

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 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, it is mentioned in article 191 c of the Federal Constitution \(Bundesverfassung\).](#)

Question 2: Is the principle of balance of powers enshrined in the constitution or a comparable legal source in your country? [Yes, indirect by mentioning the 3 powers and their duties and competences in art. 148 ff., 174 ff and 188 ff of the Constitution](#)

Question 3:

Is there any influence of the executive on selection and the first appointment of judges? [There is no influence either on the federal level or on the state level \(cantons\).](#)

If yes: describe it.

Question 4:

Is there any influence of the executive on the promotion of judges? [There is no influence either on the federal level or on the state level \(cantons\).](#)

If yes describe it.

Question 5:

Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court? **There is no influence either on the federal level or on the state level (cantons).**

If yes: describe it.

Question 6:

Is there any influence of the executive on the distribution of cases /assignment of judges to certain cases? **There is no influence either on the federal level or on the state level (cantons).**

If yes: describe it:

Question 7:

Is there any influence of the executive on the transfer of judges to other courts? **There is no influence either on the federal level or on the state level (cantons).**

If yes: describe it.

Question 8:

Is there any influence of the executive on the termination of office of judges? **No, there is no influence either on the federal level or on the state level (cantons).**

If yes: describe it.

Question 9:

Is there any influence of the executive on the disciplinary procedure against judges? **No, there is no influence either on the federal level or on the state level (cantons).**

If yes: describe it.

Question 10:

Is there any influence of the executive on the initial training of judges? **No.**

If yes: describe it.

Question 11:

Is there any influence of the executive on the in-service training of judges? **No.**

If yes: describe it.

Question 12:

Is there any influence of the executive on the salaries of judges? **No.**

If yes: describe it.

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? **Not on the federal level. However on the state level (in the cantons) it may sometimes be different. In some cantons the executive may have a considerable influence on the global budget of the Judiciary. Sometimes the executive or as the case may be the administration does not hesitate to cut down the budget of the Judiciary, even demanding to eliminate certain posts or positions which are essential for the functioning of the Judiciary.**

If yes (in either (a) or (b)), describe it.

Question 14:

Is there any influence of the executive on the selection and appointment of clerks of the court? **No.**

If yes: describe it:

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)? **On the federal level there is no Council of the Judiciary. On the state level there are Councils of the Judiciary in four cantons (Fribourg, Ticino, Jura, and Geneva). There is no influence on behalf of the executive.**

If yes: describe it:

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.**

If yes: describe it:

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? **a) The courts are competent to decide on concrete decisions of the executive or the administration respectively (as long as these decisions concern an individual and concrete act). However the courts are not competent to decide on constitutionality of laws or abstract-general rulings (no "abstract control of laws"). On the other hand the courts are entitled to review acts which might violate the European Convention on Human Rights. b) none.**

Question 18:

What power does the judiciary have over other public bodies (e.g. the police, or other quasi – governmental powers) in your country? **The courts are competent to decide on concrete decisions of such bodies.**

Question 19:

Who fulfils the task of prosecution in your country? **The public prosecutors.**

Question 20:

Is there a common career of public prosecutors and judges? **No, not necessarily.**

Question 21:

Can judges be appointed as public prosecutors and vice versa? Yes (by elections, not by appointment).

Question 22:

Is there an influence of the executive on the appointment/promotion of public prosecutors? Yes, on the federal level. Concerning the state level (the cantons) the situation is different. In some cantons the public prosecutors are elected by the legislative and they are completely independent from the executive. Some cantons (such as Genève, Fribourg, Jura) have a Judicial Council as an independent organ (the members are elected by the legislative) which has disciplinary power over the public prosecutors. In some cantons public prosecutors are elected by the people and in some others by the executive. In this case the executive has the right of general supervision over the public prosecutors.

Question 23:

Is there a possible influence of the executive on the cases public prosecutors are in charge of? Yes, at the moment there is a discussion whether supervision over public prosecutors should be given to the courts (the Federal Criminal Court) or to the executive. On the state level (in the cantons) there are regulations which exclude any influence of the executive on cases. Here the surveillance by the executive is limited to administrative matters and public service law matters (regarding the prosecutors and their staff]. In some cantons the executive can order the public prosecutor to enter into a criminal prosecution, but not to stop one.

Question 24:

Which problems (if any) do you see in the relationship between the executive and the judiciary in your country? None, the problems do not lie in the relationship between the legislative and the judiciary, but in the relationship between the judiciary and the legislative. The judiciary is under supervision of the parliaments and sometimes the parliaments or some MP's try to influence the judiciary or to apply pressure on courts or judges.

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 concrete projects to change elements in the relation between the legislative and the judiciary though, mostly on the regional level (within the cantons): for example one canton recently abandoned the – very common - Swiss system of re-electing judges every 4 or 6 years and introduced an election system by which judges and prosecutors are elected until retirement. In various cantons where judicial self-administration is not yet introduced it is in discussion or just being implemented (own budget competences for example).

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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