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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?

The constitution of Georgia (adopted in 1995) is based on the principle of separation of powers and makes a clear distinction among legislative (Parliament), executive (Government) and judicial powers (Judiciary). This distinction is expressed in the strict wording of appropriate articles of the Constitution. For example, Article 78 stipulates that “The Government of Georgia shall be the supreme body of executive power to implement the internal and foreign policy of the country”. Article 82 further stipulates “Judicial power shall be exercised through constitutional control, justice and other forms prescribed by law”. This principle is also stipulated in organic law of Georgia “On General Courts” Article 1, paragraph 1 of which underlines “Judiciary is independent from other branches of power and it's carried out only by courts”.

- 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?

There has been many discussion in relation to the separation of powers and such discussions even led to the constitutional amendments in 2010. However, such amendment did not touch upon the judiciary as an independent power in a sense that it became dependent upon other powers, however, there were some unfavourable issues adopted (see comments below).

The amendments in 2010 changed mainly the powers of President, Government and Parliament. Generally speaking, from presidential republic the country shifted to parliamentary republic.

- 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?

There has not been a debate concerning the judiciary’s interference in the field of executive or legislative powers. The fact is that judiciary strictly follows procedural laws which actually do not allow to carry out any such interference other than envisaged by law. For example, when there is a dispute over an administrative act (i.e. act issued by administrative body (a body which basically carries out executive powers)) administrative procedural law allows the court to abolish administrative act and order administrative body to issue a new administrative act. However, as I already noted, this possibility is envisaged in procedural law and is not considered as interference.

- 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)?

As I already mentioned, there has been significant constitutional amendments in 2010. It concerned at some point judiciary too, since it allowed appointment of the judges for life time but allowed the possibility of adoption examination period up to 3 years term.

Before that, all the judges were appointed for 10 years. After those amendments the parliament adopted changes in organic law of Georgia “On General Courts” according to which all the judges are appointed for 3 years examination period. This term also concerns those judges whose 10 year term expired and they too are subject to 3 year examination period and a general competition in order to be appointed for life term. Only if judges pass 3 years

examination period successfully they can be appointed for life. There are already examples, when the High Council of Justice refused to appoint even for 3 years examination period those judges whose 10 year term expired.

Venice Commission criticized this 3 year examination period in its opinion #543/2009 noting the following -

“88. Article 86 § 2 further introduces a probationary period of “not more than 3 years”. This proposal appears to be problematic.

89. The Venice Commission recalls in the first place that the European Charter on the Statute of Judges sets out at 3.3:

“3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.”

90. The Venice Commission has previously clearly stated that *“setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way. [...] This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office”. The main idea is to exclude the factors that could challenge the impartiality of judges: “despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value.”*⁶

91. The Venice Commission therefore recommends removing this proposal for a trial period for judges.”

Among other Constitutional amendments it’s noteworthy to underline that in 2006 there was an amendment adopted according to which the High Council of Judiciary is presided over by the Chairman of the Supreme Court of Georgia and not by the President of Georgia which was a case before.

According to amendments to the organic law “On General Courts”, from 6 the non-judge members of the High Council of Justice, 5 are elected by Parliament and 1 is appointed by President. Before the amendments the non-judge members of the Council used to be the members of Parliament, which is not case now. Non-judge members represent lawyers, scholars, NGO’s. The same applies to 1 non-judge member appointed by President.

- 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 comments over the role of judiciary as the third power of the state is very frequent. The content of the comments differs, depending upon the interests of the authors of such

comments. Those who received a favourable decision say that the judiciary is a true third power of the state, those who did not – say that judiciary need further reforms.

However, there is no debate about the fact whether or not judiciary should remain the third power. This is, of course, beyond 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)?

The administration of justice is dependent mostly upon the Ministry of Finance who drafts the budget in general and drafts the budget of the judiciary in particular, with participation of the Supreme Court and High Council of Justice. Later, the budget should be adopted by the Parliament. Therefore, in terms of finances administration of justice depends on two other branches of power.

As for other issues, as mentioned above, the Parliament, sometimes adopts amendments in laws which may influences administration of justice.

- 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 are not any other comments.