

JAPAN

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?

Answer 1: The principle of independence of the judiciary is enshrined in the Constitution.

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

Answer 2: The principle of balance of powers is enshrined in the Constitution.

Question 3:

Is there any influence of the executive on selection and the first appointment of judges?

Answer 3: The Chief Justice of the Supreme Court shall be appointed by the Emperor as designated by the Cabinet (Article 6, para.2 of the Constitution, Article 39, para.1 of the Court Act), and other Justices of the Supreme Court shall be appointed by the Cabinet and attested by the Emperor (Article 79, para.1 of the Constitution, Article 39, para.2 and para.3 of the Court Act). Judges of lower courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court (Article 80, para.1 of the Constitution, Article 40, para.1 of the Court Act).

Question 4:

Is there any influence of the executive on the promotion of judges?

Answer 4: There is no such influence.

Question 5:

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

Answer 5: There is no such influence.

Appointment and dismissal of judges as presidents of courts are decided through deliberations of the Judicial Assembly of the Supreme Court upon each occasion when such personnel change is necessary (Article 12 and Article 29 of the Court Act, etc.)

Question 6:

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

Answer 6: There is no influence of the executive.

Courts, vested with the judicial power, make decisions on the distribution of cases and assignment of judges to certain cases, not subject to the influence of the executive.

Question 7:

Is there any influence of the executive on the transfer of judges to other courts

Answer 7: There is no such influence.

Assignment of judges to certain courts is decided through deliberations of the Judicial Assembly of the Supreme Court (Article 12 and Article 47 of the Court Act). The transfer of judges is carried out with consent of the judges to be transferred.

Question 8:

Is there any influence of the executive on the termination of office of judges?

Answer 8: There is no such influence.

The term of office of judges of lower courts is set as 10 years, and the retirement age is designated for all judges (70 years of age for Justices of the Supreme Court and judges of summary courts, and 65 years of age for other judges). Apart from these cases, judges shall not be removed except by public impeachment (Article 78 of the Constitution). There is no influence of the executive.

Question 9:

Is there any influence of the executive on the disciplinary procedure against judges?

Answer 9: In order to secure the independence of judges in exercising their official authorities, the Constitution provides that “No disciplinary action against judges shall be administered by any executive organ or agency.” (Article 78 of the Constitution) Therefore, there is no influence of the executive on the disciplinary procedure against judges.

Question 10:

Is there any influence of the executive on the initial training of judges?

Answer 10: There is no such influence.

Question 11:

Is there any influence of the executive on the in-service training of judges?

Answer 11: There is no such influence.

Question 12:

Is there any influence of the executive on the salaries of judges?

Answer 12: Under the Constitution, judges shall receive adequate compensation at regular stated intervals (Article 79, para.6 and Article 80, para.2 of the Constitution). Article 51 of the Court Act provides that “The compensation received by judges shall separately be determined by law.” In accordance with these provisions, the Act on Compensation of Judges prescribes the monthly amount of compensation for judges of each rank, and it also provides that the Supreme Court shall determine the monthly amount of compensation to be paid for respective judges.

The Constitution also provides that the amount of compensation for judges shall not be decreased during their terms of office (Article 79, para.6 and Article 80, para.2). The purpose of this provision is construed as to, in light of the importance of their official duties, provide judges with adequate compensation that is suitable for their position, thereby guaranteeing their status so as to enable them to perform their duties independently, not subject to pressure from others.

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?

Answer 13:

(a) In Japan, the Cabinet has the authority to prepare a budget and submit it to the Diet (Article 73, item 5 and Article 86 of the Constitution). With regard to a budget necessary for courts, the Supreme Court shall prepare a written request for each fiscal year based on its estimate of necessary expenses, and submit said written request to the Cabinet (Article 17, para.1 and Article 18, para.1 of the Public Finance Act). The Minister of Finance to whom the written request has been referred by the Cabinet shall, after making any necessary adjustment, make approximate estimates of expenditure and submit them to a cabinet meeting (Article 17, para.1 and Article 18, para.1 of the Public Finance Act). The Cabinet, when adopting the approximate estimates, shall ask opinions of the Chief Justice of the Supreme Court with regard to the appropriate estimate of expenditure for courts (Article 18, para.2 of the Public Finance Act). If the Cabinet has decreased the amount of budget against the courts’ request, it shall append a note to the budget to explain the details of such decrease, and also clearly indicate the financial resources to be required if the Diet amends the amount of expenditure (Article 19 of the Public Finance Act). Through this process, a budget bill is submitted to the Diet.

In addition, expenses of courts shall be appropriated in the national budget independently from expenses of other government organs (Article 83, para.1 of the Court Act).

As described above, although the process of deciding a budget for courts may be subject to adjustment by the executive, consideration is also given so that the independence of the judiciary will not be unduly restricted in terms of budget.

(b) When the budget has taken effect after the Diet has deliberated and passed the bill, the Cabinet shall allocate a budget for courts to the Chief Justice of the Supreme Court (Article 31, para.1 of the Public Finance Act). Courts may use the budget to the extent of its purpose. However, for their expenditure plans, they are required to obtain approval of the Minister of Finance in advance (Article 34, para.1 of the Public Finance Act).

Question 14:

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

Answer 14: There is no such influence.

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)?

Answer 15: We cannot answer this question because we do not have any such council of the judiciary or similar body.

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)?

Answer 16: We cannot answer this question because we do not have any such council of the judiciary or similar body.

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?

Answer 17: When dealing with specific cases, the Supreme Court and lower courts have the power to determine whether or not orders, regulations and administrative dispositions made by the central or local government conform to the Constitution and laws, and to revoke unconstitutional or illegal administrative dispositions. Thus, the judiciary have the power to correct the unconstitutional or illegal exercise of executive power.

The judiciary do not have such power to oversee the appointment of members of the executive.

Question 18:

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

Answer 18: The Supreme Court and lower courts have the same power over other public bodies as they have over the central and local governments.

Question 19:

Who fulfils the task of prosecution in your country?

No answer.

Question 20:

Is there a common career of public prosecutors and judges?

Question 21:

Can judges be appointed as public prosecutors and vice versa?

Answer 20 and 21: For the purpose of fostering legal professionals, Japan adopts the system wherein not only people who will become judges and public prosecutors, respectively, but also those who will become practicing attorneys (lawyers) are trained as legal apprentices together at the legal training centre (Legal Training and Research Institute) under the uniform training programs. Judges and public prosecutors are appointed from among those who have completed these training programs.

Question 22:

Is there an influence of the executive on the appointment/promotion of public prosecutors?

No answer.

Question 23:

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

No answer.

Question 24:

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

Answer 24: No problem comes to mind regarding the relationship between the executive and the judiciary in Japan.

Question 25:

Are there concrete projects to change elements in the relations between the executive and the judiciary? What would this change mean?

Answer 25: We do not know of any such concrete project.

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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