International Association of Judges: First Study Commission
“Ways to identify and classify criteria, objective and subjective, by reference to which the independence of the judiciary may be assessed.”

Answers from the Swiss Association of judges SVR-ASM

1) In Switzerland the judiciary does not include prosecutors. In most Cantons prosecutors are seen as a part of the administration, this means they are under supervision by the executive. On the federal level, today the supervision is splitted: the administrative part is under the supervision of the executive, the professional/technical part is under the supervision of the Federal Criminal Court. However this concept is put up for discussion right now: the splitting is seen as suboptimal. Solutions which are discussed are a) putting the prosecution under the supervision of either the executive or b) the Federal Criminal Court or c) – as a new model – to have a kind of Conseil de la Magistrature (at the moment just for supervision of the prosecution).

2) There must be distinguished between an individual-related aspect of judicial independence and an institution-related aspect.
The individual-related aspect demands that a judge is independent from the parties of a lawsuit and that he is impartial. In this respect the constitution rules that anyone whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited. According to the law, a judge has to withdraw from the proceeding in different situations, exemplified in the law. The purpose is to prevent the impression that a judge could be prejudiced or partisan. There must be noted though, that Swiss jurisprudence not always set the bar high enough and in some cases was corrected by the European Court for Human Rights. And there are even courts where it is arguable if the kind of composition provided by the law allowes to have an independent and impartial body of judges sitting on concrete cases. One specific problem is the fact that the Swiss penal procedure applicable to children does not guarantee either the unconditional right to assistance or separation, where personnel or organization is concerned, between the examining authority and the sentencing authority (see reservation concerning article 40 UN Convention on the Rights of the Child). Part of the individual-related aspect is, that judges must be remunareted enough. Generally said this is not a problem – up to now – in Switzerland.
Regarding the institution-related aspect, judiciary should be independent from the other two powers. According to the constitution the judicial authorities shall be independent in the exercise of their judicial powers and shall be bound only by the law. Organisation and procedure of the Federal Supreme Court are governed by law; it has its own administration. The same is true for the first instance federal courts and for most of the courts on the level of the Cantons. Concerning direct exercise of influence on the judiciary the independence of the judiciary is assured in Switzerland.
There might be some cases on the Cantonal level, where the executive or the parliament tries to exercise improper influence, but this is not common. The usual system is that the parliaments have the power to exercise superintendence. This implies just the control of administrative matters, for example if the jurisdiction takes place in time. One major problem in Switzerland is the fact, that judges are elected for only 4, 5 (in some Cantons) or 6 years and that they have to be reelected every 4, 5 or 6 years (just one Canton, Fribourg, has a system where the judges are elected for indefinite time and they just can be dismissed from office due to a disciplinary procedure). This raises the problem that judges are not absolutely free to decide their cases bound only by the law. Even though most of the judges are reelected without problems the fact alone that there could be put pressure on judges to decide in a certain way if they don't want to compromise their chances for reelection is not acceptable. One can notice that the majority of the members of parliament (the „election body“) is well aware of the fact that independence of the judiciary is of very high value and they are not disposed to put it at stake frivolously. But one can also notice that in recent times voices are rising more, which plead for changing of judges, this means no reelection, if politicians disliked the outcome of judgments. Another problem – not of the same weight as the one mentioned before – is the election body: Just a few Cantons have a Conseil superieur de la Magistrature, which prepares elections of judges. On the federal level and in most of the Cantons it is a committee of the parliament which prepares the elections and the parliament which elects judges (in some Cantons the voters are the election body). This means that election of judges is mainly a political matter: in general a candidate for a position as a judge has to be supported by a political party, otherwise he probably won’t become judge.

3) Objective criteria identifying the judiciary of Switzerland as independent are first of all the constitutional guarantee that the executive or the legislative cannot interfere with a judge’s work or decision or any trials. A further criterion is the good remuneration of judges. A further criterion is that in general (in some Cantons it is different) the judiciary is free to present the budget for court or judicial administration to the legislative (there must be said though, that the main position in the budget usually are the salaries and that the legislative is deciding about the number of judges). Another criterion is the freedom of expression and association that a judge has the same way as every Swiss citizen. Objective criterion speaking against judicial independence in Switzerland is first of all the system of reelection. Another criterion which speaks against judicial independence is the lack of a body independent from other organs of state for a) deciding on appointment to judicial office; b) considering ethical/disciplinary problems and procedures. As mentioned before there is such a body (Conseil superieur de la Magistrature) in some Cantons but not on the federal level.

4) Subjective criteria identifying the judiciary of Switzerland as independent are that public opinion, the media, the legislative and the executive regard the judiciary and the legal system in Switzerland as independent, free from corruption and trustworthy. The same is true for
independent bodies (such as Council of Europe and UNO) and NGO's (such as Transparency International).

5) The three most important criteria to identify – and measure! – independence in Switzerland are:

- the non-interference of the other organs of state, secured through the constitution.
- the required remuneration of the judges and the judiciary
- the election of judges for a period up to their retirement, combined with a disciplinary system which allows to dismiss a judge for disciplinary reasons following a procedure according to the law and with remedies, respectively the deficiency of such a system.

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