International Association of Judges

1st Study Commission

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

Answers of the Italian Association of Judges

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 judicial system; 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, there is. Under the Constitution of the Republic of Italy, which has been in force since January 1st, 1948, the judiciary is an autonomous body independent from the legislative and executive powers (art. 104 Const.)

Its autonomy refers to its organisation.

It is autonomous vis-à-vis the executive, in that the independence of the judiciary would be undermined if the measures pertaining to the career advancement of the members of the Judiciary, and in more general terms, their status, were assigned to the executive power. The Constitution therefore assigned the task of administering the members of the judiciary (transfers, promotions, assignments of duties and disciplinary measures) to a self-governing body (art. 105 Const.): the “Consiglio Superiore della Magistratura”, which thus guarantees the independence of the members of the Judiciary.

The Judiciary is also autonomous vis-à-vis the legislative power, in that judges are subject only to the law (art. 101 Const.).
Its independence refers to the functional aspect of judicial activity. It does not refer to the judiciary collectively - which is guaranteed by its autonomy, as described above - but to its members when they exercise jurisdiction. Independence stems from, and is implemented on the basis of, the other constitutional principle that a judge is subject only to the law. This substantiates the derivation of jurisdiction from the sovereignty of the people. Independence and autonomy are principles, which the Constitution also acknowledges in relation to the public prosecutor (arts. 107 and 112 Const.), especially where the obligatory nature of instituting criminal proceedings is concerned. The obligatory nature of instituting criminal proceedings indeed contributes towards ensuring not only a public prosecutor's independence in exercising his duty, but also the equality of citizens before criminal law.

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

Yes, it is enshrined in the Constitution.

**Question 3:** Is there any influence of the executive on selection and the first appointment of judges?

No, there is not. The High Council of the Judiciary is entrusted with the appointment of judges (art. 105, Italian Constitution), thus the executive power has no influence at all over them.

**Question 4:** Is there any influence of the executive on the promotion of judges?

No, there is not. The High Council of the Judiciary is entrusted with the promotion of judges (art. 105, Italian Constitution), thus the executive power has no influence at all over them.

**Question 5:** Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court?

Formally speaking, there is only for the appointment. In fact, assignment of executive posts is decided by the C.S.M., with the agreement of the Minister of Justice. Senior executives are chosen on the basis of their aptitude, merit and seniority, taken together. The comparative appraisal of the applicants is aimed at assigning the most suitable candidate to a vacant office, in view of the functional requirements of the office, and, perhaps, also some environmental aspects.

**Question 6:** Is there any influence of the executive on the distribution of cases /assignment of judges to certain cases?

No, there is not. The Constitution further guarantees the judicial function, in particular, by prescribing the principle that judges/prosecutors are established by law (art. 25): on the one hand, it
establishes that the jurisdiction of judges/prosecutors can only be decided by the law and not by secondary sources of legislation or non-legislative provisions; on the other, it also provides for the competent judge to be determined before the commission of the facts to be tried, thus preventing the judge from being determined ex post. The principle that the competent judge is established by the law also assures the impartiality of the judge while exercising his office.

In addition to the aforesaid constitutional principles, there are also judicial system laws covering the drawing up of the personnel charts of the judicial offices aimed at regulating the assignment of individual judges and prosecutors to the offices and the assignment of the case files.

**Question 7:**
Is there any influence of the executive on the transfer of judges to other courts?

No, there is not.

**Question 8:**
Is there any influence of the executive on the termination of office of judges?

No, there is not. “Members of the judiciary may not be removed from office. They may not be dismissed, suspended, or moved to other jurisdictions or functions except either by decision of the Superior Council of the Judiciary for reasons and with opportunity of defence as defined by the organizational law, or by their own consent” (art. 107, Italian Constitution).

**Question 9:**
Is there any influence of the executive on the disciplinary procedure against judges?

Formally speaking, there is. In fact, the disciplinary initiative is entrusted to the Minister of Justice and the Prosecutor General attached to the Court of Cassation (which is the top prosecuting authority). The disciplinary proceeding is held before the Disciplinary Division of the High Council of the Judiciary. The Disciplinary Division is constituted by six judges, who are elected among the members of the High Council of the Judiciary.

**Question 10:**
Is there any influence of the executive on the initial training of judges?

No, there is not. The training is directly organised, co-ordinated and controlled by the C.S.M. with the help of peripheral joint bodies (judicial councils and district commissions) and available learned judges and prosecutors (collaborators and assignees). The training aims at assuring the professional training of trainee judges/prosecutors and checking their fitness to exercise the judicial functions.

**Question 11:**
Is there any influence of the executive on the in-service training of judges?

No, there is not. The in-service training is directly organised, co-ordinated and controlled by the C.S.M. with the help of peripheral joint bodies (judicial councils and district commissions).
**Question 12:**
Is there any influence of the executive on the salaries of judges?

No, there is not. In fact, the salary of judges and public prosecutors is fixed by the law.

**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?

Yes, there is. The Parliament passes the State budget and balance sheet submitted by the Government (art. 81, Italian Constitution). Therefore the judiciary does not prepare its own budget; but it may only indicate the priorities with a view to the better operation of the services concerned with the administration of law.

**Question 14:**
Is there any influence of the executive on the selection and appointment of clerks of the court?

Yes, there is. Personnel meant to assist magistrates or, in general, to work for the operation of judicial offices is appointed by the Minister of Justice following to competitive examinations. The judiciary has no discretion upon such matters since it does not appoint its own collaborators and, with respect to these issues, it shall abide by the decisions taken by the Minister of Justice.

**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, there is not.

In Italy the principle of “self-government” is in force according to which the “legal status” of the judges falls within the jurisdiction of the High Council of the Judiciary, which deals with appointments, transfers, promotions and disciplinary measures concerning the judges (art. 105, Italian Constitution).

The High Council of the Judiciary is constituted by ipso jure members and elected members and it holds office for four years. The three ipso jure members are the President of the Republic - who is its Chairman, the First President of the Court of Cassation and the Prosecutor General of the Court of Cassation. The twenty four elected members are elected as follows: two-thirds by all regular judges and public prosecutors and one-third by Parliament (Chamber of Deputies and Senate) among professors of law faculties and lawyers of long standing (art. 104, Italian Constitution).

**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, there is not.

**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?

No, the judiciary has no influence.

**Question 18:**
What power does the judiciary have over other public bodies (e.g. the police, or other quasi – governmental powers) in your country?

*Generally speaking, the judiciary has no power on other public bodies. But, “The judiciary directly commands the judicial police” (art.109, Italian Constitution).*

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

*“The public prosecutor has the duty to initiate criminal proceedings” (art.112, Italian Constitution).*

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

Yes, there is.

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

Yes, it is possible under some specific circumstances.

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

No, there is not.

**Question 23:**
Is there a possible influence of the executive on the cases public prosecutors are in charge of?

No, there is not.

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

No specific problems, up to now.

**Question 25:**
Are there concrete projects to change elements in the relations between the executive and the judiciary? What would this change mean?
No, there are not up to now.

Fausto Zuccarelli

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.

Gerhard Reissner  Richard Aikens  Christophe Régnard

g.reissner@nextra.at  mrjustice.aikens@judiciary.gsi.gov.uk  chreg67@yahoo.fr