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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?

Bosnia and Herzegovina is a country with a plurality of legal systems on four levels, which is reflected on the judicial system as well. Judicial structures are organized on the state level, on the level of two entities (FBiH and RS), and the Brčko District level. On all these four levels there is a strict separation between the judiciary and the legislative and executive state powers, which means that BiH complies with the principle of the separation of powers. In that context, the BiH judiciary is not a subject of control and management of, and is not dependent on the legislative or executive powers. The Constitutions of BiH, the Entities and the Brčko District Statute provide for the separation of powers in BiH into legislative, executive and judicial powers. One should note that the state-level judicial power is insufficiently defined, for the judicial power on the BiH level is exercised both by the BiH Constitutional Court, as defined by the BiH Constitution, as

well as the Court of BiH and the BiH Prosecutor's Office as a regular court and prosecutor's office, which were, as such, not specifically defined in the BiH Constitution, but were subsequently established by the laws enacted in the year 2000.

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?

See Question 4.

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?

No. As in any political system that applies the principle of the separation of powers, on all four (horizontal) levels in BiH the judiciary is a controller of the constitutionality and legality of actions taken by both executive and legislative powers, while the executive and legislative powers are not in a position to oversee the operations of the judiciary. The judicial system in BiH operates in a manner that all decisions of legislative and executive powers are a subject of control and reassessment by the judiciary, and each judgment delivered in that regard is complied with and executed in the manner prescribed by relevant legislation.

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 2012, in BiH there was an initiative coming from some of the ruling political parties to alter the procedure of appointment of chief prosecutors on all levels, so as to have the legislative bodies take over the process of their appointment at the proposal of governments, from within the list proposed by the HJPC. In that regard, in 2013 the HJPC sent an inquiry to the European Network of Councils for the Judiciary (ENCJ), asking the ENCJ to provide its opinion on this issue. The European Network has provided a report in which it was specifically pointed out that if the legislative authorities were to appoint chief prosecutors from within the HJPC's list of candidates, at the proposal of the executive authorities, such a procedure would “*undermine the internationally accepted principles and standards, risking to endanger judicial and prosecutorial independence, and would undermine public confidence in the judicial and prosecutorial system.*” Ultimately, there was no change to the procedure of chief prosecutor appointment.

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.

Currently there are no such proposals.

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)?

Apart from the aforementioned, not at the moment, no.

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”.

The principle of the separation of powers is of crucial importance for the proper operation of the judicial system in general, and it is exactly judicial independence that is a prerequisite for a proper operation of the judiciary and a basic element of the rule of law. The Peace Implementation Council in BiH has identified the independent judiciary as one of the key issues for the establishment of the rule of law in BiH. As such, the BiH judiciary represents an important segment in terms of efficient functioning of the state at all levels, especially in light of its path towards European integrations. Even the European Court of Human Rights has repeatedly pointed out that the respect for the principle of the separation of powers is a crucial principle of an efficient democracy, which must not be brought into question.

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)?

There have been several cases where one might speak about a sort of supervision and control exercised by the executive and legislative powers over the BiH judiciary.

One of those cases involves a financial aspect, because the courts do not decide independently about the funds available to them, but those decisions are made by the legislative and executive powers. In BiH we have a so-called treasury system, applicable to all budget institutions in BiH. This means that budgetary beneficiaries, including judicial institutions, do not have the funds at their direct disposal, but create financial obligations in the framework of the previously approved budgets. But what is important to stress is that courts in BiH have the autonomy when it comes to deciding on the salaries of judges, prosecutors and some categories of professional staff members, which is regulated by a special law, exactly in order to avoid treating judicial office holders as civil servants.

As for the appointment of judicial office holders, the judiciary has also preserved its independence in that regard as well, for the appointment of judges and prosecutors throughout BiH is carried out by a separate judicial body – the High Judicial and Prosecutorial Council of BiH (HJPC). The only exception is the appointment of the judges of constitutional courts in BiH, which is carried out by the legislature.

Also, relevant laws stipulate that the Chief State Prosecutor has the right and duty to inform the Parliament, the Presidency and the Council of Ministers about his work and application of law, and that the HJPC President submits annual reports on the situation in the judiciary and the prosecutor’s office, including recommendations for its improvement.

The report is submitted to the Parliamentary Assembly of Bosnia and Herzegovina, the Council of Ministers of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina, the cantonal assemblies, the National Assembly of Republika Srpska, the state and entity ministries of justice and the Assembly of the Brčko District of Bosnia and Herzegovina, for their information.

Besides, ministries of justice play an important role in the work of the judiciary, being in charge of drafting, interpreting and monitoring the implementation of judicial regulations, as well as of various responsibilities concerning administrative support to the work of the 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?

I believe that BiH should continue to preserve a strict separation of powers in the country, *de iure* and *de facto*, in the manner prescribed by the Constitutions in the country. The separation of the judiciary from the executive and legislative powers guarantees judicial independence. Only as such will the judiciary be able to act as a controller and corrective in the society. There can be no rule of law without an independent judiciary.

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