

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 Swiss Constitution (dating from 1874 and later partially amended) was totally revised in 1999 and adopted by popular vote and the majority of cantons ("referendum"). The respective competences of and the relations between the three powers are regulated in artt. 143-191c of the Constitution – whereas artt. 136 to 142 of the Constitution address the (considerable) political rights of the citizens: "They may participate in elections to the National Council and in Federal popular votes, and launch or sign popular initiatives and requests for referendums in federal matters" (art. 136 par. 2 Cst.) They can also vote in cantonal referendums and elections to the Council of States and thus participate in the forming of political opinions in their canton.

According to article 148 of the Swiss Constitution the Federal Parliament is the supreme authority of the Swiss Confederation.

(1 "Subject to the rights of the People and the Cantons, the Federal Assembly is the supreme authority of the Confederation."

2 The Federal Assembly comprises two chambers, the National Council and the Council of States; both chambers are of equal standing. ")

The relation between the three powers is characterised by a strict separation of their members. Art. 144 headed "Incompatibility" stipulates:

" No member of the National Council, of the Council of States, of the Federal Council or judge of the Federal Supreme Court may at the same time be a member of any other of these bodies.

2 No member of the Federal Council or full-time judges of the Federal Supreme Court may hold any other federal or cantonal office or pursue any other gainful economic activity.

3 The law may provide for further forms of incompatibility."

The Federal Assembly elects the judges of the Federal Supreme Court:

Art. 168 par. 1 "Appointments" provides:

"1 The Federal Assembly elects the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces ("the General"). "

As to the term of office (6 years): Art. 144 Cst.: "The members of the National Council and of the Federal Council as well as the Federal Chancellor are elected for a term of office of four years. Judges of the Federal Supreme Court have a term of office of six years."

There is no possibility of destitution during the term. And in the event of non-reelection the Supreme Court judge is entitled to a pension (35% of the salary in the first year in function up to 50% of the salary after 15 years).

The Federal Assembly exercises the oversight over the Federal Courts: Art. 169 Cst.

"1 The Federal Assembly exercises oversight over the Federal Council and the Federal Administration, the Federal courts and other bodies entrusted with the tasks of the Confederation.

2 Official secrecy does not apply in dealings with the special delegations of supervisory committees provided for by law."

The Federal Assembly determines the expenditure of the Confederation, adopts the budget and approves the federal accounts (Art. 167 Cst. headed "Finance").

The Federal Assembly enacts all significant provisions that establish binding legal rules in the form of a federal act. (Art. 164 "Legislation") - subject to an optional referendum: Art. 141Cst:

" 1 If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons so request, the following shall be submitted to a referendum:

1 a. Federal acts; ...".

Federal acts include in particular fundamental provisions on:

g. the organisation and procedure of the Federal authorities.

For example: According to art. 9 of the Swiss Federal Supreme Court Act judges have to retire at the age of 68.

Judicial independence is warranted in Art. 191c Cst. (Independence of the judiciary):

"The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law."

Art. 188 Cst. (Status)

1 The Federal Supreme Court is the supreme judicial authority of the Confederation.

2 Its organisation and procedure are governed by statute.

3 The Federal Supreme Court attends to its own administration.

Under the former constitution it was incumbent to the Federal Council to present the annual report and the financial statements as well as the budget of the Federal Supreme Court to the Federal Assembly. Now it is the President of the Federal Supreme Court who represents the interests of the federal judiciary in Parliament.

- 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 is a recurrent discussion about the introduction of constitutional review of federal legislation. The Swiss Federal Supreme Court has authority to control the compliance of cantonal statutes with the Constitution, but lacks competence to control the constitutionality of federal statutes issued by the federal assembly (and subject to optional referendum). Academics are widely in favour of a constitutional review of federal legislative acts by the Swiss Federal Supreme court. During the debates regarding the entire amendment of the Constitution of 1999 the constitutional control of Federal statutes by the judiciary was discussed in Parliament but finally turned down. In April 2012 an agency of the Council of States proposed the introduction of constitutional control by abolition of art. 190 Cst.

(Art. 190 (Applicable law) of the Constitution provides: "The Federal Supreme Court and the other judicial authorities apply the Federal acts and international law.")

This proposition was also turned down in the end - after debate.

- 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?

Among scholars there is a discussion about the correct method of interpretation of statutory law by the judiciary aiming at the full respect of the intentions of the legislator. The discussion is not targeted against individual judges, but arises sometimes when judicial decisions are criticised.

Public debate is generally focused on specific judicial decisions and more aimed at their material (political) impact. There have been decisions which lead to an amendment of the

legislation – which is generally accepted as a good functioning of "checks and balances" between the judiciary and the legislator.

The judges of the Federal Supreme Court who presented themselves to re-election by the Federal Assembly have up to now always (since 1874) been re-elected (one reservation: in the 1990s a judge had to present himself twice before obtaining the necessary votes). But re-elections are sometimes abused to criticise indirectly unpopular judicial decisions – the judges who wrote in a opinion, that international law can prevail constitutional norms obtained clearly less votes than the others in the most recent re-election.

This has been criticised and is not well accepted by public opinion, as it challenges our system.

- 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?

The legislation on the federal judiciary was amended in 2007, above all by a new Federal Supreme Court Act of 17th. June 2007, in force since 1st January 2007. There is no fundamental change as to the Court's independence: the statute confirms in article 25, that the Federal Supreme Court attends to its own administration, recruits its staff and keeps the accounts. The Federal Administration provides and maintains the Court's premises, while the Court itself attends to its logistical needs (Art. 25a of the Federal Supreme Court Act).

- 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.

No changes are proposed for the moment.

- 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 preparations for a popular initiative aiming at a constitutional amendment stating that the norms of the Swiss Constitution prevail over international law.

(Popular initiative requesting a partial revision of the Federal Constitution in specific terms. art. 139 of the Constitution:

1 Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution.

2 A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed.

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5 An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be

adopted or rejected. It may submit a counter-proposal to the initiative.)

- 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 role of the judiciary is generally accepted – if particular decisions are criticized in public, then there are in general attempts to change the law. The competence of the judiciary to implement the law in individual cases is not questioned.

- 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 parliament has the competence to procure the financial means and to elect the judges – the administration of justice is in the competence of the Court (Art. 188 par. 2 Cst, see above to 4a).

- 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?