

IAJ/UIM

Study Commission IV — 2022

Judicial Workplace and Judicial Independence

What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision making, governance, assignments, fund and other resources)?

Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.

ANSWERS ON BEHALF OF THE UNITED KINGDOM

It has been said that judicial independence is an aspiration since no judiciary is completely independent of its government. Judges can and should be functionally and practically free from influence from the executive and the legislature, but they cannot be so independent that, for example, they can feel free to take 1, 2, or 3 years to decide a case.

In the United Kingdom, individual independence in the sense of non-interference in an individual judge's decision making in particular cases is more clearly understood and more firmly established than is the institutional or collective independence of the judiciary from the other branches of the state, according to the personal view expressed by Lord Justice Beatson in his Atkin lecture given in November 2017.

The justice system has to be financed by the government, and judicial leadership must in practice co-operate with government if the justice system is to operate properly alongside other state structures to deliver efficient high-quality justice.

Moreover, judges have to co-operate with politicians on law reform, court reform and a massive number of practical that affect the day to day running of a successful justice system.

But judicial independence is important and has to be preserved by providing a barrier between the judiciary and the other branches of the state: the

executive and the legislature. It is a central component of the rule of law. If judges cannot decide cases against the state with complete impartiality, the rights of citizens can never be properly protected or vindicated.

The primary challenges to independence (as identified by the European Network of Councils for the Judiciary in 2017) are inadequate investment in the courts and judicial structures, increases in court complexity and workload, gratuitous criticism of judicial decisions by politicians, parliamentarians and the executive, and inadequate staffing and administrative assistance for judges.

Risks to the objective independence of the individual judge included arbitrary changes to the retirement ages for judges, challenges to the security of tenure, reduction in judicial pay and pensions and adverse changes to judicial conditions.

Problems can arise from judges having an online presence, for example by joining social networks.

The Constitutional Position in England and Wales

The Constitutional Reform Act 2005 made major changes to the organisation of the judiciary. The legislation made the Lord Chief Justice the Head of the Judiciary and President of the Courts of England and Wales in place of the Lord Chancellor. Vested in the Lord Chief Justice were very considerable powers and responsibilities over discipline, deployment, training welfare and duties including making representations to Parliament and government.

Section 3 (1) imposes on Ministers a duty to 'uphold the continued independence of the judiciary'.

Whilst evolving, by and large general policies are arrived at through the Judicial Executive Board, with the advice of the Judges Council.

The Judicial Office of England and Wales, a civil service body, supports the leadership judiciary.

Judicial Appointments

Judicial appointments are central to judicial independence. Judges in the UK are appointed in an open and transparent process by the Judicial

Appointments Commission, a body independent from government and political influence.

It is a competitive process.

The usual process involves an online application including a self assessment using a competency framework with evidence (since competency frameworks are used throughout the process): shortlisting by qualifying tests: a selection day interview: and decision with feedback if appropriate.

Promotions up the level of the judiciary is also undertaken by the Judicial Appointments Commission. An example is the present competition for a Court of Appeal judge.

However, appointments to some leadership posts are a joint function of the Lord Chancellor and the Lord Chief Justice; each has powers to reject candidates for good reason.

One important way of gaining and maintaining the public's confidence is making sure that the judiciary is reflective of society in its composition and in the issues it takes into account. In 2013 a statutory duty was placed on the Lord Chief Justice to take such steps he or she considers to be appropriate for the purpose of encouraging judicial diversity.

In order to encourage diversity, there have been initiatives such as the putting in place Role Model Judges who undertake outreach and mentoring work, and specialist outreach events targeted at underrepresented groups. There are Diversity and Community Relations Judges across England and Wales.

In the UK there are about 2,200 judges for a population of 65.6 million.

The UK has the smallest number of salaried judges per capita compared to the EU countries.

Workload pressures have been a cause of concern by a number of judges as identified in Judicial Attitude surveys.

Judicial Reform

Reforms should not be done **to** judges or justice systems. Judges should not be hostile to modernisation and reform of the justice system, provided always

that the contemplated reforms are aimed at improving the quality of the justice system for the benefit of those it serves.

Judicial independence does not mean judicial isolation as stated by the previous Lord Chief Justice of England and Wales, Lord Thomas.

Concern was expressed by the then chairman of the Bar Council of England and Wales that 'if judges become too closely identified with a programme of modernisation where success is dependent on funding and implementation by the Executive, there is a risk that in the future we will evaluate our judges on their ability to be effective managers rather than fearless independent judges who are independent of the Executive'

The decisions of the Court of Human Rights in *Bryan v UK* and *McGonnell v UK* are illustrations of the difficulties which can arise as to compliance with article 6 of the European Convention on Human Rights if judges sit in cases where they have been involved in creating legislative measures in relation to the administration of justice.

Guidance now says that with one exception that engagement by judges should be limited to technical and procedural aspects of proposals. The exception is that it is permissible for the Lord Chief Justice or his/her designated leadership judge to comment on the merits of a policy where that policy affects judicial independence or the rule of law.

Judicial accountability

Judges cannot be independent unless they are also accountable. Accountability is the quid pro quo for independence.

For an individual judge in England and Wales, accountability is primarily through the appeal process and the statutory arrangements governing discipline and removal. The Guide to Judicial Conduct sets out standards to be observed by all judges.

Institutional accountability is something which is evolving. The Lord Chief Justice presents an annual report to Parliament.

Judges need to be seen to be cooperating in the operation of an efficient justice system. That cooperation is a two way street. Judges must be provided with the tools they need to do their work, including physical premises,

Information Technology systems and the staff they need to operate efficiently. In England and Wales there is the Judges Council which meets with representatives of judges at all levels of the judiciary to discuss proposed judicial reforms and articulate responses to the administration of matters impacting on the work of judges. A central tenet is that reforms should not be done to judges or justice systems and judicial involvement in the reform process should provide the balance between the wishes of an elected government and the need to maintain judicial impartiality and the rule of law.

Improper pressure

Government cannot abrogate media or social media pressure, but it can work with judges to reduce its impact. Government can itself reduce or eliminate improper pressure from its own ranks, whatever form it takes.

Concern was expressed a few years ago about the reporting of a Court decision concerning the Brexit process and the government's powers by a newspaper, which headlined on the individual judges describing them as 'enemies of the people,' and the response from the Executive regarding this attack on judicial independence.

Corruption

In a judicial attitudes survey completed by almost 100% of UK judges in 2017 almost 100% of judges thought that bribes were not taken at all.

It is not been identified as a problem in the UK.

The Guide to Judicial Conduct for judges in England and Wales sets out clear guidance for judges. In serious breaches a judge may be dismissed but a transparent process must be followed.

Judicial training forms part of the way in which high standards are achieved.

The importance of Communication.

The judiciary must explain the centrality of justice and why it matters. The task cannot be left to others. Engagement with the public and other branches of the state is particularly important when it comes to protecting judicial independence and the proper funding of justice.

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