

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?

The basic law relating to the appointment, tenure, remuneration and pensions of senior judges (of the High Court, Court of Appeal in England and Wales) and the Supreme Court of the UK, and more junior judges in all jurisdictions and their relations with the executive and legislative powers is contained in various Acts of Parliament which date back to 1705. The principal Acts of Parliament are now the Senior Courts Act 1981 and the Constitutional Reform Act 2005.

- 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?

Yes. Fundamental changes were made by the Constitutional Reform Act 2005, which changed the nature of the office of Lord Chancellor, made the Lord Chief

Justice the senior judge in England and Wales (instead of the LC), gave more powers to the LCJ and his equivalents in Scotland and Northern Ireland and created the Supreme Court to replace the Judicial Committee of the House of Lords.

- 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?

There is continued debate in the media about the exercise of the judicial function vis-à-vis the other powers of the state if it is considered (by one or more commentators) that a judge (or the Court of Appeal or Supreme Court) has impermissibly attempted to reduce the power or discretion of ministers to make subordinate legislation or to make executive orders. This has arisen particularly in the fields of immigration, asylum, extradition, social security law and housing law. But, potentially, all areas of executive decision making are capable of challenge before courts and when they are this often gives rise to comment. On the other hand, the courts of the UK have no power to strike down primary legislation, although they can declare that a particular Act of Parliament (or part of it) is “inconsistent” with the European Convention on Human Rights. It is then up to Parliament to decide what to do about it.

- 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?

Yes. The most important is the Constitutional Reform Act 2005. There is debate about whether this has brought about more or less power to the judiciary or more or less “separation of powers”. There has also been a very recent change in the law concerning judicial pensions which some see as having the power to reduce considerably the independence of the judiciary, because it is more likely to create a “career” judiciary, which will be less independent.

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.

Yes. There are planned changes to the way that the court structure and finance is managed. It will give more responsibility to the judges in the management of the courts and their financing.

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)?

Not at present.

- 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”.

As already noted, from time to time there is debate about the “power” of the judges to rule on the application of executive power by the central or local government. Sometimes this is seen as a good thing: “keeping the over-powerful executive in check”; at other times it is seen as being “un-elected judges telling elected politicians

what they can and cannot do” and so is seen as being improper. It depends on the topic and which side the media want to take on a particular issue.

- 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)?

Ultimately, the Treasury controls the budget of the justice system in the UK and, to that extent it controls the proper administration of justice. There is a statutory obligation on the Lord Chancellor to provide the means to enable an effective judicial system to operate, but that is always within the confines of “financial constraints”.

- 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?

Generally speaking, for over 300 years the independence of the judiciary has been respected by the executive and legislative powers. However, politicians do not always appreciate judges deciding cases against them and then make hostile comments. Politicians also do not generally understand that “the independence of the judiciary” means more than simply being able to decide individual cases without fear or influence by politicians or others. It takes patience and much explanation to make them understand that the independence of the judiciary means freedom from interference as to how judges are appointed, ensuring that they are paid enough and have proper pension provisions and ensuring that they have proper facilities to discharge their functions properly.