“How to Promote in Practical Way the Independence of Judges as Protectors of International Human Rights Law”

Replies of the Italian Delegation to the Questionnaire for the 2012 meeting (Yalta -Ukraine, 5-10 October 2013)

April 2013- Questionnaire 1st Study Commission

At last year’s meeting in Washington, D.C., we voted to undertake an examination of the topic identified above. It is the view of the officers of the First Study Commission that in order to examine the independence of judges as “Protectors of International Human Rights” is necessary to examine a variety of factors that may affect the overall independence of judges. After all, if judges are not independent in the exercise of their regular day to day duties, how will they be able to be independent in acting as protectors of international human rights law.

Therefore, we are posing a number of questions that address factors we believe affect judicial independence in general, and we are also asking a number of questions that address more specifically when and how matters that specifically involving international human rights law are brought before us as judges.

We look forward to receiving your answers, which we will compile and share with each other at our meeting in Ukraine. Please respond by 15 July 2013, if at all possible. Thank you.

Introductory remarks:

Under the Constitution of the Republic of Italy, which has been in force since January 1st, 1948, the Judiciary is an autonomous body independent from the legislative and executive powers (art. 104 Const.)

Its autonomy refers to its organisation.

It is autonomous vis-à-vis the executive, in that the independence of the judiciary would be undermined if the measures pertaining to the career advancement of the members of the judiciary, and in more general terms, their status, were assigned to the executive power. The Constitution therefore assigned the task of administering the members of the judiciary (transfers, promotions, assignments of duties and disciplinary measures) to a self-governing body (art. 105 Const.): the “Consiglio Superiore della Magistratura”, which thus guarantees the independence of the members of the judiciary.

The Judiciary is also autonomous vis-à-vis the legislative power, in that judges are subject only to the law (art. 101 Const.).

Its independence refers to the functional aspect of judicial activity. It does not refer to the judiciary collectively - which is guaranteed by its autonomy - but to its members when they exercise jurisdiction.

Independence stems from, and is implemented on the basis of, the other constitutional principle that a judge is subject only to the law. This substantiates the derivation of jurisdiction from the sovereignty of the people.

As mentioned before, the CSM is responsible for any decision regarding judges’ and prosecutors’ profession. The CSM also has a fundamental task, i.e. to safeguard the independence
and autonomy of judges and prosecutors in cases where they are subjected to undue pressures or influence. In such cases, the CSM reacts by means of broad decisions (when the judiciary is attacked from outside) or specific decisions (when the judiciary is attacked from inside).

Independence and autonomy are principles, which the Constitution also acknowledges in relation to the public prosecutor (arts. 107 and 112 Const.), especially where the obligatory nature of instituting criminal proceedings is concerned. This principle should be interpreted in the sense that, once the competent public prosecutor has been informed of an offence, he must conduct investigations and submit the outcome of his investigations to the judge’s appraisal, making the relevant requests. This applies both when the public prosecutor requests the setting aside of the case because there is insufficient evidence to prove the alleged offence and when the public prosecutor requests the committal to trial of an individual in respect of a particular alleged offence.

The obligatory nature of instituting criminal proceedings indeed contributes towards ensuring not only a public prosecutor's independence in exercising his duty, but also the equality of citizens before criminal law.

A public prosecutor’s autonomy and independence have, however, special characteristics as far as relations “within” the prosecuting offices are concerned, as the office’s unitary nature has to be taken into account, along with the power of authority acknowledged to the head of the office over his deputy prosecutors.

**POLITICAL INDEPENDENCE**

1- In your country and legal system, with respect to reducing the influence of politics on the decisions that are made by judges, what guarantees or provisions of law exist to ensure the independence of judges in their decision-making? NOTE: We list several examples and invite you to add any others that may also apply in your own judicial system:

According the Italian legal system, independence relates to the functional aspect of the activity of judging. The judicial order as a whole is guaranteed autonomy, whereas independence relates to the individual judge at the moment of exercising judgement. Independence is founded on and operates in relation to the constitutional principle that the judge is subject only to the law. This principle implements the notion of judgement deriving from the sovereignty of the people.

a- Is there security of a judge’s tenure in office? If so, please describe how this is provided - for example, by constitution, by statute, by judicial rules, etc.

Judges/prosecutors are also ensured security of tenure. A judge’s independence could in fact be seriously compromised if he could be dismissed from service or transferred from one office to another.

To ensure that this does not occur, the Constitution envisages that a judge’s suspension, dismissal or transfer can only be decided by the Consiglio Superiore della Magistratura either with his consent or for the reasons and with the guarantees of defence established by the judicial system laws.

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1 The set-up of the Italian judiciary is grounded at Constitutional level in sections 101 to 113 of Title IV of Italy's Constitution. Prior to the relevant reformation, the judicial system was regulated by the provisions contained in Royal Decree no. 12 dated 30 January 1941, Royal Legislative Decree no. 511 dated 31 May 1946, Act no. 195 dated 24 March 1958, and several provisions as contained in subsequent statutes that had been enacted to upgrade the judicial system provisions that had been issued prior to Italy's Constitution. Secondary legislation applying to the judicial system includes the regulations and circular letters issued by the CSM.
Normally, therefore, judges/prosecutors can be transferred to another office or made to perform other functions only with their consent, following a decision by the Consiglio Superiore della Magistratura.

b- Is there legislation that prohibits others in the government from interfering in the judicial decision-making process? If so, please describe.

The Constitution guarantees the judicial function, in particular, by prescribing the principle that judges/prosecutors are established by law (article 25 of the Constitution): on the one hand, it establishes that the jurisdiction of judges/prosecutors can only be decided by the law and not by secondary sources of legislation or non-legislative provisions; on the other, it also provides for the competent judge to be determined before the commission of the facts to be tried, thus preventing the judge from being determined ex post. The principle that the competent judge is established by the law also assures the impartiality of the judge while exercising his office.

In addition to the aforesaid constitutional principles, there are also judicial system laws covering the drawing up of the personnel charts of the judicial offices aimed at regulating the assignment of individual judges and prosecutors to the offices and the assignment of the case.

b- Is there legislation that prohibits others outside the government from attempting to influence improperly a judge’s decision? If so, please describe.

See introductory remarks.

c- Is there a system to provide for the physical security of a judge and the judge’s family that may be invoked by the judge? If so, how is this security provided and who provides it?

Yes, this system exists. In case of serious threats, the judge/prosecutor’s physical security is ensured by police forces upon decision of the Minister of Interior.

d- Are there any special provisions to ensure a judge’s independence from improper political influence when the judge is deciding a matter involving alleged human rights violations? If so, please describe.

See introductory remarks.

f- Please describe any other guarantees or provisions of law that are intended to reduce the influence of politics on a judge’s decision-making?

See introductory remarks.

APPOINTMENT SYSTEM FOR THE JUDGES/JUSTICES

2- Are the procedures and criteria for judicial selection clearly defined by law in order to ensure transparency in the selection process? Please describe the procedures and criteria that exist.

The reformation of the judicial system was brought about by six legislative decrees, which were issued pursuant to delegated reformation powers set out in Act no. 150 dated 25 July 2005 and were subsequently amended by Act no. 111 dated 30 July 2007. The key innovations concern recruitment mechanisms; assessment of magistrates’ professional skills; initial and in-office training; organisation of prosecuting offices; transition from the position of public prosecutor to that of judge; and the disciplinary measures.
3- Is there a separate expert commission or other authority either outside or inside the judiciary which has jurisdiction and competence to participate in judicial selection, including to conduct examinations of prospective judges if such examination are used in the process of judicial selection? If so, please describe.

Access to the Judiciary is today regulated by Legislative Decree no. 160/2006, Chapter I, which sets forth the conditions for participating in the exam, the modalities for presenting the application, the composition and functions of the examining committee, the conduction of the written and oral exams and the modalities to be followed by the examiners. The said examination is thus organised like second level public exams.

The law provides for given pre-requisites for being admitted to take the examination so as to ensure that the candidates are technically qualified and their number is reduced. Those who pass the examination are appointed magistrates. The aforesaid magistrates have to undergo a training period of 18 months. The said training involves following in-depth theory-practical courses and sessions at the judicial offices. The theory courses are organised at the Superior School of the Judiciary, a body set up by the reform of the judicial system.

A magistrate undergoing training does not exercise judicial functions. At the end of the training, The Superior Council of the Judiciary (CSM) assesses whether magistrates can be conferred judicial functions. In case of a favourable appraisal, a magistrate is conferred judicial functions by the C.S.M.

Over the last years, both the initial and in-office training have been aimed at providing an in-depth study of the procedural institutions, but also at enhancing and promoting greater commitment on behalf of judges vis à vis the trial - by studying the case file before the trial, attempting a conciliation and enhancing the principle of hearing both parties - and at encouraging magistrates to acquire virtuous organisational and interpretation practices within their respective offices.

The School is in charge of the vocational training and updating of both honorary and career magistrates, as well as the training of foreign magistrates in Italy or participating in the training activity conducted within the European Judicial Training Network. It also collaborates, at the request of the competent Government authority, in the activities aimed at organising and operating the justice system in other countries.

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The courses organised by the School aim at the professional training and updating of magistrates; the change from functions of judge to functions of prosecutor and viceversa; and the executive functions.

The professional training and updating courses are held at the School’s venues (Florence) and consist of study sessions held by highly professional and competent teachers, identified in the list drawn up by the School. The list is updated annually by the steering committee on the basis of the availabilities notified to the School and the appraisal made of each teacher, also keeping account of the opinions expressed by the participants in the appraisal forms. The courses are both theoretical and practical.

All the magistrates on the rolls have to attend one of the courses organised by the School on legal matters, and updates, at least once every four years, pursuant to the internal rules of the School.
ADMINISTRATION OF THE JUDICIARY

4- a- How are the salaries of judges set?

Under the system currently in force in Italy, all types of judges (civilian, administrative and accountant judges), as well as the attorney-general (avvocati dello stato) are uniformly regulated by dedicated laws.

Pursuant to the principles established by these laws, all the judicial duties are equally treated and consequently there exists no type of economic career implied by a shift to “higher” and better paid positions.

Nearly all judges/prosecutors are “promoted” upon delays set by law and shift from apprentice judge to first instance judge and then to appeal judge and supreme court judge, the senior positions. Such promotions are made by the Higher Council of the Judiciary on the basis of opinions delivered by the senior officers of the bureau where the judge performs his/her duties.

b- Are those salaries and any other allowances paid to the judges adequate to satisfy the reasonable living expenses of judges?

Yes, the salaries are adequate to satisfy the reasonable living expenses of judges. However, take note that judges/prosecutors are not entitled to receive any other allowances.

d- Do the judges’ compensation adequately reflect the dignity and importance of the judges’ position?

For the time being, no. Indeed, in the last two years, due to the global financial crisis, the government decided to freeze some automatic salary amounts to judges and prosecutors as well.

5- Is the administrative authority of the chief judges/justices used in a way to influence the adjudication of cases and to affect the content of judicial decision-making? If so, how?

No, there is no influence.

6- To address disciplinary matters involving judges who are accused of violating judicial conduct rules, is there a judicial council or some other body that has the power to:

a- Receive complaints and conduct disciplinary investigations? If so, please describe.

b- Hear evidence, make decision based on the evidence, and, if it finds a violation of judicial conduct rules, impose disciplinary measures? If so, please describe.

c- Hear appeals from the decisions that have found disciplinary violations and imposed disciplinary measures? If so, please describe.

d- Does the person who has made a complaint about a judge’s conduct have an opportunity to participate in whatever process is available for reviewing that conduct? If so, what is the extent of that participation?
Disciplinary proceedings are judicial in nature and are regulated by the rules of the code of criminal procedure, in view of their compatibility.

The competent authority is the Disciplinary Division of the C.S.M., made up of six members: the Vice President of the C.S.M., who acts as the president, and five members elected by the C.S.M. itself among its members, of which one is elected by Parliament, a magistrate with the rank of court of cassation magistrate actually exercising court of cassation functions and three magistrates of the merits.

Disciplinary proceedings are instituted at the initiative of the Minister of Justice and the Prosecutor General attached to the Court of Cassation. Prosecution has been changed from discretionary to obligatory for the Prosecutor General, while it remains discretionary for the Minister.

The obligatory nature of prosecution is linked with the choice of typifying breaches of discipline, and is very similar to that within the criminal system, and imposes strict compliance with the principle of legal certainty, so as to avoid uncertainties in law application as much as possible.

The law also provides for a general clause for the disciplinary irrelevance of a conduct should the act be of "scarce importance". This clause will work on a different level - although convergent with regard to objectives - from the Prosecutor General’s authority to set aside a case.

In fact, the Prosecutor General has the autonomous power to set aside a case when the act in question does not amount to a breach of conduct, is the subject of an incomplete report, does not fall within any of the typical cases identified by law, or when investigations show that the act was inexistent or not committed.

The measure setting aside the case is transmitted to the Minister of Justice. The latter can request a copy of the case file within ten days of receipt of the measure, and in the subsequent sixty days can ask the President of the Disciplinary Division to set a hearing for discussion, and issue the relevant charges.

At the hearing, the functions of public prosecutor are in any case exercised by the Prosecutor General or one of his deputies.

Once the first stage is over, the law provides for the proceedings to be instituted within a year of the notice of the breach, of which the Prosecutor General attached to the Court of Cassation had knowledge following preliminary investigations or a detailed report or communication of the Minister of Justice. Pursuant to the legislative decree, then, within two years of the commencement of the proceedings, the Prosecutor General has to make the conclusive requests, and within two years of the request, the Disciplinary Division of the C.S.M has to make a decision. The law also stipulates that disciplinary proceedings cannot be instituted ten years after the act was committed.

As from the beginning, notice of the disciplinary proceedings must be given to the accused within thirty days and the accused can be assisted by another magistrate or a lawyer. Then, investigations are conducted by the Prosecutor General, who makes his requests sending the case file to the Disciplinary Division of the C.S.M. and giving notice thereof to the accused.

If he does not think that he has to request an order setting aside the case, the Prosecutor General issues the charges and asks for a hearing for the oral discussion of the case to be set.

The Minister of Justice can intervene in the disciplinary proceedings by requesting investigations, requesting to extend the action instituted by the Prosecutor General to other acts, exercising its authority to issue an integration of the disciplinary charges in the cases instituted by the Prosecutor General, and by asking to change the disciplinary charges in case of actions he has instituted himself, by exercising its authority to make the charges and autonomously ask to set the date of the disciplinary proceedings in all the cases in which he disagrees with the request for acquittal issued by the Prosecutor General.

The discussion of a case within disciplinary proceedings, which occurs by public hearing, consists of hearing the report of one of the members of the Disciplinary Division, gathering ex officio evidence, hearing the reports, inspections, procedures and evidence gathered, as well as the
discovery of documents. The Disciplinary Division makes a decision after having heard the parties and the said judgement can be opposed before the Joint Divisions of the Court of Cassation. Once it becomes final it can in any case be reviewed.

INTERNATIONAL HUMAN RIGHTS ISSUES

7- What is the source of the law, if any, that a judge takes into consideration when deciding whether and how to enforce international human rights law? For example: the constitution, treaties, laws of the country?

*The Italian Constitution and international treaties as well.*

8- Do there exist procedures by which your courts may hear cases involving alleged violations of international human rights law when those alleged violations are separate from and independent of the laws of your country law? If yes, please describe these procedures.

*NO, there are not.*

9- If the answer to Question 8 is “No,” are there any types of cases in which a judge may consider and apply principles of international human rights law when making a decision, or is the judge limited to applying fundamental principles of international human rights law in making a decision only if such principles are embodied in the laws of the country?

*Judges are entitled to apply the laws of the country in conformity to international treaties.*

10- Are there any persons or groups of people who work for the government in your country who have judicial immunity for their illegal actions?

*No, there are not.*

*Filled in by Mr. Fausto Zuccarelli*

*National Association of Judges, ITALY*