

INTERNATIONAL ASSOCIATION OF JUDGES
First Study Commission
2010

“Ways to identify and classify criteria, objective and subjective, by reference to which the independence of the judiciary may be assessed.”

Dear Colleagues

You will recall that at the conference in Marrakech the First Study Commission decided to continue its work for another year on identifying objective and subjective criteria for establishing whether a judiciary was independent. Before last year’s conference many of you provided answers to the questionnaire that we sent you, but some did not. We would urge all of our colleagues who did not respond last time to do so now, so that we have the widest possible views on this important subject.

On the information given in the answers to the questionnaire and also as a result of the valuable discussions at the Marrakech conference, we have identified a certain number of criteria which are regarded as useful. We enclose a list, which is not in any particular order of importance or usefulness. We ask all colleagues to make their own list, in which they set out the order of usefulness and importance of the criteria so far as their country is concerned. In the discussion this year, we shall concentrate on four particular issues: (a) what are the fundamental criteria, without which it cannot possibly be said that a judiciary is independent; (b) is it desirable to place the criteria in order of importance; (c) if so, what is that order; and (d) should the table be made public.

There are a number of associations who have answered the first questionnaire but from whom we would like some further details. Our request to those associations will be sent separately.

*We would ask you to send all responses to the Secretariat of the IUM/IAJ and the Presidency committee of the First Study Commission by **15 September 2010**.*

Best wishes

Richard Aikens, Christophe Régnard, Pol Van Iseghem, Peter Hall:

The Presidency Committee of the First Study Commission.

List of possible objective and subjective criteria

Are prosecutors regarded as members of the judiciary?

Is there security of tenure once a judge (prosecutor) has been appointed?

Does an independent body regulate appointment and promotion of judges (prosecutors)? If so, are judges in a majority? Is its advice binding?

Is salary determined by an independent body? Is its advice binding? Can salaries be reduced?

Are disciplinary matters dealt with by an independent body? If so, are judges in a majority? Is its advice binding?

Is training organised by an independent body?

Is the court administration independent of other executive departments?

Is there a separate budget for the court system? Who determines the budget? Who decides spending priorities?

Is there immunity from criminal/civil suit against judges (prosecutors)?

Is there freedom of association for judges (prosecutors)?

Is there recognition of professional bodies of judges by the executive?

What is the public opinion/press of the independence of the judges (prosecutors) in your country?

Are there any reports by international organisations on the independence of the judges (prosecutors) in your country?

Questionnaire 2009

All member Associations of the International Association of Judges will agree that the rule of law cannot function effectively in a state unless that state's judiciary is truly independent of pressure from either the executive or the legislative arm of the state or other organisations such as the media, unions, large corporations and employers' associations. Judicial independence is a foundation and a guarantee of democracy. It is essential for the protection of the liberty of citizens and to ensure that citizens have remedies against the abuse of power by other organs of the state. Therefore, in order to judge whether a state is governed by the rule of law and to measure the efficacy of its democracy it is of vital importance to assess whether that state's judiciary is independent. The difficult task that the First Study Commission has set itself for its work at the 52nd Conference in 2009 is to see if there are ways to identify and classify criteria, objective and subjective, by reference to which the independence of a state's judiciary may be assessed.

Preliminary Thoughts

There are well known documents which set out what might be regarded as the minimum requirements which an independent judiciary should have: see in particular the United Nations' document "*Basic Principles on the Independence of the Judiciary*" (UN Doc A/Conf.121/22/Rev.1 at 59 (1985) and the IAJ's own "*Universal Charter of the Judge*" (published in 1999). But there are two preliminary points to consider. First, in some countries the judiciary includes prosecutors and some judges function in part as inquisitors (eg. *juges d'instruction* in France). In other countries, prosecutors are not regarded as part of the judicial system. It may be important to identify which system applies in particular states because it may have a bearing on what is covered by the phrase "*judicial independence*". Secondly, the documents referred to above make some assumptions about what "*judicial independence*" means. So another preliminary question to ask is whether there a consensus on this fundamental concept? Assuming that we can define "*judicial independence*" as a concept, we must then ask: is it *necessary* that a judiciary should satisfy certain *specific* criteria before it can be identified as "independent"? If so, what are they? It is, however, easy to "tick boxes". So a third question arises: is the fulfilment of certain specific criteria a *sufficient* requirement to enable a particular state's judiciary to be identified as "independent"?

It is a fundamental requirement for granting membership of the IAJ to a national Association of Judges that the General Council of the IAJ is satisfied that "*the independence of the judicial authority is genuinely assured in the country in question*": see Art. 11(4) of the Regulations under the Constitution of the IAJ. So all members of the IAJ must represent an independent judiciary in their country. However, each country which is represented in the International Association of Judges has a different history; a different tradition of substantive law, procedure and the development and scope of its judiciary will be different. Equally, each country will have different political and social systems to a greater or lesser extent.

There are threats to judicial independence in almost all countries, even those with a long tradition of democracy and judicial independence. But the threats may come from different quarters in different countries. Therefore, rather than inviting member associations to answer specific questions which may well not be appropriate to their countries' history, legal and judicial system or political and social structure, we have decided to use a different approach towards our preparation for the First Study Commission sessions this year. We believe that this year's topic will involve more discussion at the Study Commission sessions than those of past years and we hope that our approach will encourage discussion at the sessions in the IAJ

meeting in Marrakech. (We may start our discussions in small groups, then share the results in a plenary session).

We therefore ask the representatives of Study Commission One in each member Association to write a short paper, equivalent to *no more than 2 sides of A4 size paper*, on the following five questions:

- (1) Does your country's judiciary include prosecutors (or equivalent)? If so, do prosecutors benefit from the same guarantees of judicial independence as other judges?
- (2) How would you define "judicial independence" in the context of the political and social system of your country today?
- (3) Which *objective* criteria would you identify as indicating that the judiciary of your country is independent and why?
- (4) Which *subjective* criteria would you identify as indicating that the judiciary of your country is independent and why?
- (5) If you have to identify the three most important criteria for indicating judicial independence in your country, what would they be and why?

As an *aide memoire* to member Associations, we set out below (in no particular order of importance) some *possible* factors which might (or might not) be regarded as *indicia* of judicial independence – it is a matter for you!

Objective indicia?

1. Security of tenure as judge.
2. Having a body independent from other organs of state for: (a) deciding on appointment to judicial office; (b) fixing judicial salaries; (c) deciding on promotion; (d) considering ethical/disciplinary problems and procedures; (e) judicial training.
3. Constitutional guarantee/other constitutional provision to ensure that the executive or other organs of the state cannot interfere with a judge's work or decision and/or any trials.
4. Laws ensuring judges have freedom of expression and association.
5. Administration of the courts/judges that is run by judges or a service that is independent of the executive/legislature.
6. A budget for court/judicial administration that is free from interference by the executive/legislature.

Subjective indicia?

1. Public opinion/the media/the legislature regards the judges/legal system in its country as independent and/or free from corruption.
2. Independent bodies (such as Council of Europe, UNO) regard the judges/judicial system in a country as independent and/or free from corruption. (Is this subjective or objective?).

Member Associations are invited to complete this questionnaire and to return it to the Secretariat of the IAJ (secretariat@iaj-ium.org) and to the members of the Presidency of the First Study Commission by **15th August 2009**.

Richard AIKENS: Chairman

Christophe REGNARD: Vice – Chairman

Pol Van Isaghem: Vice – Chairman

Peter Hall: Hon. Sec.

