

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 from SWITZERLAND

I. General remark

Judicial independence has an institutional as well as a personal perspective. The institutional aspect consists of a procedural guarantee, which is set up under art. 29a of the Swiss Federal Constitution (FC)¹ in connection with art. 30 para. 1 FC², and an organizational principle, the principle of the separation of powers provided by art. 191c FC³. This includes the need for all public authorities to respect and protect the independence of the courts.

With regard to the personal aspect, a judge has to act with inner independence and impartiality; his or her decisions must be unbiased and free from prejudice or undue influence. Thus, art. 30 para. 1 FC provides that any case to be judicially decided must be heard by an independent and impartial court. Similar provisions are found in the Constitutions of the Swiss Cantons.

II. Judicial workplace and judicial independence

There are different issues related to the term “judicial workplace” (used in a broader sense) which could affect the judicial independence:

1. Courthouse

It's very important that the court can work free from possible interferences. Therefore, and to show the independence also to the public, courts should have their own buildings and facilities separated from any other users whether they are private companies or public authorities. For this reason, a situation (actually existing) in which the remand prison, the public prosecution and the criminal court are accommodated in the same building may have some practical advantages but seems very difficult with regard to

¹ “In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case.”

² “Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court.”

³ “The judicial authorities are independent in the exercise of their judicial powers and are bound only by the law.”

the independence of the judge. Courthouses should also be free from any political statements/messages and religious symbols⁴.

2. Staff and Equipment

To fulfill their judicial and administrative responsibilities, the courts need the assistance of their support staff (court clerks, administrative staff including human resources, IT-support and media staff). Furthermore, it is important that they have the necessary Information Technology equipment for an effective and safe management of digital files as well as the access to specialized literature. It is therefore elementary to get sufficient for these needs. At the same time, it should be clear that any kind of sponsoring (for instance putting digital equipment at the disposal for free by an IT-company) has to be strictly forbidden.

3. Job safety and salary

The independence of judges requires that any judge can only be removed from office for serious breaches of his/her duties (or, of course, in case of incapacity for office). The removal procedure has to be fair and transparent and should end in an appealable decision. Therefore, the Swiss system in which judges are elected for a period of time (e.g. 4 or 6 years) and have to be reelected after, is a problematic one, and the Swiss Association of Judges campaigns against it.

Furthermore, a personal responsibility of judges for their decisions/sentences should be excluded. However, a criminal responsibility should take place if the judge's behaviour fulfills a criminal offence (e.g. bribery or misconduct in public office⁵).

Last but not least, judges should be paid in a way to ensure a proper standard of living including an adequate pension plan. This seems not only important to prevent any form of corruption, but is also the basis to forbid any other gainful activity for judges (except may be an academic activity; in some courts in Switzerland, judges work only part time and are working as lawyers for the rest – what could rise the question of impartiality). The prevention of corruption requires also adequate salaries for all the members of staff who have access to the judges and/or the files.

4. Codes of Conduct

Codes of Conduct regulating the behaviour of judges inside⁶ the courthouse can also help to strengthen the perception of independent judges and to avoid doubts on the appearance of impartiality.

III. Proposal for 2023 Topic

Legal aspects of working-at-home (i.e. labour law, data protection etc.).

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⁴ This last point should be distinguished from the disputed question if judges should be allowed or not to wear visible religious symbols as for instance a cross, a kippa or a burka.

⁵ Cf. art. 322quater and 314 of the Swiss Criminal Code.

⁶ Of course, the behaviour outside the court can and should also be the subject of such Codes of Conduct but here we discuss only the workplace situation.