribution within the Courts of Sweden is solely up to the Swedish National Court Administration. Money can however be given for specific areas, for example to fund the introduction and ongoing management of the Migration Courts. How the money is distributed in the given area is once again solely up to the Court Administration. The Swedish National Court Administration may also be given Government mandates, this may affect the administration in a practical way in that regard that it might take up the Courts of Sweden’s resources. Questions concerning information technology fully fall within the discretion of the Swedish courts. Laws may of course stipulate that for example an examination of a witness during a public hearing should be recorded and stored digitally, how and with the use of what technical instrument is up to the Swedish National Court Administration to decide. As stated in the constitution no public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law.

- 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?

There have been changes in the relations between the judiciary and the other powers of the state that has been constitutional. For example new courts have been introduced in the area of migration and land and environment, granting individuals a broader access to the courts by making more public agency decisions subject to court adjudication. Case law from the European Court of Justice and the European Court of Human Rights has also influenced the Swedish judicial system and arguably strengthened the judiciary power in relation to the other powers of the state, especially so in the area of accessibility to the courts. The influence of these courts has further enhanced the role of the Swedish courts in the work to protect and enforce human rights. One example where European law has had this influence is the question of tax surcharge and the right not to be tried or punished twice in criminal proceedings for the same criminal offence.