

Report of the First Study Commission of the International Commission of Judges 2017

“Threats to the Independence of the Judiciary and the Quality of Justice: workload, resources budgets and other threats.”

Conclusions and recommendations of the First Study Commission 2017

Recalling the international instruments cited in the questionnaire sent out to participants and building on and reaffirming the standards found in the Universal Charter of the Judge adopted by the IAJ on 14 November 2017 and the conclusions reached by this Study Commission in 1997 (Alternative dispute resolution), 2006 (appointment and assessment), 2011 (Intemperate criticism of judges), 2013 (salaries) and 2015 (workloads), and noting the continued failure in many countries to meet the standards reflected in these conclusions and other international standards such as those set out in the UN Basic Principles on the Independence of the Judiciary 1985 and other principles of international law this Commission affirms:

Preamble

The judiciary must be treated differently from the executive of the state. It has a very special role as one of the three powers of the state. In particular the independence of the judiciary secures for every person the right to a fair trial and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system.

Workload

1. Excessive workload affects judicial independence and so governments should ensure that there are a sufficient number of judges and support staff for the work required of the judiciary.
2. If the workload of the court increases there should be a commensurate increase in judicial numbers, court staff and infrastructure. Similarly changes to the law may require an increase in the judiciary if it leads to increased workload.
3. The judiciary should be able to manage efficiently its resources to improve the quality of its work without improper interference from the legislature or executive government.
4. There should be no unreasonable delay in filling judicial posts arising; judicial vacancies increase the workload for others and have an impact on the quality and timeliness of decisions.
5. Where deadlines are imposed sufficient resources must be provided in order not to negatively impact on the quality of judicial decisions.

Budgetary Allocation

6. For the reasons set out in the preamble all decisions on budget (including remuneration) have to respect this special role; in particular they must protect the independence of the judiciary.
7. Insufficient budgetary allocation or unfair allocation between courts adversely affects the capacity of the courts to hear and decide cases fairly and expeditiously. Courts should have sufficient and fair budget allocation. Courts should have the opportunity to present their budgetary requirements to the body responsible for the decisions about the budget of the state.
8. Expert witnesses and interpreters need to be properly remunerated so that their expertise is available to the courts.

9. Improving the information technology available to courts and case management is likely to improve the quality and efficiency of the courts where appropriate and therefore resources should be made available to achieve this.

Remuneration

10. Adequate remuneration and pensions are a prerequisite for securing judicial independence. To secure the quality of the judiciary, judicial positions have to be attractive to qualified persons and therefore sufficient salary and working conditions must be offered to ensure the best candidates are not lost to the private sector. A reduction in the remuneration and pensions or deterioration in working conditions of judges is likely to adversely affect the quality and the independence of the judiciary and should therefore be avoided.

In addition to those topics, the Commission made the following recommendations to deal with other threats to quality and independence:

Appointment

11. The method of appointment of judges must be free from improper interference, political or otherwise, to ensure the quality and independence of judges.

Security of Tenure

12. Security of tenure is an essential foundation of judicial independence and should be protected by constitutional or other legislative provisions.

13. There should not be any retrospective reduction in the retirement age of judges.

Criticism

14. Ill-informed and populist attacks on judges and courts by politicians and the media may undermine respect for judicial decision-making and thereby weaken judicial independence and public support for the rule of law. The three pillars of the State, legislature, executive and judiciary must foster and protect the trust of the public in democratic institutions and particularly the independent judiciary.

A Summary of the Deliberations of the First Study Commission

Written responses to the Questionnaire were received from the following countries:

- | | |
|--------------|-------------------|
| 1. Algeria | 14. Greece |
| 2. Australia | 15. Iceland |
| 3. Austria | 16. Ireland |
| 4. Armenia | 17. Israel |
| 5. Brazil | 18. Italy |
| 6. Bulgaria | 19. Japan |
| 7. Canada | 20. Liechtenstein |
| 8. Chile | 21. Moldova |
| 9. Cyprus | 22. Norway |
| 10. Denmark | 23. Panama |
| 11. Estonia | 24. Poland |
| 12. France | 25. Portugal |
| 13. Germany | 26. Serbia |

27. Slovenia
28. Spain
29. Sweden
30. Switzerland

31. Taiwan
32. United Kingdom
33. United States

In addition there was substantial debate and discussion at the meeting of the First Study Commission in Santiago, Chile in November 2017.

Threats to Judicial Independence

A number of responses highlighted long traditions of judicial independence,¹ placing greater emphasis on threats to quality of justice. However, some responses did report specific concerns regarding threats to judicial independence.

Judicial Remuneration, Working Conditions and Pensions

Many responses identified issues relating to judicial remuneration, working conditions and pensions as threatening judicial independence.² Portugal cited the continued deterioration of judges' remuneration as a threat to judicial independence. Armenia stated that the salaries and pensions of judges have been "groundlessly diminished". Greece has experienced economic crisis since 2009 and in an aim to tackle this crisis, the Greek government and foreign institutions implemented austerity measures, leading to reductions in the salaries of all civil servants. Greek judges were included in the cuts and after five consecutive cuts to judges' salaries, Greece is concerned that the reductions affect the status and independence of the judiciary.

Until recently, the Irish Constitution prohibited the government from reducing a judge's remuneration during their term of office. In the wake of the 2008 global financial crisis, the government implemented significant pay cuts in the public sector. A referendum was held to amend the Irish Constitution to allow the government to reduce judicial salaries. The referendum passed with almost 80% of the vote. This was despite that fact that voluntary pay cuts were taken up by the majority of the Irish judiciary.

Sweden and Chile reported concerns relating to the method of setting of judges salaries. In Sweden, salaries are set on an individual basis and the court president in different jurisdictions has to decide between different judges. Further, the salaries of court presidents are set by the Director of the Swedish National Courts Administration, who is appointed by the government. In Chile, judges' salaries are determined in the nation's annual budget. This is seen as a threat to judicial independence as it sparks yearly debate about the appropriate salary for judges. Israel reported that judicial salaries are protected by legislation and as a result it is difficult to diminish judges' salaries. However, Israel cited the pension system as posing a potential threat to judicial independence. Judges in Israel have different pension entitlements, depending on when they were appointed.

It was recognised that whilst important in all systems particularly in countries where there are economic changes to the standard of living, remuneration was only one aspect of the judicial function and there were many other attractions of the position. However, in both common law countries and civil law countries the failure of judicial salaries to be competitive with the private sector has had an adverse effect on recruitment to the judiciary.

¹ Armenia, Australia, Brazil, Canada, Cyprus, Greece, Iceland, Ireland, Italy, Taiwan, United Kingdom

² Australia, Armenia, Greece, Ireland, Italy, Moldova, Portugal, Slovenia, Sweden

Austria noted that the failure of judicial salaries to keep pace with the earnings available to a new graduate in private practice has a deleterious effect on judicial recruitment particularly of young men that causes gender imbalance in recruitment. A number of other European countries noted similar difficulties of recruitment although not specifically with regard to gender balance.

Algeria, Liberia and Senegal all reported serious problems in the adequacy of judicial remuneration in Africa.

In the United Kingdom there is a shortage of recruits to the judiciary after a substantial career in the private profession.

In Cyprus new judges are no longer granted a pension after retirement. This poses a risk of judges seeking to return to legal practice.

Israel indicated that the vast majority of judges were willing to strike to enforce treasury agreement for higher salaries for judges that receive lower pensions.

In Canada as a result of case law preventing direct negotiation with government, a Commission reviews conditions and salaries every four years. It takes into account the salaries of private lawyers and higher paid civil servants. The procedure is adversarial and the government must explain any decision not to follow the recommendation.

Budget Regulation and Allocation

Some responses reported that budget regulation and allocation can threaten judicial independence.³ In Sweden, the budget for the courts as a whole is decided by parliament and that sum is given to the Swedish National Courts Administration to distribute among the courts. Sweden expressed concern that this procedure places political pressure on the court presidents. Cyprus noted that the independence of the judiciary can be compromised indirectly by reducing its financial means or by restricting the number of judicial appointments that are required to handle an increasing workload.

France reported issues related to workload and the distribution of budgets as the main threat to judicial independence and quality of justice. France noted that human resources in the courts have been largely inadequate for many years and excessive workloads and insufficient budget allocation threatens judicial independence as judges sometimes have to renounce cases because of a lack of resources. Greece explained how budget allocation can be used by the government as “revenge” or “rewarding” judges depending on whether their decisions are favourable to the executive. Australia described how state courts are somewhat subject to the decisions of the legislative and executive relating to budgets, while federal courts have greater autonomy over how funds are allocated. De Australia noted that while there is potential for the executive to undermine the independence of the judiciary through budgetary controls, there has been little to suggest that any serious concern is warranted.

Iceland reported that since 2016 legislation required formal consultation with the judiciary and where the Ministry of Justice proposed to allocate less than the judiciary assessed as necessary this needed to be noted by Parliament when approving the budget.

There was consensus that where resources are scarce, it should be the judiciary who decide on budget allocation and that the judiciary should work to efficiently manage resources and improve the quality of its workload without inappropriate interference from other branches of government. It was

³ Austria, Australia, France, Greece, Italy, Portugal, Sweden

recognised that the increasing gap between earnings in the private profession was deleterious to recruitment and retention and was a factor to be taken into account when setting salaries.

In Greece the dispute over remuneration has led to inflammatory criticism of the judiciary.

Algeria noted that budgets were set by Parliament without any consultation with the judiciary.

Appointment of Judges and Security of Tenure

A number of responses described how the method of appointing judges and the conditions of their appointment can threaten judicial independence.⁴ In Slovenia, judges are elected by Parliament on the recommendation of the Judicial Council, who selects candidates on the basis of clear criteria. However, in the last two years, the recommended candidate has not been elected by Parliament. In Ireland, judicial appointments have traditionally been made by the executive with little scrutiny or insight by any external body. The Irish judiciary has long called for reform of this process and regard current reform proposals as inadequate. Austria expressed concern about the influence of the executive in the appointment of judges.

Some responses discussed the importance of security of tenure and potential threats to judicial independence.⁵ Serbia referred to multiple constitutional and legislative provisions that result in inappropriate political influence on the judiciary, including constitutional provisions requiring newly appointed judges to serve a three year probation period.

Switzerland described how the election of judges for relatively short terms (for example, 6 years in the federal courts) can threaten the independence of the judiciary. While generally judges are re-elected by parliament once their term is complete, there have been some instances where the system is used to put pressure on the judiciary. An example was given of an instance where a Member of Parliament openly criticised the judgment of the Federal Supreme Court and threatened not to re-elect the judges involved in writing the judgment.

Public Criticism

Some responses discussed how public criticism of the judiciary by the government or the media can threaten judicial independence.⁶ Serbia and Slovenia both reported that judges are unprotected from unfounded and populist attacks by politicians and the media. England and Wales expressed concern regarding media criticism of the judiciary linked to the “brexit” referendum. The day after the High Court handed down a decision relating to the referendum, a newspaper printed pictures of the three judges under the headline “Enemies of the People”. England and Wales expressed concern that this language was the language of pure abuse and was not legitimate criticism. There was a particular duty on the Lord Chancellor under law to defend the judiciary in such circumstances, but no defence was made. Portugal also referred to this incident in its response. Brazil cited media criticism as threatening judicial independence, with Brazilian journalists increasingly criticising judicial salaries. Panama reported that lawyers often release information about cases to the media, often resulting in the public

⁴ Austria, Ireland, Serbia, Slovenia, Switzerland

⁵ Serbia, Switzerland

⁶ Brazil, Panama, Poland, Serbia, Slovenia, United Kingdom

being misinformed. This has created problems for the judiciary, despite efforts to raise awareness among journalists.

Poland

Poland's response detailed significant concerns relating to threats to judicial independence. In the parliamentary election in October 2016, the Law and Justice Party gained control of the Polish government. The Polish response explains that one of the main aims of the Party is to take total control of the Polish judicial system. In recent months, the Polish Constitutional Court has been effectively disabled. Draft legislation has also been introduced which seeks to eliminate judicial independence. The Polish Constitution provides that the National Judicial Council "shall safeguard the independence of the courts and judges". Current draft legislation proposes to change the process of the appointment of judges to the Judicial Council. Poland stated that the draft legislation "eliminates the most representative, self-government judicial body in Poland with the widest representation of Polish judiciary". Other draft legislation seeks to introduce an "assessor judge" who can be appointed by the Minister for Justice despite objection by the Judicial Council. Poland explained these concerns in a detailed report which was provided in addition to its response.

Threats to Quality of Justice

Workloads and Resources

Many responses identified increases in court workloads without corresponding increases in the availability of court resources as threatening the quality of justice.⁷ Switzerland identified this issue as a key threat to the quality of justice. Taiwan noted that while there has been a dramatic increase in the volume of cases, the increase in the number of judges has not kept pace.

France identified issues relating to workload and the distribution of budgets as the main threats to judicial independence and quality of justice. Human resources in France have been largely inadequate for many years and excessive workloads and insufficient resources threaten to decrease the quality of decisions and increase the pressure to process cases quickly. France noted that expert psychiatrists and psychologists often refuse to work for the courts as they are insufficiently remunerated and are paid late. Iceland noted that since the financial crisis of 2008, courts in Iceland have been hit by a "tsunami" of cases. While the number of judges was temporarily increased to deal with the increase, only minimal increases in clerical assistance and infrastructure were provided. Iceland noted that the Supreme Court has had to increasingly resort to deciding cases with a coram of three instead of five or seven judges. Cyprus also reported concerns relating to increases in caseloads in the wake of unprecedented financial crisis. Greece reported a lack of funding and access to experts or interpreters, particularly at a time when a large number of refugees or immigrants are arriving in the country. Israel reported that it has been rated amongst the most burdened courts worldwide, with very heavy caseloads per judge. While Israel does not consider that this caseload threatens judicial independence, it does consider that it may impact the quality of justice.

Budget Regulation and Allocation

A number of responses described how court budgets are set independently of the court, often by other branches of government.⁸ This can result in disparity between the financial needs of courts and

⁷ Algeria, Australia, Brazil, Bulgaria, Cyprus, Denmark, France, Greece, Iceland, Israel, Italy, Moldova, Switzerland, Taiwan, United States

⁸ Algeria, Australia, Bulgaria, Greece, Italy, Panama, Sweden, United States

the resources allocated.⁹ This disparity is exacerbated where there is insufficient communication between the courts and other branches of government.¹⁰

Australia described how state courts are somewhat subject to the decisions of the legislative and executive relating to budgets, while Federal courts have greater autonomy over how funds are allocated. Australia noted that budget cuts have resulted in a greater focus on efficiency measures such as case management and settling matters out of court. While this can be useful in reducing costs and increasing efficiency under reduced budgets, this has also been seen as undermining the courts ability to perform its judicial function, with judges being expected to play a more managerial rather than judicial role. Iceland explained that the Judicial Council, rather than the individual courts, makes budget proposals to the Ministry of Justice, which in turn makes proposals to the Ministry of Finance. Iceland noted that the courts lack a sufficiently strong voice in this budget process. By contrast, Japan described how budgets are set by the court itself. As a result, Japan has not experienced “any threat to judicial independence or the quality of justice from the aspect of budget regulation or allocation.”

Delay

A number of responses expressed concern about delay in the court system and its effect on the quality of justice.¹¹ Many responses noted that the setting of minimum case processing targets is an ineffective method of reducing delay.¹² Canada cited significant concerns relating to delay in the courts. In Canada limited resources, budget restrictions and excessive workloads are generally manifested in the time in which matters can be adjudicated. As a result, a recent decision of the Supreme Court of Canada set time ceilings for the hearing of criminal cases, beyond which the delay is presumptively unreasonable and a violation of an accused’s constitutional right to be tried within a reasonable time. This decision has led to numerous convictions being stayed in part because resources were insufficient to have the matters resolved promptly. In Israel, judges are required to complete judgments within specific time periods, usually within 30 days. Israel reported that this policy causes difficulties, noting that if a judge does not give a sufficiently timely judgment, a party may lodge a complaint with the Ombudsman who hears disciplinary matters.

Recent budget cuts in Norway have significantly contributed to undue delay in Norwegian courts. In 2016, about of half of the courts in Norway were not able to meet the Parliament’s standards on the management of judicial time. Serbia and Slovenia highlighted how insistence on swiftness in solving cases while neglecting the quality of decisions greatly threatens the quality of justice. In Greece, judges are required to give judgments within a specific period (usually four months). Failure to abide by these deadlines can lead to disciplinary proceedings being instituted against the judge. The recent increase in workload in the Greek courts has made meeting these deadlines highly impractical and the imposition of the time limits threatens the quality of justice. Bulgaria cited excessive workloads and inappropriate methods of reducing delay as threatening the quality of justice. In Bulgaria, judges in some courts have been subject to disciplinary proceedings because of their failure to observe deadlines.

Judicial Pay and Entitlements

⁹ Australia, United States,

¹⁰ United States

¹¹ Bulgaria, Canada, Greece, Israel, Italy, Norway, Slovenia

¹² Algeria, Bulgaria, Brazil, Canada, Greece, Israel, Norway

The regulation of judicial pay and entitlements was identified in some responses as influencing the quality of justice.¹³ In Ireland, judges are typically appointed from the upper echelons of private legal practice. Reductions in pay as well as changes to pension arrangements for judges as a result of economic crisis has meant that appointment as a judge is no longer a financially attractive option for many at the top of the legal profession. Iceland cited similar concerns, reporting a considerable decline in the number of applications for vacant judicial positions after judicial pay cuts were introduced in 2008. However, judicial remuneration was increased by a decision in 2015, which also introduced reforms relating to judicial entitlements.

Sweden explained how judges' remuneration has not increased despite increasing workloads. This has meant that some smaller courts have difficulties recruiting the best lawyers as judges. Germany also reported that low judicial salaries, when compared to incomes earned in the wider legal profession, has caused difficulties in recruiting new judges. In Japan, the status and remuneration of judges are guaranteed by the Constitution and judges are on the public pension system. As a result, Japan has "never experienced any threat to judicial independence or the quality of justice from the aspect of their terms or working conditions."

Appointment of Judges and Court Staff

A number of responses highlighted the need to fill judicial vacancies in an effort to reduce delay or excessive workloads.¹⁴ Canada recommended that new Superior Court Judges be appointed on the day of known retirement of a judge. Ireland described excessive delay in the filling of judicial vacancies, citing political deadlock as the main reason for the delay in judicial appointments. Ireland noted that if political deadlock continues there may be an insufficient number of Supreme Court judges to hear constitutional cases with the necessary panel of seven. Liechtenstein cited understaffing within the judiciary as the key threat to quality of justice as high time pressures may lead to incorrect decisions and judgments and may lessen the quality of reasoning. The United States reported that in 2016, approximately 12% of all district and appellate judgeships were vacant. In Norway, judicial vacancies are not filled or new appointments are postponed in order to avoid exceeding court budgets. Serbia and Slovenia cited the insufficient number of judges in larger cities as a key threat to the quality of justice, leading to poor quality judicial decisions. It was one of the few countries where judges were appointed by Parliament that has rejected good judges for political reasons.

Switzerland described how the method of election of judges may threaten the quality of justice. Judges are elected primarily based on whether they are a member or are close to a particular political party. Vacancies are filled according to the proportional representation of the respective political parties according to the percentage of seats in parliament. While Switzerland does not consider that this system of election poses a threat to judicial independence, it does consider it may negatively impact the quality of justice. Highly qualified candidates may not be elected if they belong to the wrong party or no party in favour of less qualified candidates.

Understaffing in administrative positions was also said to contribute to excessive delay in the courts.¹⁵ Serbia and Slovenia referred to inadequate administrative employees within the courts, which slows down the work of the courts. France reported having half the number of registry staff in their courts than the European average.

¹³ Austria, Armenia, Cyprus, Germany, Greece, Iceland, Ireland, Italy, Spain, Sweden

¹⁴ Canada, Estonia, Ireland, Israel, Liechtenstein, Moldova, Norway, Serbia, United States

¹⁵ France, Serbia, Slovenia

In Denmark and the Netherlands, judicial budgets are set for four years that gives predictable resources.

Measures to Protect Quality of Justice and Independence of the Judiciary

The responses listed a wide variety of measures, which had been taken, or should be taken, in their countries to diminish or eliminate threats to quality of justice and the independence of the judiciary.

Security of Tenure and Remuneration

A number of responses discussed the need for constitutional or legislative guarantees of judges' tenure and remuneration or greater involvement of judges in the process of setting salaries.¹⁶ In Bulgaria, judicial salaries and pensions are set by legislation and are not constitutionally guaranteed. Chile noted that a constitutional guarantee of the irreducibility of judges' salaries would protect judicial independence. It also recommended that legislation be enacted in Chile to increase judicial retirement pensions. Switzerland stated that short terms of office and the re-election system should be abolished. Instead, judges should be elected until retirement or for a very long period. Switzerland acknowledged that the introduction of such a system should also include the possibility of disciplinary and dismissal measures. Switzerland also noted that the election of judges should be based on merit not politics. Taiwan explained how the constitutional guarantee of an appropriate salary, pension and security of tenure attracts highly qualified candidates and ensures the quality of justice.

There were different national practices about part time and probationary judges becoming full time judges. It was recognised that there were potential threats to independence if renewal was denied for inadequate reasons. Equally it was important that there were sufficient means to ensure the quality of permanent judiciary by training and actual experience of the judicial function.

Improvement of Court Technology

Many responses discussed how improving court IT systems can improve the quality of justice.¹⁷ Canada recommended the more efficient use of technology to address delay in the courts. Denmark explained how the implementation of new IT systems aims to digitise all case records and reduce the workload of administrative staff. France noted that technological modernisation in the courts would improve the quality of justice. Norway noted that the provision of funding for the digitisation of case files may increase the long term efficiency of the courts. However, the Norway response also noted that the government may have overestimated the potential for the digitisation project to improve efficiency as oral hearings, deliberations and the writing of judgments take up most of judges' work time. Norway also suggested increasing the use of sound and/or video recordings of hearings in the courts of first instance. Under the current system, appeal court proceedings usually involve a complete "rerun" of the case. In Israel, the administration is currently considering recording all court proceedings. It is expected that this would enhance the efficiency of proceedings and would ensure that judges can focus on the cases before them.

Case Management and Alternative Dispute Resolution

Some responses cited the implementation of case management and encouraging alternative dispute resolution as important measures for protecting the quality of justice and judicial independence.¹⁸ Greece recommended that alternative forms of dispute resolution and pre-trial case management be

¹⁶ Algeria, Armenia, Bulgaria, Chile, Greece, Israel, Japan, Switzerland, Taiwan

¹⁷ Canada, Cyprus, Denmark, France, Iceland, Israel, Norway

¹⁸ Greece, Israel, Italy, Portugal

promoted to reduce the workload of the courts. Italy's response stated that improving the mandatory mediation scheme and strengthening court management will reduce delay and excessive workloads in the courts. Portugal cited the implementation of a court management system as crucial to eliminating threats to judicial independence. A new court management system in Portugal has achieved important results regarding the increase of resolution rates and important improvement in productivity. Israel noted that mandatory mediation in cases above a certain sum has had a growing impact, with an increasing number of cases settling out of court.

General Measures

The following measures were recommended or had been usefully implemented to protect judicial independence and the quality of justice:

- **Algeria:** the financial autonomy of the courts would contribute significantly to guaranteeing greater independence of the judiciary. Since 2000, the courts have benefited from increased budgets for the creation of new courts and the number of judges has been increased. Efforts in recruitment and training of judges have helped alleviate excessive workloads.
- **Australia:** the implementation of measures in some Australian jurisdictions to reduce the administrative control of the executive over the judiciary have helped to reduce threats to judicial independence and the quality of justice. While greater autonomy over administration of the courts is seen as best practice, the Australian response acknowledges that it tends to be a more expensive model.
- **Austria:** a powerful judges' association is recommended as a measure which can diminish threats to judicial independence or quality of justice.
- **Brazil:** In some Brazilian states, legislation has been introduced which provides that court fees paid by parties must go directly into the budget of the judiciary and not into the general budget of the executive.
- **Canada:** where possible, certain procedural matters should be performed by judicial officers other than judges and proper case management procedures should be in place.
- **France:** France recommended increasing the number of assistant and registry staff in the courts.
- **Germany:** it is necessary to establish Councils of the Judiciary in each of the States.
- **Iceland:** increased legal and clerical assistance is required to better deal with increasing workloads.
- **Ireland:** the creation of a lower appellate court in Ireland has significantly reduced a backlog in the number of litigants seeking to have appeals heard by the Supreme Court.
- **Panama:** Panama implemented training for members of the Communication Department to enable them to respond to the media in sensitive cases.
- **Serbia:** Serbia referred to a number of measures which would reduce threats to quality of justice. These included introducing more transparent conditions for the appointment of judges, greater regulation of the dismissal or discipline of judges and ensuring more equal distribution of the workload between jurisdictions. Serbia also described how an increase in the number of basic courts has somewhat reduced the burden on courts and improved judicial working conditions as judges are required to travel less
- **Slovenia:** Slovenia recommended more equal distribution of workloads across jurisdictions; better working conditions for all courts and judges and more accurate assessment of judicial performance

- **Sweden:** the identification of duties that can be performed by non-judicial staff has been successful in improving efficiency in the Swedish courts. However, some in Sweden feel that this has gone too far, creating a feeling of loss of control among the judiciary.
- **Switzerland:** the use of single judges should be limited and that there should not be single judges on the appeal level. The tendency to use single judges for budgetary reasons is seen to negatively affect the quality of justice.
- **Taiwan:** on-going training provided by the Judges Academy in Taiwan is an important measure ensuring quality of justice.

Decisions of Courts or Tribunals or Constitutional Measures

Sufficient Budgets for an Effective Judicial System

Some responses described constitutional guarantees or decisions relating to budgets. Norway and Italy described how efficiency of justice is a major component of the right to a fair trial, guaranteed by the *European Human Rights Convention* and incorporated into the Norwegian and Italian Constitutions. It is necessary that budgets are sufficient to ensure compliance with all aspects of the right to a fair trial, including parties' rights to receive a final judgment within a reasonable time. A decision of the Constitutional Court of the Republic of Slovenia referred to the importance of a sufficient budget for the operation of an effective justice system in decisions about judges' salaries in 2006, 2008, 2009 and 2010.

Judicial Conditions and Entitlements

Many responses listed constitutional measures or decisions of courts or tribunals relating to judicial conditions and entitlements.¹⁹ In particular, a number of responses referred to constitutional guarantees that judicial remuneration not be reduced during the term of office of judicial officers.²⁰

In Taiwan, budgets, status and remuneration are guaranteed by the Constitution and the Judicial Yuan is vested with the power of judicial administration. This power is exercised by the president of the Judicial Yuan, who is also the Chief Justice. The Judicial Yuan proposes and submits an annual budget which may not be eliminated or reduced by the Executive Yuan, the Executive Yuan may only offer its opinions and include these in the budgetary bill which is then deliberated by the Legislative Yuan. These procedures are all guaranteed by the Taiwanese Constitution and Additional Articles to the Constitution.

Japan's response described how the status and remuneration of judges is set by the Constitution, which provides that judges must receive at regular stated intervals adequate compensation which shall not be reduced during their terms of office. Supreme Court judges may only be dismissed by a majority vote for dismissal in a national review process conducted in the House of Representatives. The Japanese Constitution provides that judges in lower courts are appointed for 10 years and can be reappointed.

Moldova referred to a recent decision of its Constitutional Court which disallowed the Government from excluding the special pension for judges in Moldova. That decision found that while the Constitution does not expressly guarantee a special pension for judges, it is an element of the "judge's independence principle". The Court further reasoned that as judges ultimately make decisions about

¹⁹ Algeria, Australia, Brazil, Chile, Cyprus, Greece, Iceland, Ireland, Israel, Japan, Moldova, Serbia, Slovenia, Spain, Taiwan, United States

²⁰ Australia, Ireland (until the referendum of 2011), Japan, Taiwan, United States

life, liberty and human rights, they must possess material independence and a sense of security about their future. Further, judges must not be assimilated with other public authorities.

In Portugal, the Constitutional Courts made decisions relating to judicial pensions and salaries during periods of economic difficulty in 2011 and 2015, when Portugal was receiving international financial assistance. The decisions found that austerity measures which reduced judicial entitlements must only be temporary.

Consultation on Resources, Workloads and Budgets

Responses to this question were varied, with a number of responses indicating that their nation does not have any Council of Justice or similar consultative body.²¹ Some responses reported insufficient or superficial consultation between judges' associations or committees and other branches of government on resources, workloads and budgets.²² In Greece, where the government intends to legislate on a matter that will affect the courts, consultation occurs between the government and the judiciary on a case by case basis. Greece reported difficulties with this fragmented, case by case approach. In France, the Supreme Council of the Judiciary is not consulted about important changes. The lack of consultation causes great difficulties for the functioning of the courts. The Judicial Council in Slovenia represents the interests of the judiciary in the process of the budget being adopted by Parliament. Despite this representation, Slovenia reported facing shrinking financial resources every year, this has meant that the courts do not have enough money to provide adequate working conditions and cannot recruit clerks. Slovenia does not consider that the judiciary's opinions are properly taken into account. Portugal has a Council of Justice but it has no real say in the final decision on court budgets or resources. The decisions rest with the government and parliament and any consultation that does take place is "timid" and occurs mostly for protocol reasons. Portugal reported that the lack of consultation clearly has a negative impact on the quality of justice.

Other responses reported successful consultation on resources, workloads and budgets.²³ Norway reported a highly consultative relationship between the Norwegian Courts Administration, the Judges' Association and the Legislature, noting that these bodies are consulted about court resources, workloads and budgets. Despite not having a council of justice at a federal level, Australia reported reasonable levels of consultation between the judiciary and the executive. Where the executive seeks to implement measures that will affect the operations of the courts, the general practice is for the Attorney-General to discuss the matter with the head of jurisdiction. Switzerland explained that while the situation varies across Cantons and at federal level, generally the courts can present and defend their budgets in parliament. This measure in general brings satisfying results for the judiciary. The Danish Courts Administration is an independent state body with its own management, appointed by the courts. The DCA negotiates court budgets with the Treasury every year. Denmark reported that generally the DCA does a good job at securing the necessary financial resources for the courts. In Algeria, the Superior Council of the Judiciary is consulted in relation to all matters concerning court management and workloads. While the recommendations of the Council are not enforceable, they are usually carried out by the Chancellery.

In Moldova, the financial means necessary for the good functioning of the courts are approved by Parliament, at the proposal of the Superior Council of Magistracy, and are included in the state budget. This means court budgetary allocation cannot be reduced without the agreement of the Superior

²¹ Australia (has similar bodies in some states but does not at Federal level), Cyprus, Greece, Ireland, Japan, Liechtenstein, Sweden (has a Council of Appointment of Judges but no general consultative body)

²² Brazil, Bulgaria, France, Greece, Iceland, Italy, Poland, Portugal, Serbia, Slovenia

²³ Algeria, Australia, Denmark, Israel, Japan, Moldova, Norway, Sweden, Switzerland, Taiwan, United Kingdom

Council of Magistracy. In Taiwan, the Judicial Yuan is consulted about court resources, workloads and budgets and is vested with the power of judicial administration. The President of the Judicial Yuan supervises various subordinate judicial agencies to ensure that they discharge their duties in accordance with the law. The Judicial Yuan can also propose statutory bills to the Legislative Yuan with regard to the organisation of subordinate judicial agencies and the matters governed by its judicial authorities. The Judicial Yuan consults with all courts before proposing bills.

In England and Wales, the Lord Chief Justice is formally consulted by the Lord Chancellor in relation to court budgets when those budgets are set. This is preceded by much more detailed consultation with the wider judiciary and the agreement of the Lord Chief Justice to the budget must be obtained. The Scottish Courts and Tribunal Service is consulted by the government prior to preparing the budget for Parliament. Where agreement cannot be reached, there is a right of representation. Sweden explained that most changes in legislation or procedure are very well prepared with a high degree of involvement by the judges. Proposals for changes are always sent to the courts and the Judges' Association for consultations. The opinion of the judiciary is well respected by parliament.

Impact of Changing Procedures

A number of responses discussed changing procedures and resulting increases in the workload of the courts.²⁴ Algeria discussed how the recent introduction of rules requiring the immediate appearance of accused persons before the criminal court has significantly increased workloads. Ireland reported that changes to fines legislation has added significantly to the workload of the courts. Both Liechtenstein and Ireland pointed to the development of legislation, without the provision of additional court resources, as being a significant factor impacting the quality of justice. Norway noted that in coming years, the workload of the courts may be affected by the transfer of new functions from other government departments.

Portugal reported significant problems with changing technology procedures. Most case files are now digitised and the inefficiency and slowness of the national software has an adverse effect on the daily work of judges. Moldova said that uncoordinated legislative changes to procedure lowers the quality of justice. In Serbia, changes to laws relating to employees in state authorities have unfavourably affected the workload of the courts. Changes to procedural rules and the organisation of the courts have adversely affected the workload of the courts and the quality of justice in Slovenia.

In Greece, economic crisis has resulted in legislative intervention which has created new categories of cases, increasing the workload of the courts. Due to the inability of citizens and commercial entities to pay their loans, a mechanism has been established whereby the courts can determine the method and time limit for citizens and businesses to repay debts. The legislation has significantly increased the workload of Greek courts and threatens both judicial independence and the quality of justice.

Other responses did not consider that the courts had been adversely affected by changing procedures²⁵ and reported effective consultation with the courts prior to the introduction of procedural changes.²⁶ In Taiwan, courts at all levels are consulted before procedural changes are made. In Australia and Canada the courts play a significant role in establishing processes and procedures. In England and Wales, most court procedure is effected by statutory rule committees that have judicial membership and are chaired by a judge. If the government requires wider changes

²⁴ Algeria, Austria, France, Germany, Ireland, Liechtenstein, Moldova, Norway, Portugal, Serbia, Slovenia, Switzerland, Taiwan

²⁵ Australia, Chile, Japan, Taiwan

²⁶ Australia, Denmark, Sweden

to court procedure, the judiciary will be consulted before any such changes are introduced to parliament. In Cyprus, court procedure is generally determined by the Supreme Court.

The topic for 2018

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
 - The President Trump reference to a “so-called judge”
 - 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”

This kind of “hate speech” could be seen as undermining judicial independence by encouraging a culture of disrespect for the judiciary. Of course, legitimate respectful disagreement and critic should be usual in democratic societies. But the situation seems to be getting “out of control” and an analysis by this Study Commission about eventual boundaries could be very useful.

**Justice Roslyn Atkinson AO
President of the First Study Commission**