

Strasbourg, 6 January 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”

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 Italian judicial system is governed by the Italian Constitution and by an organic law (Royal Decree January 30, 1941 n. 12, amended several times over the years, more recently through a reform law of July 25, 2005 n. 150, partially revised by the law of July 30, 2007 n. 111).

The judiciary is an autonomous “order” (the Constitution does not use the word “power”) “independent of all other powers” (and here the reference to being a power of the State is indirect): this is the provision of art. 104 of the Constitution of the Italian Republic. According to the Constitution, “magistrates” (i.e. judges and prosecutors) are holders of the judicial function, which they administer on behalf of the people.

The self-governing body of the judiciary is the High Council for the Judiciary (see answers on behalf of Italy in preparation of CCJE Opinion no. 10), a constitutional body, chaired by the President of the Republic. This body, in accordance with art. 105 of the Constitution, has the task to ensure the autonomy and independence of the judiciary, and to decide on the employment, assignments and transfers, promotions and disciplinary measures for judges and prosecutors.

The principle of independence, neutrality and impartiality of the judge is mentioned not only in art. 104; art. 101 of the Italian Constitution also states: "the judges are subject only to the law."

This formula shows, first, that any judicial decision must be based on legislative requirements, that the court is called upon to interpret and apply. Second, the adverb "only" see, first of all, the concept of "external" independence of the judge, ie independence from any interference extraneous to the law.

On the other hand, the adverb in question wants to recall, also, "internal" independence within the judiciary, i.e. the absence of constraints coming from the judiciary itself.

Article. 107 of the Italian Constitution also states that judges are distinguished only by their different functions. This implies that the judiciary is free from a hierarchical organization in the technical sense, being the judicial power a diffuse power lying with each member.

A further corollary of the independence of the judiciary is also the rule preventing the dismissal of judges, which can not be dismissed or suspended from office or assigned to other courts or functions, if not as a result of decisions made by the High Council.

Another consequence of this principle is that no one can choose the judge by whom to be adjudicated ("no one can be withheld from the judge previously ascertained by law"), nor the judge can choose the subjects to judge.

After the entry into force of the Constitution the law cannot establish new extraordinary or special judges (as required by Article 102). Art. 103 provides for the maintaining of special courts, such as administrative courts, the Court of Auditors and the military courts, existing before the entry into force of the Constitution.

- 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?

Yes.

- 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?

Yes.

- 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?

Yes.

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.

Yes.

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)?

Yes.

- 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".

Yes.

- 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 judiciary (both the Court system and the High Council) has no formal or informal power to negotiate the budget for justice.

The Ministry of Justice is, according to the Italian Constitution, responsible for the "organization of justice" and for initiating disciplinary measures on judges and prosecutors (decided upon by a special chamber, of a judicial nature, of the High Council).

As "organizer" of justice, the Ministry has the final word on IT.

However, the High Council has set up an internal articulation dealing with organizational matters, often in contact with the Ministry.

Parliamentary Investigative Committees, sitting often with the investigation powers similar to those of magistrates, have often been created; disputes have arisen when setting up of such Committees concerned facts still pending before the judiciary.

- 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?