

JUDICIAL INDEPENDENCE AND THE IMPLEMENTATION OF THE NEW UNIVERSAL CHARTER OF THE JUDGE

**International Conference
Marrakech, Wednesday 17 October 2018**

CONCLUSIONS OF THE HON. TONY PAGONE PRESIDENT, INTERNATIONAL ASSOCIATION OF JUDGES

The focus of this conference has been judicial independence and the implementation of the new Universal Charter of the Judge. The Central Council of the IAJ adopted a Universal Charter of the Judge at its meeting in Taiwan on 17 November 1999 and updated the Charter at its meeting in Santiago de Chile on 14 November 2017.

The conference was opened with remarks from Mr Mustapha Fares (Deputy President of the High Council of the Judiciary), Mr Christophe Régnard, Immediate Past President of the International Association of Judges (“the IAJ”), and Mr Giacomo Oberto, Secretary-General of the IAJ. The topic was then considered by papers given by speakers looking at the issues from different perspectives.

The paper by Mr Mustapha Fares was delivered by Judge Abdelhar Ayassi, President of the host association of judges in Morocco. Mr Fares outlined the reforms which had been made to the Constitution of Morocco in 2011 which guaranteed the independence of the judiciary and the separation of powers. His paper reminded delegates that the independence of the judiciary is for the benefit, and is the basic right of, the people and is not the personal privilege of the judge. The Constitution of Morocco provides for the separation of powers and of the independence of the judiciary, and provides that the independence is guaranteed by the Monarch. The Constitution provides that judges are to

apply the law and established the High Council of the Judiciary which is comprised of members who are themselves independent and chosen broadly by reference to such criteria as gender.

Mr Oberto's observations focused upon remedies, other than the establishment of High Councils of the Judiciary, to strengthen judicial independence. Mr Oberto began by reminding the assembly that the role of the judge is to apply the law and not to provide services or to act upon the will of others. In that context, Mr Oberto observed that the hierarchical structure for appeals within the judiciary can to some extent undermine independence if judges tend to decide cases by reference to the views of others rather than to the judge's belief of the law. Such structures may also expose judges to other risks which undermine judicial independence where personal advancement or career prospects may be influenced by those higher in the hierarchy. Article 3.1 of the Universal Charter is specifically directed to such situations by stating it to be a violation of the principle of independence for a hierarchical structure to affect decision making.

The keynote address was delivered by Dr Oliver Stolpe, Senior Programme Officer, United Nations Global Programme for the Implementation of the Doha Declaration. Dr Stolpe's focus was upon the topic of strengthening judicial independence and integrity and the launch in April 2018 of the Global Judicial Integrity Network. Dr Stolpe observed in that context that judiciaries have been more reluctant to tackle issues of integrity and accountability than to stress concerns about attacks upon independence. The experience at UNODC, however, did not support the concern that structures and mechanisms for accountability had undermined the independence of decision making by judges as long as the reforms were holistic and were driven by the judiciary.

The Global Judicial Integrity Network was established in April of this year as a network of like-minded judges to share their experience, to join forces in the development of tools, and to provide peer-to-peer support in strengthening independence, integrity and accountability. A fundamental message from Dr Stolpe's address was the need to see judicial accountability as a protective factor rather than a threat to judicial independence. The significance of the judiciary becoming involved in structures for accountability ensure that accountability measures will help to safeguard judicial decision-making as well as administrative processes affecting the judiciary, such as e.g. appointments and promotions, against undue interference.

Justice Daubney considered the question of judicial integrity from the perspective of common law countries. Article 6 of the Charter sets out an ethical principle for judicial conduct of requiring a judge in the performance of judicial duties to be impartial, and to be so seen. Justice Daubney emphasised the close links between impartiality and independence, and reported on the findings of the research program of the judicial integrity initiative undertaken by the International Bar Association ("the IBA") in 2015 in which bribery and undue influence were reported as the two most frequent forms of corrupt behaviour seen in judicial systems. In that context, Justice Daubney elaborated upon the subtle forms of undue influence as might be found in appointment procedures, budget allocations and oversight mechanisms falling short of blatantly dishonest conduct. This theme was later developed further by Justice Vanessa Ruiz when considering the particular role of women judges in ensuring judicial independence and the emerging understanding of the role of sextortion.

Mr Čule considered the topic from the perspective of prosecutorial independence. Article 9 of the Charter contemplates the application of the principles in the Charter to Public Prosecutors and, in Article 9.3 states that the independence of prosecutors is essential for the rule of law, and must be guaranteed by law at the highest possible level in a manner similar to that of judges. The formal mechanisms intended to guarantee a prosecutorial independence may be undermined by various ways such as the need to justify requests for funding, insufficient security for the personal safety of judges, insufficient resources and interference with prosecutorial investigations.

Ms Veronica Hinestroza spoke on the important role of lawyers in safeguarding judicial independence. Ms Hinestroza is a senior lawyer at the International Bar Association Human Rights Institute and spoke about the importance of laying down standards for lawyers when engaged in the judicial process and the administration of the law. Fundamental to the role of the lawyer is the duty to uphold the rule of law and at all times to maintain the highest standards and levels of integrity in relation to dealings with the court. Lawyers must give no false information to courts when administering justice and must avoid conflict and where relevant must reveal conduct to a court that may influence the proper outcome of the decision. Lawyers have a role also in responding to press attacks upon the judiciary and have a central role as intermediaries between clients and the Courts. The fundamental responsibility of lawyers to the administration of the law was concisely conveyed by the words in a short video presented by Ms Hinestroza saying: “you protect the rule of law and the rule of law will protect you”.

Justice Vanessa Ruiz focused upon the particular role of women judges in ensuring judicial independence and integrity. Her Honour undertook that

task in light of the broader consideration of the need for transparency and trust, and observed that “[t]he judiciary will not be trusted, if it is viewed as a bastion of entrenched elitism, exclusivity and privilege, oblivious to changes in society and to the needs of the most vulnerable.” The entry of women in the judiciary was thus explained to be a positive step in the direction of a more transparent, inclusive and representative judiciary. The role of women as judges, however, provide also an important aspect in decision making. The presence of women as judges provides an opportunity to review issues afresh, including gender related issues. The recognition of sextortion as an example of corruption is an instance of the reconsideration of questions of corruption by reference to a gender perspective. Her Honour gave a powerful example of a study which had been conducted by the World Bank about gender disparity for bribes. Questions asked in the survey by reference to different gender perspectives gave rise to significantly different answers. Generalised questions about bribes gave no appreciable difference in result by reference to gender, but did so when bribes were linked to sextortion. Had it not been for gender perspective, sextortion would not be perceived as a form of corruption as it now is.

The Vice-President of the Moroccan Association of Judges, Mr Mohamad Khadraoui, concluded the addresses by turning his attention to domestic considerations. He returned to the protection of judicial independence and the role of the IAJ International Charter in Magreb countries. His Honour reminded us that questions of judicial independence requires constant reconsideration as our understanding deepens and changes over time. In Morocco, the Constitution had recently stressed the importance of judicial independence and had given constitutional guarantees of independence and security of tenure of judges. To that end, the High

Council of the judiciary provides for its members to be elected by judges. His Honour considered in some detail the Moroccan experience and the importance of the role of the State in protecting and guaranteeing judicial independence. The media and government from time-to-time attempt to influence judicial decisions, and the structures required to maintain a robust and independent judiciary included appropriate processes of appointment and training. Appointment to the judiciary in Morocco is by external exam and training is undertaken in accordance with international standards. Codes of ethics have been adopted in consultation with the judiciary but the work of securing independence requires more work to be done, including by looking at the provision of social protection, and economic and financial security. The constant work required to maintain judicial independence was reminded by his Honour by saying that “the person that moves mountains starts by moving many small stones”.

There was general discussion and participation from delegates at the conference after the formal speeches. A delegate from Taiwan queried calls for judicial reform pointing out that proposals for increasing accountability often led to interference in judicial decisions by increasing the role in the judicial process from politicians. A delegate from Liberia drew attention to the difficulty faced by judges required to remain silent in the face of criticism and attacks upon the judiciary. An American delegate raised for consideration the possibility of judicial training being undertaken together with training by prosecutors. Mr Čule responded that sometimes it was desirable for training of prosecutors to be undertaken simultaneously with judges. Dr Stolpe observed that it was important for there to be responses to criticisms of the judges and that this was an important role for the IAJ to undertake.

The conference drew attention to the role of the judge as being intensely difficult. The judge stands between persons in conflict. Sometimes one of those is the government. Decisions by judges are likely to leave someone feeling unhappy and to have been wronged. The person who loses may feel, or believe, that the judge who has decided against that person was not independent or impartial. The losing party, and the whole of society, needs to feel confident that decisions are made without bias, interference, direction or partiality. The usefulness of this conference has been to highlight these issues.

G.T. Pagone
Marrakech, October 2018