

Meeting of First Study commission, Istanbul 5/9/2011

"The physical, structural and economic conditions of judicial independence"

1. Introduction:

- We had the first "on-line" questionnaire EVER in the history of the IAJ. Hopefully we can continue in this fashion, which will make our tasks easier and allow us to communicate in a much quicker and more efficient way, despite the distances that separate us.
- It is very easy to discuss the physical, structural and economic conditions of judicial independence without having a basis in fact in which to ground these discussions. Working in this way, however, bears with it a big danger: namely, the danger of comparing situations which cannot be compared, because they are too different.... Based on the contributions of several countries, we are able to examine available facts and figures. An outsider who reads our report can refer to this part of the report and he/she can see that the subjects which have been raised, are real problems, which must be dealt with by the judiciary on the ground. (The accumulated data will be an appendix to the report.)
- Notwithstanding our abilities to receive and compile this information, a certain number of countries did not fill in the report. It is unfortunate, because a certain amount of credibility is lost when "only" 30 countries out of 72 answer the questions.
- Last year, we worked in small groups which allowed everyone to give his personal point of view. The group discussions are summarized in this report. Out of these group discussions, a plenary discussion was held, and this gave us some additional elements to be considered. All of these elements are summarized in the conclusions.
- Out of the questionnaire, three main problems are visible:
 - a) (mostly individual) physical problems in executing our function as a judge. Only some days ago, a colleague in Brasil was murdered. Last year, a Belgian judge and her clerk were gunned down in the court-room. Justice must be accessible and open to public, so that public knows what happens and so that there is no doubt about the independence of the judge who makes the decision. On the other hand, some individuals (until now, no group attacks have occurred) have abused this open structure to harm individual colleagues. Thus the question is: Are measures taken in your country to make courthouses safer, and if so, do these measures again lock us in the "ivory tower" out of which we emerged some years or decades ago? Do these measures have a negative effect on the possibility of contact between the judiciary and those who use the courts?

- b) Politics and media are more and more aiming criticism at the judiciary and the decisions that judges make. Do you agree with this statement? What is the best way to react to such criticism? Should there be a difference in reaction when the attack
 - 1. is against an individual judge versus against the judiciary as whole?
 - 2. comes from a politician versus from the media?
- c) Nobody can ignore the economic crises in which the world economy finds itself now. This crisis also its consequences for the judiciary.
 - 1. Do we agree that the judiciary, as a group, must go along with certain measures in order to cut expenses in the justice budgets?
 - 2. If so, what kind of measures seem acceptable?(cuts of means, salaries, pensions???)
 - 3. Where is the line to be drawn?

2. Conclusions of the group discussions.

Following countries contributed to this report:

Group 1: Slovenia, Croatia, Liechtenstein, Macedonia, Bosnia, Austria, Serbia and Belgium.

Group 2: Albania, Bulgaria, Denmark, Finland, Germany, Iceland, Italy, Mozambique, Netherlands, Norway, Portugal, Slovakia, Sweden and Switzerland.

Group 3: Algeria, Azerbaijan, Benin, Cote d'Ivoire, France, Mali, DR Congo and Ukraine.

Group 4: Australia, Canada, Greece, Israel, Japan, Kazakhstan, South Africa, Switzerland, Taiwan, Turkey and United States.

Group 1:

1.

In different countries, serious attacks against judges have been made. Until now, we have the impression that those committing the acts are mostly individuals. As a consequence of these attacks in the last decade, most of the countries have invested in the security of the court buildings. Technical facilities have been installed, and people are screened when they enter a building.

It is mostly small court houses that remain unprotected but the risk level seems less important.

Special police forces are available and can be asked to protect specific judges when they are dealing with a high-risk case.

Such security and protection does not only concern judges, but also staff, the public and witnesses.

One aspect that is not covered is when a judge needs protection outside a court: his family and children sometimes are in as much danger as he/she is. Here, nobody suggested any solution.

Perhaps there is none, because, according to security-professionals, you can only protect someone against an attack if the author is categorized somewhere between a professional and a lucky amateur.

On the other hand, increased security does not seem to affect the accessibility of judges and courts to the users of justice services.

2.

Everyone agrees that the attacks on judges and judgements in the press and other media is growing. What is more: there is even criticism of the personality of judges, which has nothing to do with his work. In addition, the media are sometimes trying to influence a trial in which a judgement has not yet been pronounced. These circumstances in the way judges must now work makes it more difficult to decide one way or another, because at times the press has already affected the public's expectations in a certain way.

Politicians, at times, also seem to "ab" use the press and media to get their opinions in the spotlights. Those opinions are mostly not based on the legal truth and the facts in the file, but on the speaker's own way of seeing things. In some countries, the role of the public prosecutors is put in doubt.

Of course, some criticisms need no answers. Other criticisms are premature. When someone doesn't agree with a first degree decision, an appeal can always be filed. When a criticism is founded, it is better to read it closely and to take it into account for the future.

So, there are four layers of reactions that can be distinguished:

1. No reaction is response is needed if the matter can be addressed via institutional means, e.g. appeal

2. The indefensible must not be defended: if it is wrong, learn from it for the future
3. If the problem concerns the court generally, a spokesman can be appointed to speak with the press. Although this seems a good method, practice (confirmed by journalists) teaches that a judge, as a spokesman, is not interesting enough for the press, and is not newsworthy enough. Some members of the group had the impression that this situation can be improved over time, when you invite press and the media again and again, then a certain relationship and understanding may grow, out of which the general communications about the court will benefit. But the relationship cannot become too close: goals of courts and media are not at all the same.
4. Some situations can only be solved by the associations of judges. They are the only ones that can speak for the judiciary as a group.

3.

The economic crisis strikes us all. The judiciary can understand that measures have to be taken. But at the end, there has to be a “balanced solidarity”: parliament, government and the judiciary have to be treated in the same way, and all groups have to carry the same or an equal burden.

Of course, in some developing economies that way of working causes a problem: in such economies, the justice budget is already very limited, and cutting expenses could cause serious problems. Some countries promote the issue of the EC-authorities seeking to increase the justice-budget; there the cuts are out of the question.

Salaries and remunerations should be the last items to touch. In the first instance, all other posts on the justice budget should be looked at to see if cuts aren't possible.

We noted that if it concerns the judge's only income: he/she cannot have income from other jobs or public positions. Politicians do not have the same problem.

A decent remuneration for the judges is a condition for an independent judiciary, and it tends to avoid vulnerability or exposure to all kinds of corruption. Of course, what is an “adequate” income differs from country to country.

Group 2:

1-2

In the majority of countries represented in the group, judges seldom were killed, nor were they direct victims of violent crime. In some countries judges had been killed, but in these cases it was mostly mentally ill offenders behind the deeds. One exception was Italy where, as many as 27 judges and prosecutors had been killed in the last 30 (?) years as a result of the fight against organized crime. In Germany there had also been several attacks against judges.

Threats against judges and court buildings were a common problem in Bulgaria and Slovakia as a way for parties to stop or delay proceedings, though the threats seldom or never were realized.

In most countries, measures have been taken to protect the judges from violent crime. In Mozambique this was not the case and the judges of Mozambique often felt vulnerable to violence. In most countries metal detectors already have been installed or are on the way and the workplaces for judges are separated from the parts of the court buildings to which the public has access. In some countries, e.g., Denmark, security measures have been taken, but there is also a possibility for the court to arrange for police surveillance if this was needed in a certain case. In Germany as in Sweden some courts are equipped with high security courtrooms where high risk trials can be handled.

In Italy judges and prosecutors can be provided with armored cars and/or bodyguards, depending on the level of threat they have to work under.

As for the question whether the measures taken could harm the public access to courts, court proceedings and judges, the vast majority of members of the group didn't think so. In some countries trials were broadcasted on television and the public could get information via electronic communication instead of having to visit the court. In other countries the safety measures had made it more difficult to come in direct contact with judges outside the courtrooms, but this was not seen as a problem, rather the opposite.

3.

The judges must show solidarity with the efforts made to solve the economic crisis that some country's experience at the present time.

This solidarity must be shared with the community. We should do this primarily by finding ways to manage more efficiently judiciary budgets and by trying to do more with fewer resources. Only after undertaking these efforts should we accept the reduction of salaries or pensions.

However, in considering cutting expenses in the budget, the executive and legislative powers, which have the final decision in this matter, must decide beforehand on the quality of the respective system of justice they wish to maintain and how far they are willing to go to risk diminished performance of the judiciary.

In the final analysis, a line must be firmly drawn when the independence of the judiciary is endangered

or when there is any kind of negative discrimination towards the judicial power that affects the judiciary to a greater degree than the other State powers are affected.

Group 3:

1.a.

All in all member countries of the group have noted that some security measures are taken to control entry into the courthouse and sometimes to the courtroom. There are some countries which have security gates at the entrance of the courthouse as well as camera surveillance systems. But generally judges do not enjoy special protection beyond the workplace.

The security measures that are taken do not prevent access to the court by the public.

1.b.

The group recognizes that justice in general and judges and their decisions in particular are increasingly being criticized by both the political powers and the media. Faced with these criticisms, it is sometimes tempting to react to accurately depict the true situation and give the correct information to the public and users of public justice services. But this reaction should not be one that is system-wide. It must be done on a case by case basis and after an investigation of the facts criticized or charged. Thus, if it is a criticism against a judge in particular, the reaction to defend the colleague must be preceded by checking to see that he has not himself committed acts contrary to standards of professional ethics. If the criticism is of the judiciary as a whole, then the institution's reaction must be appropriate to the seriousness of the criticism. In all cases, the reaction must come from the associations of judges and not from the persons against whom the criticisms are directed, so they do not expose themselves further. In addition, this non-systemic response must always be preceded by an audit.

2.

On the effects of the financial crisis, associations across the group expressed their rejection of any principle involving reduction of the budget for the judiciary already very low in most countries. The group also rejected any reduction in the duties and in the pensions of judges. However, the group also agrees that when necessary and to show their solidarity with the citizenry, judiciaries should support reductions that can be made in the operating expenses of the justice system and possibly in wages, provided such reductions occur within the context of a national effort without compromising the independence of judges.

Group 4:

1.

In most countries, after 11 September 2011, the security of the court houses has been increased. The security is aimed primarily at preventing weapons from being brought into the courthouses. In some jurisdictions, particularly in rural areas, there is no security. Some countries also require persons to present identification documents before granting them admission to the courts. A number of judges feel as though security is not sufficient given that there have been attacks, some fatal, even with the additional security in place.

As for whether the added security is creating problems with the courts' constituencies, including the public and the media, the strong consensus is that with the advent of increased security in many aspects of life over the past ten years, that same sort of increased security in the courts has not raised any additional barrier that makes citizens feel that the judiciary is walling itself off from them.

2.

The group agreed that politics and the media are leveling more and more criticism at the judiciary and at judicial decisions. With the limited exceptions discussed below, most of the group thought that no reaction was the best reaction. The group generally thought that there should not be a difference in how we reacted to whether the criticism came from a politician or whether it came from the media, although there was a shared feeling that criticism from a politician may carry more weight than criticism generated by the media. The group was also of the view that an attack on an individual judge, particularly an unfounded attack, was the same thing as an attack on the judiciary as a whole. The group discussed another source of attack similar to an attack from the media, a "blog" attack. We noted this may become the sort of attack it was necessary to guard against, because left unchecked, it could wear away at the judge compromising her ability to perform her job appropriately. Even if the judge tried to ignore it, many times the media picked it up and continued to refer to it.

Several solutions to some of these publicity problems were offered. To ensure that the media adequately understands a complicated judicial decision, Taiwan has developed a system by which a judge, serving as a publicity officer for a particular court, is available to explain complicated decisions from the court. The judge who has authored the opinion provides a simplified summary of the decision that may be used by the publicity officer when meeting with the media. In response to attacks, particularly those by politicians published in the media, bar associations may author appropriate counter responses---something we agreed that judges would not and should not do.

3.

The group agreed unanimously that the judiciary must share in cutbacks when their purpose is to help deal with the current economic crisis. There are a number of factors that must be taken into consideration when doing so, however. First, it is preferable not to cut judges' salaries. Particularly if a judge's right not to have salary reduced is protected by the country's constitution, then for the protection of the present and future judiciaries, that constitutional right to prevent one's salary from being reduced should not be waived. To do so is seen to be a slippery slope. If salaries are not protected by a constitution, then the group agreed that salaries may be cut, but only in the same proportion as will be cut the salaries of executive and legislative branch government officials who are comparably. That said, we must bear in mind that for each country there is a level of salary below which that judge's salary may not be cut without risking serious infringement of the judge's independence. Below that level, the judge will not be able adequately to provide for family needs and a reasonable standard of living. If cuts need to be made, the group was of the unanimous view that those cuts were best made first in the areas of infrastructure expenditures, including buildings, IT equipment and the like. It may also be necessary to cut some staff support. It was generally felt that there should not be efforts made to cut judicial pensions, particularly in countries where available pensions are already seen as inadequate to meet a judge's post-retirement needs. The bottom line is that although the judiciaries are willing to share in absorbing financial cutbacks to aid in the response to the financial crisis, these need to be done very carefully, particularly where such cuts have not been undertaken before. Failure to be vigilant and failure to proceed in a thoughtful manner, may open the door to such cuts occurring on a more regular basis, whether or not there is a crisis giving rise to the need for them. Such added vigilance is also needed to guard against legislative and executive efforts being made to restructure the composition of courts (e.g., cutting appeals panels from 5 back to 3 members), in ways that adversely affect the administration of justice.

3. General Conclusions

Security in the courthouses.

In the last decade, security has become a main issue in many countries. Most court buildings have increased security for entrance into the buildings. Most countries have also implemented personal security for the judiciary if required. This is done on a case by case basis. Court and judicial security is generally adequate, but some countries feel there should be increased security compared to what they have. For example, in some rural courts there is no security at all. Also, in particular situations there is inadequate security for judges and their families at times those particular judges are involved in cases where they need special protection. We realize that there are some situations which we cannot guard

against, and that no security system is perfect, but judges and users of the courts have the right to be effectively protected. All agreed that the increased security measures did not harm the relationship between the judiciary and its users.

Criticism of the judiciary

All agreed that the judiciary was coming under unfounded criticism and in some cases concerted attacks. attack from the media generally, from politicians and from individual citizens (e.g., blogs). Also, it was generally agreed that the judiciary needed to exercise self-restraint in responding to such criticisms. Criticisms of initial decisions will almost always be addressed in appeals. When the criticism is of the court generally, the courts may appoint a spokesperson or seek assistance from the judges' association or the bar associations to address the criticism in the media. Although experience indicates that such spokespersons are not necessarily appreciated by the media, the Commission supports the solution as an appropriate method of addressing such criticism. Some courts provide the media a spokesperson who help explain complex decisions when they are being handed down by the court.

Economic considerations

It was agreed that the judges must participate in the efforts made to solve the economic crisis that some countries are experiencing at the present time. This solidarity must be shared with the community, and we should do this primarily by finding ways to manage more efficiently the judiciary budgets and by trying to do more with fewer resources. In considering cutting expenses in the budget, however, the executive and legislative powers, which have the final decision in these matters, must decide beforehand on the quality of the respective system of justice they wish to maintain and also decide how far they are willing to go to risk diminished performance of the judiciary. Where the constitution or a specific law of a country protects the salary of judges, there should be no reduction in salary imposed in violation of the constitution or the law. In the final analysis, a firm line must be drawn to prevent endangering the independence of the judiciary. Where budgets are already limited, it may be impossible for the judiciary to absorb any additional cuts without seriously affecting judicial independence. We must also be vigilant to guard against any kind of negative discrimination towards the judicial power that affects the judiciary to a greater degree than the other State powers are affected. In short, we support balanced solidarity.

4. Next year's theme?

The extent to which specialization of courts and judges affects judicial independence.

Thanks to everyone who collaborated,

For the First Study Commission,

Pol Van Iseghem

Istanbul, September 7, 2011

Appendix

1. Results of questionnaire
2. Names and addresses of participants