

FIRST STUDY COMMISSION QUESTIONNAIRE

“The relationship between the executive and the judiciary in a democratic society; the question is - who should be master?”

RESPONSE OF IRELAND

Question 1:

Is the principle of independence of the Judiciary enshrined in the Constitution or a comparable legal source in your country?

Yes.

Question 2:

Is the principle of balance of powers enshrined in the Constitution or a comparable legal source in your country?

Yes.

Question 3:

Is there any influence of the Executive on selection of the first appointment of Judges?

Yes. The Constitution provides that Judges shall be appointed by the President on the nomination of the Government. The role of the President is formal. The Government makes the decision on the first appointment of a Judge. Appointments are made from among persons who have been approved as suitable for appointment as Judges by the Judicial Appointments Advisory Board. This Board is chaired by the Chief Justice as President of the Supreme Court and includes the three Presidents of the other Courts. There are also two representatives of the legal profession on the Board along with three persons who are not lawyers. Exceptionally the Government may appoint a person to a judicial office who has not been subject to approval by the Judicial

Appointments Advisory Board and should it do so it must publish the fact that the person has not received such approval in the Official Journal.

Question 4:

Is there any influence of the Executive on the promotion of Judges?

Yes. Limited. The appointment of a Judge to a higher Court is a new judicial appointment and subject to the same constitutional requirements namely nomination by the Government and appointment by the President. In Ireland we do not have a career Judiciary. Judges are appointed from professional lawyers of standing and long experience in practice before the Courts. Once appointed to each judicial position a Judge may expect that he or she will remain in the same position for the entire of their judicial careers. That is usually the case and the number of promotions either as President of a Court or to a higher Court are relatively few in number.

The appointment of a Judge as a President of the Court of which he or she is a member or to a higher Court is considered a new judicial appointment and is subject to the same constitutional provisions namely nomination by the Government and appointment by the President.

Question 5:

Is there any influence of the Executive on the selection or appointment or dismissal of Presidents of Courts?

See answer to Question 4. As regards dismissal the Executive have no power to remove a President of a Court. Like all other Judges the President of a Court enjoys security of tenure and may not be removed from office except by a resolution of both Houses of the Oireachtas (parliament) for stated misbehaviour or incapacity, which has never happened.

Question 6:

Is there any influence of the Executive on the distribution of cases/assignment of Judges to certain cases?

No.

Question 7:

Is there any influence of the Executive on the transfer of Judges to other Courts?

No.

Question 8:

Is there any influence of the Executive on the termination of office of Judges?

The Executive have no power to terminate the office of a Judge who may be removed only in the circumstances referred to at Question 5 above.

Question 9:

Is there any influence of the Executive on the disciplinary procedures against Judges?

No.

Question 10:

Is there any influence of the Executive on the initial training of Judges?

No.

Question 11:

Is there any influence of the Executive on the in-service training of Judges?

No.

Question 12:

Is there any influence of the Executive on the salaries of Judges?

Yes. The level of salaries paid to Judges, along with all others paid out of public funds, is a budgetary matter which is decided by the Government in the first instance

and subject to the annual budget being approved by the Oireachtas. There are periodic reviews of judicial salaries (along with other higher paid public offices) by an independent review body. However, it conducts the review within guidelines of public pay policy of the Government. This review body makes recommendations which are usually accepted by the Government. The Government has the right to reject the recommendations in whole or in part or to introduce recommended increases in phases.

It may be noted that the Constitution prohibits the Executive from reducing Judges' salaries, Article 35.5 stating that "The remuneration of a judge shall not be reduced during his continuance in office."

Question 13:

Is there any influence of the Executive in deciding (a) the overall budget of the Judiciary and/or (b) how the funds designated for the Judiciary are to be spent?

- (a) The Executive/Government is responsible for drawing up the annual budget for all public expenditure. The Board of the Courts Service, which is an independent corporate body responsible for the administration of the Courts and the provision of support services to the Judiciary, negotiates the annual Courts budget with the relevant Government Departments (other than judicial salaries which is an entirely separate matter). The Government decides on the overall budget for the Courts administration subject to the approval of the Oireachtas (parliament).

- (b) The agreed overall budget for the Courts is structured according to areas of expenditure e.g. capital/non capital – administration, IT development etc. Once the budget has been approved the spending of the budget is a matter for the Board of the Courts Service which comprises a majority of Judges. The distinction between the role of the Courts Service for the administration and support services for the Courts (notwithstanding the participation of members of the Judiciary on its Board) and the independent judicial function and role of the Judiciary is important and respected.

Question 14:

Is there any influence of the Executive on the selection and appointment of clerks of the Court?

No. Clerks, who have no judicial function, and who, so far as judicial business is concerned, are subject to the directions of the relevant Judge or President, are recruited and promoted by the Courts Service.

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)?

No such body exists as yet. Draft legislation for a proposed Council of the Judiciary envisages that such a Council will consist of members of the Judiciary only and the Executive will have no influence in its composition.

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)?

Does not arise. See answer to Question 15.

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?

Obviously, the exercise of Executive powers by central or local government is a matter for the officers or authorities concerned and the Judiciary have no role or influence in the adoption or pursuit of policy objectives. However, administrative or Executive decisions by central or local authorities must be made within the ambit of and in accordance with the law and the Constitution. For example they may not be

arbitrary, discriminatory (on the grounds of gender, sexual orientation, or disability) and fair procedures guaranteed by the Constitution must be observed. The exercise of Executive power at national or local level may be challenged by parties affected by them before the Courts, inter alia, on the grounds that decisions were not in accordance with law, exceeded the powers conferred by law or breached the rights guaranteed to the individual by the Constitution or law.

The Courts have no power to oversee the appointment of members of the Executive unless the process by which they are appointed is in breach of the law or the Constitution.

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 Judiciary have no investigative role and have no function in relation to the conduct of criminal investigations by the police. At a trial however evidence obtained by the police may be excluded if the police have acted in breach of the law or constitutional guarantees of rights and fair procedures. The Police may be sued in the civil courts by individuals for damages, including aggravated and punitive damages, for breach of or abuse of their powers.

Otherwise the Courts have power to review, at the instance of private parties, the decisions of public bodies as indicated in answer to Question 17. Parties may be awarded damages in certain circumstances particularly where they have suffered personal loss.

Question 19:

Who fulfils the task of prosecution in your country?

While the Constitution vests responsibility for criminal prosecutions in the Attorney General the overall responsibility for such prosecutions has been delegated, in accordance with those provisions of the Constitution to an independent officer, namely, the Director of Public Prosecutions (D.P.P.). He exercises those functions

independent of the Executive and of the Attorney General. In general the Office of the Director of Public Prosecutions decides on whether prosecutions should be brought and in respect of what offences. In the greater Dublin area prosecutions are conducted by lawyers in the Chief Prosecuting Solicitors Office which are independent and act under the directions of the D.P.P. Criminal jury trials are prosecuted by independent counsel on the instructions of the Chief Prosecuting Solicitor and the D.P.P. Outside of Dublin each county has one or two State Solicitors, who may also be in private practice on the civil side and they act on the instructions and directions of the D.P.P. They instruct counsel in criminal jury trials.

Question 20:

Is there a common career of public prosecutors and judges?

No. In a criminal trial the prosecutor is regarded as a party before the Court with essentially the same status as lawyers appearing for the defence who is another party before the Court. The public prosecutor although required to act independently is not perceived as exercising in any sense a judicial function.

Question 21:

Can Judges be appointed as public prosecutors and vice versa?

Judges cannot be appointed as public prosecutors.

Lawyers, who conduct prosecutions may, as practitioners before the Courts, be appointed to judicial office if they have the required standing and experience.

Question 22:

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

The Director of Public Prosecutions is appointed by the Government. The Government may only appoint a person from candidates first selected by a committee consisting of the Chief Justice, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society (Solicitors), the Secretary to the Government (Public Official) and the Senior Legal Assistant in the Office of the

Attorney General (Public Official). The law provides that the Director shall be independent in the performance of his function. The Director may only be removed from office by the Government after consideration of a report concerning his capacity or conduct prepared by a committee consisting of the Chief Justice, a Judge of the High Court nominated by the Chief Justice and the Attorney General. No such committee has ever had occasion to consider the capacity or conduct of a Director of Public Prosecutions.

It is an offence for any person to communicate with the Director of Public Prosecutions or any of his officers for the purpose of influencing the making of a decision to withdraw or not to initiate proceedings or any particular charge in criminal proceedings. [There are exceptions such as where communications are made by a person who is an accused or a victim or a legal or medical adviser].

Question 23:

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

No.

Question 24:

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

There are no problems of fundamental importance or significance in relationships between the Executive and the Judiciary. According to the Constitution the Judiciary of the Superior Courts constitute the judicial organ of government with the Government constituting the executive organ of government and the Oireachtas (parliament) constituting the legislative organ of government. There is mutual respect between these independent organs of government. (It might also be borne in mind that the final determination as to whether any government action in relation to the Judiciary would offend against the constitutional guarantees of independence of the

Judiciary rests with the Supreme Court in its role as final interpreters of the Constitution).

Of course problems or issues do arise from time to time concerning the availability of resources particularly where personnel are involved or the speed of delivery of such resources. Similarly over the decades Presidents of Courts from time to time have had difficulty in persuading the Government of the need for extra Judges in all jurisdictions. In recent decades such problems have been fairly minimal, (e.g. significant numbers of extra Judges have been appointed to virtually all jurisdictions) but recent economic indicators may require a tightening of public expenditure and such problems may arise again.

Question 25

Are there concrete projects to change elements in the relationship between the Executive and the Judiciary? What would this change mean?

There are no proposals to change that relationship as such. There is a proposal for the establishment of a Judicial Council comprised exclusively of members of the Judiciary and under the aegis of which there would be a judicial complaints committee. The latter committee will consist of at least a majority of Judges and possibly two or three non lawyers. The proposal does not affect the relationship between the Executive and the Judiciary although the Judiciary could decide to use such a Council as a means of raising specific matters of concern with the Government.