Questionnaire 2016 of the 1st Study Commission

Best Practice within the Judicial System for Ensuring
Transparency and Integrity and Preventing Corruption

1. What would you identify as best practice to safeguard transparency of:
   a) court proceedings
   The performance of judges and the judicial system must be transparent. This means that there must be clear and formal reporting on issues such as case disposals, timeliness, case duration, appeal waiting times, and many other aspects of the quality of the judicial process. There should be regular reporting structures, and a database on the performance of the judicial system in each state.

   The leadership of a court will often exert influence on the judges working in that court. However, much more complicated situations arise, where the court management may influence decision-making in an effort to uphold standards with respect to productivity and timeliness, or in order to promote the uniform application of the law in similar cases. In this regard, the independence of the judiciary is key and structures must be put in place to record any such interference in judicial decision making.

   Transparency includes in this context that judges should explain their decisions in such a way that parties, media and the public in general can understand and verify their reasoning.

   A judge is required to adjudicate a case entrusted to him independently and impartially. If this is not possible, he should voluntarily withdraw from the case. Also, there should be a transparent procedure for recusal in case parties doubt the impartiality of a judge. Furthermore, this requires the existence of a transparent mechanism for the allocation of cases.

   b) selection of judges
   In some countries, even in the absence of a Council for the Judiciary, the Judiciary is able to achieve a large degree of self-government, where, for example, the Ministries of Justice delegate to judges and representatives of civil society. Independent commissions or councils for the appointment and discipline of judges are a case in point.
Human resource decisions concerning selection and appointment, disciplinary processes and removal are an area of vulnerability for the independence of judges. In these areas, judges are exposed to potentially improper interference by other state powers, including, for example, political appointments of judges. Both interference and the appearance of interference undermine the perceived independence of the Judiciary.

The European Network of Councils for the Judiciary (ENCJ) developed guidelines for transparency in the appointment of judges.¹ The process should:

1. be undertaken by a body that is independent of both the legislative and executive branches of government, and involves members of the existing judiciary;
2. be open to public scrutiny and be fully and properly documented;
3. be undertaken according to published criteria;
4. promote the diversity of the range of persons available for selection, whilst avoiding all kinds of discrimination;
5. only involve consultation which is open, fair and transparent, with views being (a) related to relevant competencies, (b) recorded in writing, (c) available for scrutiny, and (d) evidence-based.
6. provide for an unsuccessful candidate to be informed of the reasons for his/her lack of success; and
7. provide for an independent process of challenge and complaint.

These guidelines were approved by the Judicial Studies Review Committee in its Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process.²

c) administration of the judiciary?

Judicial independence requires the Judiciary to govern itself. The preferred option is for that governance to be undertaken by a Council for the Judiciary composed predominantly of a judicial membership. The majority of the members of the Council for the Judiciary should be judges elected by their

¹ ENCJ 2012 Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary.
peers, while other members represent society. In practice, however, Councils for the Judiciary across Europe have a wide variety of governance structures. Whilst the Minister of Justice and the executive should, in general, have no influence over the Council for the Judiciary (save for a formal role in relation to, for example, appointments), a hybrid structure is often found. In such situations, the President of the Court is often responsible for the Judiciary, whilst the Minister of Justice is responsible for court management and staff. An intermediate position exists in states where there is a Court Service with judges predominating on oversight committees. This is the case in Ireland and serves as a compromise between a fully independent Council for the Judiciary, and a system where government has full oversight in relation to the administration of the judiciary.

In recessionary times, it is perhaps unsurprising that few judiciaries are able entirely to determine their own budgets. But whatever budgetary arrangements are employed, there must always be adequate funding for the volume of cases that the Judiciary is required to handle. ‘Adequacy’ must in this context allow for the timely disposal of the case-load. The Council of the Judiciary should have the right to propose a budget and to address Parliament if its budget is rejected or amended. Once a budget has been agreed, the Council should be free to allocate the funds to individual courts, and the courts should be free to use the funds allocated, always subject to the overall supervision of the Council.

The strongest protection is a guarantee in the constitution or the state’s equivalent provisions. What is important is that the position of the Judiciary cannot be impugned by a simple majority of the legislature. Constitutional courts are also able to bolster the necessary protections. There is no single possible compliant system. The entire constitutional and historical protections need to be viewed as a whole.

The independence of the Judiciary can be undermined if the salaries of judges are controlled by the executive, and if the executive is not bound by formal controls relating to fixing these salaries. Punitive salary cuts are totally unacceptable. But arbitrary executive control of judicial salaries exposes judges to the risk of inappropriate pressures and corruption. Formal protection for judges’ salaries is, therefore, of great importance. Again, the strongest protection is a constitutional safeguard. A legal safeguard that can be changed by a majority in the legislature is a weaker protection.

A major guarantee of the independence of individual judges is their irremovability. It should not be possible to transfer judges without their consent, except for disciplinary reasons in exceptional circumstances. The strongest protection is a guarantee in the Constitution or in documents that are equivalent in the sense that the position of the Judiciary cannot be
changed by simple majority. A guarantee in laws that can be changed by simple majority offers weaker protection, whilst customary protection is even weaker.

2. **What would you identify as best practice to support and promote integrity of judges? Do you have experiences with such practices? Which?**

(i) Judges should be guided by ethical principles of professional conduct, which include duties and responsibilities breach of which may be sanctioned by disciplinary measures. Judges must have the same duties of integrity in both their public and personal lives. Guidelines and/or a code of conduct and ethics should be drawn up by judges or a Council for the Judiciary, and should be made available to the public. It should state the types of breach of the principles of judicial conduct or ethics which would be unacceptable including conduct which is capable of bringing the judiciary into disrepute.

A Code of Judicial Conduct provides a standard in which to assess judicial behaviour and serves as a guide to acceptable and unacceptable behaviour. The adoption of a Code of Conduct along with judicial support mechanisms via education and training would promote integrity.

In the United States of America federal judges must abide by a Code of Conduct. This is a set of ethical principles and guidelines which were adopted by the Judicial Conference of the United States. The Code provides guidance on issues concerning judicial integrity, independence, diligence, impartiality, permissible extra-judicial activities and the avoidance of impropriety. The Code provides that:

- A judge should uphold the integrity and independence of the judiciary;
- A judge should avoid impropriety and the appearance of impropriety in all activities;
- A judge should perform the duties of the office fairly, impartially and diligently;
- A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office; and
- A judge should refrain from political activity.³

This approach is also endorsed by the ENCJ of which Ireland is a member. At present in Ireland, there is no judicial code of conduct and ethics. In Ireland

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the General Scheme of the Judicial Council Bill 2010 proposed the establishment of a Judicial Council. This council will be responsible for drafting guidelines concerning judicial conduct and ethics and will also promote the continuing education of judges.

(ii) Disciplinary structures are also necessary to uphold the integrity of the judiciary by providing a mechanism in which complaints about unethical conduct by a judge may be received, investigated and determined. Disciplinary procedures should be based upon established standards of ethical conduct. In terms of best practice, the ENCJ, in its Report 2014-2015 Minimum Judicial Standards V Disciplinary Proceedings and Liability of Judges, recommended that judicial disciplinary procedures should be organised within the framework of an independent judicial, constitutionally established council or some similar independent institution. Matters of discipline, judicial ethics and the processing of complaints should fall under the authority of a Council for the Judiciary or other independent or autonomous body. Alternatively such matters may be dealt with entirely within the relevant judicial system. Such bodies should be composed of a substantial representation of judges elected by their peers. They should avoid self-interest and self-protection. The complaints process should incorporate a filtering mechanism so as to ensure that manifestly unfounded, frivolous or vexatious complaints are dismissed at the earliest opportunity.

(iii) Best practice for the promotion and support of judicial integrity must also contain measures by which councils for the judiciary, courts and judges maintain an open and transparent system of justice. The accountability of the judiciary is essential to gaining public trust and maintaining the credibility and integrity of the judiciary. In this respect, the ENCJ recommended that:

(1) The judiciary should be active in promoting understanding of its work.

(2) Sufficient information should be provided to the public and to the media to ensure that the public gains an accurate perception of the administration of justice;

(3) All bodies, including Councils for the Judiciary, should (a) provide periodic reports on how they have discharged their functions, and (b) publish such reports with a view to promoting the efficiency and quality of justice without jeopardising the independence of the judge’s decision-making.


Councils for the Judiciary should also monitor public confidence in the judiciary and promote measures to increase it.\(^6\)

(iv) As discussed in question one, it is essential to the integrity of the judicial position that a judge must recuse himself or herself from adjudicating a case where there is actual or perceived bias on the part of the judge. For example, in *Dublin Wellwoman Centre v Ireland* [1995] 1 ILRM 408 the Supreme Court held that a High Court judge ought not adjudicate in a case concerning access to abortion information as she had previously expressed support for the right of access to such information. Denham J. stated there was no suggestion of actual bias but that a judge should offer to recuse himself or herself where there was even an appearance of bias. This decision indicates the high standard of impartiality which is required.

(v) Also, individual cases should be assigned to individual judges by a mechanism that safeguards the independence of the judiciary and excludes the possibility of the predetermination of an issue. There should be an established and publicly available method of allocation of cases, governed by statute, regulation or judicial or administrative practice.\(^7\)

3. **What would you identify as best practice to prevent corruption within the judiciary? Do you have experiences with such practices? Which?**

(i) Judges’ remuneration should be sufficient to shield them from inducements aimed at influencing their decisions. In this regard, we would support the general principles to be drawn from the international sources which were outlined in the ENCJ 2015/2016 Report on *Funding of the Judiciary*, which was co-coordinated by the Courts Service of Ireland. These principles are:

- The remuneration of judges must remain at all times commensurate with their professional responsibilities, public duties and the dignity of their office.
- Remuneration must be entrenched constitutionally or guaranteed in law so as to preserve judicial independence and impartiality.
- All discussions and negotiations relating to judicial remuneration should involve the judiciary.
- The salaries of the judiciary should not be altered to their disadvantage after their appointment. An exception to the principle of non-reduction of salaries may be made at a time of economic crisis.

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\(^6\) Ibid.

\(^7\) Ibid.
difficulty if there is a general reduction of public service salaries and the judiciary is treated no differently.

- The remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses and non-financial benefits which include an element of discretion should be excluded.

- There should be provisions for the periodic review of judges’ remuneration to overcome or minimise the effect of inflation. Judges’ remuneration should provide appropriately for illness, maternity or paternity leave.

- Judges should receive pensions after their retirement, which should be adequate and should be in a reasonable relationship to their level of remuneration when working.

(ii) Delays in the delivery of justice cause opportunities for corrupt practices and the perception of corruption. Thus, as outlined in the response to question one, effective case management is required to ensure that cases are justly determined, at a proportionate cost and in a timely manner. Methods to achieve such results were recommended by the ENCJ as follows:

- Every Judiciary should set up a structure on how to establish methodologies for case management, including associated standards for the (average) duration of cases for specific categories of cases/jurisdictions. These structures should be guided by the judges and should allow for discussion with stakeholders such as lawyers.

- It is right to say that “justice delayed is justice denied”. Timeliness must, however, be balanced against other aspects of judicial performance. The quality of the decision-making should have the highest priority.

- Introduction of new technologies improves case management, access to justice, and the quality of justice. Judges, Councils for the Judiciary and all other stakeholders should proactively engage in these processes.

- To achieve timeliness in the delivery of justice, co-operation is required from the executive and legislative branches of government, Councils for the Judiciary, court administrations, judges and court staff, as well as advocates and prosecutors.
Changes in court practices proposed by Councils for the Judiciary and/or court administrations must always be evaluated by judges, so as to safeguard the independence of the judiciary.

Councils for the Judiciary should achieve timeliness by analysing the problems of their judicial system, identifying remedies, considering the impact of proposed remedies, and establishing methods to measure outcomes, before implementing remedial action.\(^8\)

(iii) As outlined in the response to question two, a complaint mechanism is essential to prevent judicial corruption. Structures should be in place for the investigation of complaints and where such misconduct is proved, the imposition of an appropriate sanction.

4. **What are the major threats, in your experience, to transparency and integrity and a non-corrupt judiciary?**

(i) Inadequate funding of the judiciary and resources to enable the judiciary to manage its functions properly is a threat to transparency, integrity and a non-corrupt judiciary. Access to justice and the right to fair proceedings are not properly guaranteed if a case cannot be considered within a reasonable time by a court that has appropriate funds and resources in order to perform efficiently. For example, in Ireland, the budgetary constraints have impacted on the supports provided to the judiciary and the courts particularly in relation to the development of IT systems and supports for the management of court business. The budgetary constraints have also impacted negatively on the funding of other initiatives which could benefit the court process e.g. the provision of expert reports in family law cases. As recognised by the ENCJ in its *Report on Funding of the Judiciary*, the implementation of cutbacks should not be done in a manner that undermines the independence of the judiciary, impedes access to justice or which supports ill-intentioned outside interventions.

(ii) Reductions in judicial remuneration pose a significant threat to judicial independence. In Ireland, Article 35.5 of the Constitution provided that the remuneration of a judge shall not be reduced during his continuance in office. The purpose of this article was to protect the independence of the judiciary from being undermined by the executive who might reduce a judge’s salary in response to an unfavourable judgment. However, in the context of general pay cuts to workers in response to a severe economic recession this provision

\(^8\) Ibid.
was amended by referendum to provide that the remuneration of judges may be subject to the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class. While this amendment received overwhelming support in a referendum it was criticised by some commentators as a dilution in the independence of the judiciary and an increase in the power of the executive.

Furthermore, at present, there is an unsatisfactory situation whereby judges at the same level are on different salary scales as a result of urgent action taken during the financial crisis. Following discussion with the judiciary it has been decided that this disparity will be gradually ended over the next five years so that equality of salary will be achieved within all levels of the judiciary in Ireland in accordance with their jurisdiction.

(iii) The process for judicial appointments is another area of threat to the transparency of the judiciary. A transparent appointments’ process, free from politicisation and based on integrity, impartiality and merit, is necessary. In Ireland, the appointment of judges is ultimately at the discretion of the government. The Judicial Appointments Advisory Board, which was established pursuant to the Court and Courts Officers Act, 1995, recommends suitable judicial candidates to the government though the Board does not rank its recommended candidates and their recommendations are not binding on the government. As noted by the Judicial Studies Review Committee in its Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process, the present system of judicial appointments in Ireland is unsatisfactory and a radical improvement is required to ensure the transparency of the judicial appointments process in Ireland. The Committee observed:

“It is increasingly clear that the relative success of the administration of justice in Ireland has been achieved in spite of, rather than because of, the appointment system. The system of judicial appointment in Ireland is by now demonstrably deficient, fails to meet international standards of best practice, and must be reformed if in more challenging times it is to achieve the objective of securing the selection of the very best candidates for appointment to the Irish judiciary and thus contributing

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to the administration of justice in a manner which will sustain and enhance public confidence.”

The Committee was firmly of the belief that the importance of having a system to select the best possible candidate, and generate public confidence that this is so, should be clear.

(iv) As recognised by international documents and instruments, a council for the judiciary or a similar independent body is essential for the protection of judicial independence. The absence of such is recognised as posing a major threat to the independence of the judiciary. There is no such body in Ireland at present and the Judicial Studies Review Committee recognised that the creation of a Judicial Council is a much needed reform to support the judiciary. The Committee recommended that a judicial council should be established forthwith in Ireland, with responsibility for representation of the judiciary, an independent disciplinary process, judicial education, and the judicial involvement in the appointment process.

\[\text{Ibid, p. 9.}\]
\[\text{Ibid.}\]