

Submission to the Special Rapporteur on the exercise of freedom of expression, association, peaceful assembly and the political rights of judges and prosecutors

Introduction

The Special Rapporteur has requested that we complete a questionnaire to assist with a report to the Human Rights Council regarding the right to freedom of expression, association, peaceful assembly, and the political rights of judges and prosecutors.

The Judicial Office for Scotland has prepared this document by means of response to the questionnaire as the questions relate to the Scottish judiciary.

This response is completed in the knowledge and understanding that it will form part of a report which will be presented to the Human Rights Council in June 2019, and will be published online on the Special Rapporteur's website.

Whilst completing this response, the Judicial Office for Scotland has borne in mind that the aim of the report is:

“to analyse the legislation and practice existing at the national level on the exercise of these rights by judges and prosecutors, both offline and online. In particular, the report aims at identifying the restrictions specifically applicable to the exercise of fundamental freedoms by judges and prosecutors in order to preserve the dignity of their office and the impartiality and independence of the judiciary.”

Questionnaire

Q1. Please provide detailed information on the constitutional, legislative and regulatory provisions on the exercise of the right to freedom of expression, the right to freedom of association, the right to peaceful assembly and the political rights of judges and prosecutors. Do these provisions expressly cover the exercise of these rights online, for instance through digital technologies such as the Internet and social media?

Constitutional

1.1 Scotland is not subject to a written constitution. It operates a hybrid legal system of common law and statutory laws. Some of the statutory provisions are undoubtedly constitutional in nature such as the Treaty of Union 1707 which formed the United Kingdom. Certain rights which are now reflected in the Human Rights Act 1998, which incorporates the European Convention of Human Rights into domestic law, were also part of pre-existing Scottish common law.

Legislative

1.2 The Judiciary and Courts (Scotland) Act 2008 makes statutory provision for judicial independence. Section 1 of this Act places an obligation on the First Minister, the Scottish Ministers, members of the Scottish Parliament, the Lord Advocate and all other persons with responsibility for matters relating to the judiciary or the administration of justice in Scotland to uphold the continued independence of the judiciary. This provision is mirrored in section 3 of the Tribunals (Scotland) Act 2014 in relation to the independence of members of devolved tribunals and likewise, section 3 of the Constitutional Reform Act 2005 for members of reserved tribunals.

1.3 The Scotland Act 1998 and the Human Rights Act 1998 incorporate the European Convention of Human Rights, including Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) into domestic law.

1.4 Statutory laws in the form of the Civic Government (Scotland) Act 1982 and Public Order Act 1986 contain provisions affecting freedom expression, such as a prohibition on the use of abusive words intended to stir up racial hatred¹, and freedom of assembly and association, such as the prohibition of public processions in certain circumstances². The Communications Act 2003 (section 27) prohibits the sending of grossly offensive, obscene or menacing messages over the internet or sending false information for the purpose of causing annoyance, inconvenience or needless anxiety.

Regulatory

1.5 The Statement of Principles of Judicial Ethics for the Scottish Judiciary (“the Statement”) provides guidance for Scottish judges on ethical questions with which they may be faced.

1.6 To prevent duplication of answers, further information on the Statement and how this interacts with the fundamental freedoms is discussed in Q2 and Q3 below.

Q2. Please provide information on whether, and to what extent, the exercise of the fundamental freedoms referred to above has been regulated in codes of judicial ethics or professional conduct developed by professional associations of judges and prosecutors in your country. Do these codes expressly include provisions concerning the exercise of these rights through the use of digital technologies?

2.1 As discussed above, the Statement provides guidance for judges on ethical questions with which they may be faced. The Statement was devised following consultation with the Judicial Council for Scotland in 2010, and was last revised in 2016. It does not act as prescribed code of conduct, but provides guidance which judges may use to make their own

¹ Section 18, Public Order Act 1986

² Section 13, Public Order Act 1986

decisions in regard to their professional and personal lives. The Lord President may issue such guidance in accordance with section 2(2)(d) of the Judiciary and Courts (Scotland) Act, which provides that he is responsible “for making and maintaining appropriate arrangements for the welfare, training and guidance of judicial office holders”. A copy of the Statement is enclosed with this response for convenience.

2.2 At the core of the Statement is the *Bangalore Principles of Judicial Conduct* (“the Principles”), endorsed by the United Nations Human Rights Commission in 2003. The Principles are stated as six “values” which establish standards of judicial conduct: independence; impartiality; integrity; propriety; equality; and competence and diligence. The Statement makes explicit reference to the Principles at the outset, before considering the meaning of each Principle and providing guidance on judicial conduct.

2.3 In paragraph 6.1 the Statement states that, “in general, judges are entitled to exercise the rights and freedoms available to all citizens”. Equally, however, it recognises that judges “require to accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience”. The aforementioned restraints include restrictions on fundamental freedoms including freedom of expression, assembly, association, and political rights. These particular restrictions are discussed below in Q3.

2.4 In relation to digital technologies, the Statement warns judges of the dangers of posting information online, and urges extreme caution in discussing judicial or personal matters. It refers judges to the IT and Information Security Guide for Judicial Office Holders in Scotland which was issued by the Lord President in 2012 and contains information on general social media etiquette expected of a judge. This IT and Information Security Guide was recently revised in 2018, but says little about the exercise of the fundamental freedoms as a consideration.

Q3. What kind of restrictions (constitutional, legal or regulatory) can be found in your legal system to the exercise of these freedoms? What is the rationale for these restrictions? Do these restrictions apply both offline and online? And if not, are there particular restrictions on the exercise of these rights through the use of digital technologies?

Legislative restrictions

3.1 The Judiciary and Courts (S) Act 2008³ provides that it is the Head of the Scottish judiciary, the Lord President’s, function to represent the views of the Scottish judiciary to the Scottish Parliament and the Scottish Ministers. An individual judge’s freedom of speech is therefore restricted in this regard.

³ Section 2, Judiciary and Courts (Scotland) Act 2008

Regulatory restrictions

3.2 The Statement provides unequivocally that a judge should forgo any kind of political activity, with the exception of exercising their right to vote, in order to protect judicial independence. Paragraph 4.5 is the key provision which discusses the restrictions on judges' political activity in detail. Such restrictions include severing ties with any political party, avoiding participation in public demonstrations or protests, attendance at political gatherings or fundraising events, and making any financial contribution to any political party.

3.3 Paragraph 4.6 of the Statement provides a word of caution against a judge becoming involved with a public debate, particularly one which could result in political controversy. Further, judges are reminded that they must take care about the occasions and places at which they choose to speak publically, so as not to create any potential perception of bias toward any organisation, group or cause.

3.4 On the issue of expressing viewpoints on topics which affect the judiciary as a whole, and with which other judges may disagree, paragraph 4.6 explains that it is more appropriate in these circumstances for the Lord President to express a collective viewpoint on behalf of the judiciary rather than individual judges providing comments.

3.5 Paragraph 4.7 of the Statement concerns published judgments. Paragraph 4.7 is clear that a judge may not respond publicly to any criticism of his judgment, no matter how unfair. It goes on to state that, if a public response is required, the Lord President will provide this. Judges involved in an appeal process are not restricted from making appropriate comment on earlier judgments.

4. Please elaborate on the nature of restrictions specifically applicable to the exercise of fundamental freedoms by judges and prosecutors. In particular:

a) Are these restrictions dependent on the position and matters over which the particular judge/prosecutor has jurisdiction?

4.1 The Statement is directed at all judicial office holders exercising their offices within Scotland, including full time judges, sheriffs, sheriffs principal, acting sheriffs principal, justices of the peace, ordinary and legal members of the Scottish Tribunals. However, paragraph 2.2 recognises that Justices of the Peace, part-time fee-paid judges and members of some tribunals have generally always been regarded as free to be members of, and to lend active support to, a political party (meaning that they are not subject to paragraph 4.5). If any of the above judges are involved with a political party, they must ensure that this does not impinge upon the performance of their judicial function.

b) Should the venue or capacity in which these opinions are given be taken into account (for instance, whether or not they were exercising or could be understood to be exercising their official duties)?

4.2 In the context of public speaking, paragraphs 4.6 and 5.1 of the Statement remind judges that venue and capacity are extremely important. As discussed above at paragraph 3.3 a judge must be aware that an occasion at which he or she speaks may cause the public to associate the judge with a particular organisation, group or cause. There is no prohibition on public speaking if not exercising official duties, but a judge must be careful of the impression given to the public.

4.3 Moreover, paragraph 4.5 of the Statement is clear that venue and capacity is irrelevant in terms of party political involvement or participation in any public demonstration or protest.

4.4 Social media is a platform on which judges will never be exercising their official duties, however, it is important that they are cautious about expressing opinions on anything judicial, political or even personal online. Paragraph 5.2 of the Statement discusses social media advises against its use.

c) Should the purpose of such opinions or demonstrations be taken into account?

4.5 Nothing in the Statement suggests that the purpose of the opinion or demonstration should be taken into account.

d) To what extent, if at all, is the context – such as democratic crisis, a breakdown of constitutional order or a reform of the judicial system – relevant when evaluating the applicability of these restrictions?

4.6 In the event of a democratic crisis or breakdown of constitutional order, the Statement is all the more important for judges. In both the scenarios in Q.4(d) it would be inappropriate for a judge to comment on, or attend a political demonstration of any type, as this would undermine the principle of independence and impartiality set out in the Statement.

Q5. Please provide information on the scope or interpretation that has been given to these restrictions by national courts, national judicial councils, prosecutorial councils or equivalent independent authorities with general responsibilities for disciplinary proceedings against judges and, where applicable, prosecutors.

5.1 The Lord President has the power under section 28 of the Judiciary and Courts (Scotland) Act 2008 to make rules in connection with the investigation and determination of any matter concerning the conduct of judicial office holders. In exercise of this power, the current version of the *Complaints about the Judiciary (Scotland) Rules 2017* came into force in February 2017. A copy of the rules is enclosed.

5.2 Particular note should be taken of rule 13(4) which states that the judge nominated to investigate a judicial conduct complaint must do the following:

“In deciding whether an allegation is to any extent substantiated and in making any recommendation in consequence, the nominated judge is to take due account of the extent to which the conduct concerned complies with any guidance relating to the conduct of judicial office holders issued by the Lord President under section 2(2)(d) of the 2008 Act.”

5.3 As the Statement is ‘guidance’ issued by the Lord President under section 2(2)(d) of the 2008 Act, the nominated judge must therefore have regard to the Statement and its restrictions on the fundamental freedoms when investigating a complaint against a member of the judiciary.

Q6. Please provide information on cases where judges and prosecutors in your country were subject to legal or disciplinary proceedings for an alleged breach of their obligations and duties in the exercise of their fundamental freedoms, both offline and online. Please also provide information on cases where judges or prosecutors have been subject to threats, pressure, interference or reprisal in connection with, or as a result to, the exercise of their fundamental freedoms.

6.1 Due to the confidential nature of the complaints and disciplinary process for the judiciary in Scotland, unfortunately we cannot provide an answer to this first question. We have no evidence that there is a significant problem, in Scotland, in relation to judges being subject to threats, pressure, interference or reprisal in connection with, or as a result of, the exercise of their fundamental freedoms.

Q7. Please provide information on initiatives undertaken by professional associations of judges and, where relevant, prosecutors, to raise their awareness of the risks associated with the exercise of their rights online, particularly on social media.

7.1 The Lord President has recently revised the IT and Information Security Guide for Judicial Office Holders in Scotland in 2018. This document is enclosed with this response and provides brief discussion on the appropriate use of social media by a judge at paragraph 7 and its associated risks particularly to a judge’s personal safety.

7.2 In addition to this, the Statement at paragraph 5.2 advises judges not to sign up to social media sites at all, and warns that if they choose to do so they must “exercise extreme caution in discussing both judicial and personal matters”.

**Judicial Office for Scotland
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