

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?***

A1 Both the present Irish Constitution of 1937 and its predecessor, the 1922 Constitution, the first post independence Constitution enumerates the powers of government as of three distinct types, legislative, executive and judicial. It is true that neither of them actually prescribes in terms a “separation of powers”. Nonetheless, in a whole series of cases the courts and in particular the Supreme Court have stated very explicitly that the Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of Government, or the separation of powers. Article 6 of the Constitution provides as follows:

“All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and,

in final appeal, to decide all questions of national policy, according to the requirements of the common good.”

The position of the courts and of the judiciary is dealt with specifically at Articles 34 and 35 of the Constitution. There have been a great number of cases dating back to the early years of the State which have asserted the independence of the courts from executive or legislative control.

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?*

A2 This issue arose for consideration in the context of changes in the terms and conditions of service of members of the judiciary against the backdrop of a dramatic downturn in the Irish economy. I will return to this in the context of later answers.

However, the most detailed discussion took place in the context of the entitlement of the Oireachtas (Parliament) to conduct public inquiries with potential to attribute blame. The background to this issue becoming the subject of debate was that a mentally ill man was shot dead by members of An Garda Síochána (the Irish Police Service) during the course of a siege. The circumstances of the shooting gave rise to controversy and a committee of the Oireachtas was established to inquire into the circumstances of the incident. However, the entitlement of the Oireachtas to embark on such an inquiry was challenged by members of An Garda Síochána who had been involved in the siege. The Supreme Court upheld the challenge by gardaí concluding that, by reference to the separation of powers, the Oireachtas had no entitlement to embark on such an inquiry.

The issue came into sharp focus once more when there was a desire to conduct an inquiry into the circumstances in which the State was forced to enter a Troika (IMF/ECB/EU) programme. Following a general election the newly elected government promoted a referendum designed to bestow the power to conduct such inquiries on the Oireachtas. However, the proposal was defeated narrowly by the people in a referendum.

The whole controversy gave rise to quite intense public debate, but it must be said that the issue was whether the Oireachtas was exceeding its remit and then whether the remit of the Oireachtas should be extended and there was no specific suggestion that the courts were exceeding their function or that the role of the courts ought to be confined or restricted. However, there is no doubt that the decision of the Supreme Court in the Abbeylara Siege Tribunal case was very unwelcome in political circles.

It is though the case that there has been no significant body of opinion whether in political, academic or media circles arguing that activist judges need to be brought under control.

- 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?***

A3 In general this question has to be answered “No”, that is not to say that there have not been individual decisions which have given rise to surprise or even disquiet. However, there would be no significant body of opinion in Ireland that would take the view that the judiciary was impermissibly trespassing on the territory of the Executive or Legislature. Indeed, in contrast, there have been a number of occasions where the courts have criticised the Legislature where there was a failure to introduce appropriate legislation because the issue was seen as politically difficult or politically sensitive and as a result issues that were properly for the Legislature and Executive were, by default decided upon by the courts. Public opinion has generally been supportive of the courts on these occasions.

- 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?***
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.
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)?

A4(a) A very significant change in the position of the judiciary occurred in the context of the decline in the Irish economy. Significant reductions in the remuneration received by public servants were introduced by Government and were enacted into law. When this first happened members of the judiciary were exempted from the cuts. This was because the Constitution contained a specific prohibition on the reduction of the remuneration of a judge during his or her term of office. Notwithstanding, that the great majority of judges, on a voluntary basis signed up to the cuts, a proposal to amend the Constitution was put to the people and approved in a referendum in October 2011. The new text of the Constitution is as follows:

1. The remuneration of judges shall not be reduced during their continuance in office save in accordance with this section.
2. The remuneration of judges is subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class.
3. Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.

A4(b) There are a number of changes under active discussion. To date Ireland has not had a Judicial Council established by statute. However, there is an expectation

long promised legislation to establish such a Judicial Council will be introduced and enacted this year.

Secondly, there is a strong view within the judiciary that the changed constitutional position requires that an independent commission should be established with a role in relation to levels of judicial remuneration and the terms and conditions of service generally. A "GRECO" report of November 2014, lent support to this suggestion. It does not appear that there is any real opposition in principle to this suggestion. However, the question of timing is problematic. This is because the Government secured the assent of public sector trade unions to pay cuts and there would be a nervousness about making any structural changes during the currency of that agreement which is due to expire in 2016.

A third area where there is discussion about the need for change relates to the system for appointments. The Constitution provides that judges are appointed by the President on the advice of the Government. However, since 1995, there has been a role for a body known as the Judicial Appointments Advisory Board. The key word here is "Advisory" and the actual final selection of candidates and decisions on appointments is for Government. There has been some discussion on making the system of appointments more transparent so as to avoid the perception that the appointment of judges is subject to political influence. Any conclusions would still seem some distance away, but discussions have centred on extending the role of the Judicial Appointments Advisory Board.

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".*

A5 This question has really been addressed in the context of earlier answers and I do not have really have anything useful to add.

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)?*

A6 The day to day administration of the courts is the responsibility of the courts service, an independent corporate organisation established pursuant to statute, the function of which is to manage the courts and to provide support services for judges, to provide, manage and maintain court buildings and to provide facilities for users of the courts. The Courts Service is dependent for its budget on monies voted by the Oireachtas which occurs following the usual budgetary process involving the Department of Justice, the parent Department for the Courts Service and the Department of Finance. There is a view within the legal community that the Courts Service was hit particularly hard during the economic downturn, though it is very likely that similar feelings are widespread in many different areas of the public service. This has led to suggestions that the courts, as the third organ of State should have a greater autonomy in financial matters. This view has been articulated by the Chief Justice.

In the very recent past, a working body has been established to address this issue which is chaired by a judge of the Supreme Court. Discussions on this topic are still at an early stage.

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?

A7 During the period 2011 to mid 2014 tensions between the executive and the judiciary manifested themselves. This resulted in a significant decline in morale among members of the judiciary generally. This is hardly surprising given the extent of the impact on remuneration, pensions and terms and conditions of service. A further aspect is that the terms and conditions of service of recent appointees, ie. individuals appointed since 2011 are now significantly inferior to the conditions that apply to colleagues who have been serving before that date.

While recent years have not been easy there has been a significant change of mood in recent months and people are looking to the future with a much greater sense of optimism and confidence

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