

Questionnaire of the 1st Study Commission: 2018

The topic for discussion this year is:

“Taking into account the relevant provisions of the Universal Charter of the Judge adopted by the IAJ on 14 November 2017, in particular Articles 1, 2.1, 2.3, 2.5 and 6.5:

the First Study Commission will analyse the trend of public criticism towards judges and judicial decisions in a disrespectful manner by other state powers, the media and in social media.

Examples include:

- The “enemies of the people” remark by a British tabloid following the UK High Court’s decision in the Brexit case;
- The allegation by a senior British parliamentarian that “unelected judges” on the UK Supreme Court were “meddling” with the running of a democratically elected parliament;
- President Trump’s reference to a “so-called judge;”
- The criticism by the Hungarian Minister of Foreign Affairs of the judgment by the ECJ regarding the distribution of refugees, stating that the court had “violated the law”;
- The declaration of the Polish Prime Minister Morawiecki who said that Poland would accept the judgment of the ECJ regarding the non-admittance of refugees by Poland only if the Court decided in favour of Poland;
- To support controversial projects for changing laws on the judiciary “The Polish National Foundation” launched a campaign with posters and on the internet. This campaign was financed by 17 State-owned enterprises and led by former employees of the state chancellery. It sought to portray the judiciary as a privileged caste which should be brought under political control;
- The Turkish government’s suggestion regarding the extradition of Turkish Generals that the Greek Supreme Court has been “encouraging the impunity of criminals” and providing shelter and protection to putschists”;
- Recent personalised attacks and offensive criticism directed at Ms Justice Aileen Donnelly, Ireland, reportedly emanating from sections of the Polish media.

Introduction

This kind of “hate speech” or illegitimate, disrespectful and unwarranted criticism could be seen as undermining judicial independence by encouraging a culture of disrespect for the judiciary. Of course, legitimate respectful disagreement and criticism should be usual in democratic societies. But the situation seems to be getting “out of control”. According to a survey led by the European Network of Councils for the Judiciary (ENCJ) regarding judicial independence, 21% out of 11,712 judges polled from 26 European countries expressed the opinion that judicial independence was not respected by their government. 32% of the judges being surveyed also expressed the opinion that media did not respect judicial independence sufficiently.

In this respect an analysis by this Study Commission about appropriate boundaries of criticism and about measures against criticism which transgress such boundaries could be very useful.

Universal Charter of the Judge

The relevant provisions are:

ARTICLE 1 – GENERAL PRINCIPLES

The judiciary, as guarantor of the Rule of law, is one of the three powers of any democratic State.

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

The independence of the judge is indispensable to impartial justice under the law. It is indivisible. It is not a prerogative or a privilege bestowed for the personal interest of judges, but it is provided for the Rule of law and the interest of any person asking and waiting for an impartial justice.

All institutions and authorities, whether national or international, must respect, protect and defend that independence.

ARTICLE 2 – EXTERNAL INDEPENDENCE

Article 2-1 – Warranty of the independence in a legal text of the highest level

Judicial independence must be enshrined in the Constitution or at the highest possible legal level.

Judicial status must be ensured by a law creating and protecting judicial office that is genuinely and effectively independent from other state powers.

The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary.

Article 2-3 – Council for the Judiciary

In order to safeguard judicial independence a Council for the Judiciary, or another equivalent body, must be set up, save in countries where this independence is traditionally ensured by other means.

The Council for the Judiciary must be completely independent of other State powers.

It must be composed of a majority of judges elected by their peers, according to procedures ensuring their largest representation.

The Council for the Judiciary can have members who are not judges, in order to represent the variety of civil society. In order to avoid any suspicion, such members cannot be politicians. They must have the same qualifications in terms of integrity, independence, impartiality and

skills of judges. No member of the Government or of the Parliament can be at the same time member of the Council for the Judiciary.

The Council for the Judiciary must be endowed with the largest powers in the fields of recruitment, training, appointment, promotion and discipline of judges.

It must be foreseen that the Council can be consulted by the other State powers on all possible questions concerning judicial status and ethics, as well as on all subjects regarding the annual budget of Justice and the allocation of resources to the courts, on the organisation, functioning and public image of judicial institutions.

Article 2-5 - Protection of the judge and respect for judgments

The judge must benefit from a statutory protection against threats and attacks of any kind, which may be directed against him/her, while performing his/her functions.

Physical security for the judge and his/her family must be provided by the State. In order to ensure the serenity of judicial debates, protective measures for the courts must be put in operation by the State.

Any criticism against judgments, which may compromise the independence of the judiciary or jeopardise the public's confidence in the judicial institution, should be avoided. In case of such allegations, appropriate mechanisms must be put in place, so that lawsuits can be instigated and the concerned judges can be properly protected.

Art. 6-5 – Judge's possible recourse to an independent authority in order to get advice

Where judges consider that their independence is threatened, they should be able to have recourse to an independent authority, preferably that described under Article 2-3 of this Charter, having means to enquire into facts and to provide them with help and support.

Judges should be able to seek advice on ethics from a body within the judiciary.

Questions for consideration

- 1) Please provide at least one example, which can be used as a case study, of an occasion in your jurisdiction where a judge, the judiciary or the courts have been unfairly criticized by:
 - a) A politician or politicians;
 - b) The mainstream media;
 - c) Social media.
 Please attach the actual examples to your response.
- 2) What effect, if any, have those criticisms had:
 - a) On the independence of the judiciary;
 - b) On the separation of powers;
 - c) On public confidence in the judiciary.
- 3)
 - a) What steps, if any, were taken to deal with the criticism?
 - b) How effective were those steps?
- 4) What is regarded as the boundary between legitimate and unfair criticism?
- 5) What approaches have been adopted in your jurisdiction to improve the accuracy of reporting of court decisions and fair treatment of judges and the justice system?
- 6) What have been the benefits of and any problems caused by those procedures?
- 7) What suggestions could you make for:
 - a) improving the accuracy of reporting of court decisions; and
 - b) the fair treatment of judges and the justice system
 - i) By politicians
 - ii) By the media;
 - iii) In social media?

The Presidency Committee also invites each national organization to provide details of any threat to judicial independence which has been experienced in your country or region in the past year.

Proposal for topic 2019

You are asked to submit your proposals for possible topics to be treated in 2019 together with the answers to the questionnaire. The reason for this is that we would like to do some research before the meeting in Marrakech to know whether a topic has been handled with before and if there exist already standards, opinions, recommendations in relation to a topic. It also enables us to prepare the possible topics for consideration by the delegates for discussion in 2019.

Please send your detailed answers – not later than 30 June 2018 – to the Secretariat and the board of the First Study Commission.

The Honorable Justice Roslyn Atkinson AO, President of the First Study Commission