The relationship between the executive and the judiciary in a democratic society: the question is - who should be master?

The independence of the judiciary and the balance of power between the three powers of a democratic state: the legislature, the executive and the judiciary, are core elements of the work of the First Study Commission.

The central role of the legislature will not be part of our considerations of this year. In the past the First Study Commission has studied several topics where the relationship between the executive and the judiciary has been an element of the analysis. This year this relationship will be the centre of our investigation.

An examination from this viewpoint may make possible general conclusions on the mutual influence of these two branches of the powers of state and we hope will throw light on the question of the balance of powers in Member States and this specific aspect of independence of the judiciary.

For the purpose of this questionnaire we ask everyone

(i) to exclude from their consideration the position of the “constitutional court” (if one is part of the judicial system in their country) can be regarded as part of the judiciary; and

(ii) to exclude the head of state in their country (as opposed to the head of government) from consideration as a part of the executive, unless the head of the state exercises power or “influence”. If either might be exercised, then it should be noted.

(iii) “Influence” may be exercised or not; we think that if it might be exercised, then it should be noted.

Question 1: Is the principle of independence of the judiciary enshrined in the constitution or a comparable legal source in your country?
Yes, in the Constitution.

Question 2: Is the principle of balance of powers enshrined in the constitution or a comparable legal source in your country?
Yes, in the Constitution.

Question 3: Is there any influence of the executive on selection and the first appointment of judges?
There is an indirect influence. Minister of Justice can decide the number of judges in a court, can decide whether or when will be announced public competition for a vacant position of judge, etc.

Question 4: Is there any influence of the executive on the promotion of judges?
All judges (except the Supreme Court judges) are appointed to the office on the basis of public competition. There is no promotion of judges.

Question 5: Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court?
The chairman of a county court is appointed from among the judges of the court for five years. The chairman of a court is appointed by the Minister of Justice after having considered the opinion of the full court.

Question 6:
Is there any influence of the executive on the distribution of cases /assignment of judges to certain cases?
No.

Question 7:
Is there any influence of the executive on the transfer of judges to other courts
The Supreme Court en banc may appoint a judge to office to another court of the same or a lower level with the consent of the judge and on the proposal of the Minister of Justice. The Supreme Court en banc may appoint a judge of a court of first instance with his or her consent to permanent service in another courthouse of the same court.

Question 8:
Is there any influence of the executive on the termination of office of judges?
No.

Question 9:
Is there any influence of the executive on the disciplinary procedure against judges?
No. The right to commence disciplinary proceedings have:
1) the Chief Justice of the Supreme Court, against all judges;
2) the Chancellor of Justice, against all judges;
3) the chairman of a circuit court, against judges of courts of first instance in his territorial jurisdiction.
4) the chairman of a court, against the judges of the same court;
5) the Supreme Court en banc against the Chief Justice of the Supreme Court.

Question 10:
Is there any influence of the executive on the initial training of judges?
The judge’s examination committee (consists mainly of judges) approves the preparatory service plan of the candidate for judicial office.

Question 11:
Is there any influence of the executive on the in-service training of judges?
The Training Council is responsible for the training of judges. The term of the authority of members of the Training Council shall be three years. The Training Council is comprised of two judges of a court of the first instance, two judges of a court of appeal, two justices of the Supreme Court, and a representative of the Prosecutor’s Office, the Minister of Justice and the University of Tartu.

Question 12:
Is there any influence of the executive on the salaries of judges?
No.

Question 13:
Is there any influence of the executive in deciding on (a) the overall budget of the judiciary; and/or (b) how the funds designated for the judiciary are to be spent?
The Minister of Justice approves the budgets of courts of the first instance or courts of appeal. During a budgetary year, the Minister of Justice may amend the budget expenditure of a court only with good reason after having considered the opinion of the chairman of the court and the director of the court and pursuant to the principles formulated by the Council for Administration of Courts. The director of court prepares, with the approval of the chairman of the court, the draft budget of the judicial institution and submit the draft budget to the Minister of Justice and control the budgetary funds of the judicial institution. Directors of court of courts of the first instance and courts of appeal are appointed to office by the Minister of Justice. The Minister of Justice may give directives to organise issues within the area of activity of directors of court.

Is there any influence of the executive on the selection and appointment of clerks of the court?

The director of court appoints clerks to office and release them from office.

Question 15:
Is there any influence of the executive on the composition of the Council of the judiciary or a similar body (if such a body exists)?

No. Minister of Justice appoints his representative only.

Question 16:
Is there any other influence of the executive on the work of the Council of the judiciary or a similar body (if such a body exists)?

No.

Question 17:
What influences (if any) does the judiciary have on the executive power of central/local government? In particular, (a) does the judiciary have any power to control the exercise of executive power (by virtue of orders that the court can make on the application of parties to the court) and (b) what power (if any), does the court have to oversee the appointment of members of the executive?

Indirect, no special influence.

Question 18:
What power does the judiciary have over other public bodies (eg the police, or other quasi-governmental powers) in your country?

Indirect, no special influence.

Question 19:
Who fulfils the task of prosecution in your country?

Prosecutor.

Question 20:
Is there a common career of public prosecutors and judges?

No.

Question 21:
Can judges be appointed as public prosecutors and vice versa?

No.

Question 22:
Is there an influence of the executive on the appointment/promotion of public prosecutors? Yes.

Question 23: Is there a possible influence of the executive on the cases public prosecutors are in charge of? No.

Question 24: Which problems (if any) do you see in the relationship between the executive and the judiciary in your country? See q 25

Question 25: Are there concrete projects to change elements in the relations between the executive and the judiciary? What would this change mean? Yes, there is a draft law in progress which can change elements in the relations between the executive and judiciary. According to the idea the Chief Justice shall be the head of the judiciary (including budget and administration) and only responsible person. Minister of Justice has no influence on judiciary. The draft law will be ready at the beginning of 2009, the earliest possibility enter into force (if there is a political will) would be 2010.

The members of the First Study Commission are asked to send their answers to this questionnaire to the General Secretariat as well as to the members of the presidency committee of the Study Commission not later as July 5th 2008.

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