Questionnaire 2016 of the 1st Study Commission

Best Practice within the Judicial System for Ensuring

Transparency and Integrity and Preventing Corruption

A best practice is a method or technique that has consistently shown results superior to those achieved with other means, and that is used as a benchmark. In addition, a "best" practice can evolve to become better as improvements are discovered. The IAJ 1st Study Commission is trying to identify best practices within its member associations for ensuring transparency and integrity within the judicial system and to prevent corruption within the judicial system.

“It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” Transparency is a basic requirement so that justice can be seen to be done. Not only must the court proceedings be transparent to the public, but also the procedure of selecting judges and the administration of the judiciary.

Trust in the judiciary is a condition precedent in order that the judiciary can fulfill its important and distinguished role in a constitutional democracy.
governed by the rule of law. Prerequisite for trust in the judiciary is the integrity of judges. The IAJ Study Commission acknowledges the efforts of national judges’ associations in combating corruption and promoting the dignity and integrity of the profession. The main purpose of these efforts is to raise awareness of the reasons and consequences of judicial corruption and to enhance the highest standards of judicial conduct among judges.

Judicial corruption is defined by to mean: "all forms of inappropriate influence that may damage the impartiality of justice and may involve any actor within the justice system, including (but not limited to) judges, lawyers, administrative Court support staff, parties and public servants"

Bribery is defined as encompassing the:

a- Promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

b- The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for himself or herself or another person or

1 Lord Chief Justice Hewart in R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256.
entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

In preparation of the questionnaire 2016 the presidency of the 1st Study Commission decided to

a- identify possible aspects of the topic;

b- examine already existing opinions, statements etc. on these aspects;

and

c- formulate questions regarding the different aspects (taking into account already existing opinions, statements, etc)

d- Considering above-mentioned sources, discover how judicial corruption could be eliminated.

**a) Possible Aspects:**

1. What measures can be taken to safeguard transparency of court proceedings, selection of judges and administration of justice?

2. How political interference and bribery have appeared to be the most prevalent modes of corruption?

3. What is the role of the judicial appointment process on judicial corruption?
4. Where in the judicial process corruption is most likely to occur and in which types of cases, together with examples gathered from certain events?

5. What is the role of government in ensuring the existence of a truly clean and independent judiciary free of corruption?

6. How should judiciary or civil society react where the government or majority of politicians are manifestly corrupt?

7. What is the differences between those societies where the judiciary is trusted versus those where it is not?

8. What is the role of lawyers and intermediaries in corrupt transactions?

9. How to teach the importance of legal education to prevent jurists from engaging in corrupt practices

10. What kind of measures can be taken by international society, (judicial associations, institutions and government) when the majority of the state institutions have engaged in corrupt behaviour by abusing state resources and powers.

b) Existing Documents (Reports, Articles, Bulletins)

2- Judicial corruption fuels impunity, corrodes rule of law, says new
Transparency.

3- Combating Corruption in Judicial Systems Advocacy Toolkit

4- Independence And Impartiality Of Judges, Prosecutors And Lawyers


6- Corruption And Anti-Corruption In The Justice System

7- Innovative Anti-Corruption Reforms In The Judiciary

8- United Nations Activities Against Corruption In The Judiciary, Prosecution
And Law Enforcement Authorities


10-Opinion no. 3 (2002) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behavior and impartiality.
11-Opinion no.10 of the Consultative Council of European Judges (CCJE) 13

12-Consultative Council of European Judges (CCJE) Magna Carta of Judges (2010)14

13-IAJ 1st SC Conclusion 2004: Rules for the ethical conduct of judges, their application and observance15


**Relevant Legal Universal Instruments**


6 http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf

7 http://cjei.org/publications/mackay.html


11 http://www.ibanet.org/


14 https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707925
15 http://www.iaj-uim.org/site/modules/mastop_publish/?tac=44.

- “The International Covenant on Civil and Political Rights”, 1966
- “Guidelines on the Role of Prosecutors”, 1990
- “Basic Principles on the Role of Lawyers”, 1990
- “United Nations Convention against Corruption”, 2003
- “Mechanism for the Review of Implementation of the United Nations Convention against Corruption”
- “Open-ended Workshop on International Cooperation Between Public International Organizations and States Parties” Vienna, 2009
- “Anti-Corruption Network Istanbul Action Plan”
- “ACN Work Programme for 2013-2015”.

Regional Instruments
- The American Convention on Human Rights, 1969
- The European Convention on Human Rights, 1950
- Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges.

21 http://www.oecd.org/corruption/acn/istanbulactionplan/

QUESTIONS

Could you please provide answers to these questions by 20 June 2016 for discussion by the First Study Commission at the next annual meeting of the IAJ:

1. What would you identify as best practice to safeguard transparency of

a) court proceedings

   Under the Japanese Constitution, trials shall be conducted and judgment shall be
declared publicly (Article 82, Paragraph (1)) and exceptionally, only the trials, excluding trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of the Constitution are in question, may be conducted privately where a court unanimously determines publicity to be dangerous to public order or morals (Article 82, Paragraph (2)).

In this way, the Constitution prevents judicial proceedings from being taken in secret by publishing important parts of judicial proceedings, admitting the right of the citizens to observe the proceedings, and limiting cases of private proceedings to extremely exceptional ones. This is an extremely basic and important system to guarantee a fair trial and the transparency of judicial proceedings has been ensured under this system.

b) selection of judges

In Japan, justices and judges are appointed through the following procedures.

The Chief Justice of the Supreme Court shall be appointed by the Emperor as designated by the Cabinet (Article6, Paragraph(2) of the “Constitution”, Article39, Paragraph (1) of the “Court Act”). Other justices of the Supreme Court shall be appointed by the Cabinet (Article79, Paragraph(1) of the “Constitution”, Article39, Paragraph (2) of the “Court Act”).

Judges of lower courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court (Article80, Paragraph (1) of the “Constitution”, Article40, Paragraph (1) “Court Act”). In order to secure judiciary independence, the Supreme Court is vested with the power to nominate candidates for lower court judges.

The nomination of lower court judges, except for Summary Court judges, is done in consultation with the Advisory Committee for the Nomination of Lower Court Judges and is determined in consideration of the committee’s opinions(Article3 of the “Rules of the Advisory Committee for the Nomination of Lower Court Judges”). The Advisory Committee for the Nomination of Lower Court Judges has been established as a body to state opinions from a national perspective and multilateral viewpoint, so
as to enhance the transparency of the judge nomination process and have public views reflected in such a process. The committee is composed of the three categories of legal professionals (judges, public prosecutors, and attorneys) and persons with relevant knowledge and experience. Its duty is to examine the appropriateness of the nomination of prospective lower court judges when consulted by the Supreme Court and to report the results of such examination (Article 2).

As stated above, by establishing an organ that states its opinion with the mindset of the general public and from a diversified perspective to reflect public opinion, the transparency of the process of appointing judges has been ensured.

c) administration of the judiciary?

The Act on Access to Information Held by Administrative Organs has been enacted in Japan for the purpose of “ensuring to achieve accountability of the Government to the citizens for its various activities and to contribute to the promotion of a fair and democratic administration that is subject to the citizens’ appropriate understanding and criticism” (Article 1 of the Act).

The abovementioned Act does not directly apply to the courts of Japan, but if there is a request for disclosure of documents of judicial administration held by a court of Japan, the court shall disclose such documents of judicial administration to anyone as a part of judicial administration facilities based on the purport of the Act (Part 2-1 of the “Outline of Handling of Affairs Concerning Disclosure of Documents of Judicial Administration Held by Courts”).

This sort of system is useful to protect the transparency of judicial administration affairs, since the accountability to the citizens is achieved with respect to the judicial administration affairs handled by the courts, and it also indirectly contributes to the promotion of fair judicial administration affairs.

Do you have experiences with such practices? Which?

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

Under the Constitution, judicial power is vested in courts in its entirety (Article 76, Paragraph (1) of the Constitution) and administrative organs shall not be given final judicial power (Article 76, Paragraph (2)). Further, judicial administration power shall be vested in the Supreme Court and the personnel affairs of a court and the operation of budget are conducted by the court itself. In this way, the independence of the judicial power has been strongly guaranteed.

Moreover, it has been prescribed that “All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws” (Article 76, Paragraph (3)), independence of judges in the exercise of authority is guaranteed and the status of judges is fully guaranteed to secure the independence of judges in the exercise of authority.

There is no legislation in Japan that specifies the tenure of justices of the Supreme Court, except that the appointment of these justices shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment and at the subsequent general elections to be held every ten years (Article 79, Paragraph 2-4).

A justice of the Supreme Court may be dismissed as a result of a review by the people when the majority of the voters favour the dismissal of the justice. However, no justice of the Supreme Court has been dismissed through such a review so far.

Judges of lower courts shall hold office for a term of ten years and may be reappointed (Article 80, Paragraph 1). The appointment of judges of lower courts, including reappointment thereof, is consulted with the Advisory Committee for the Nomination of Lower Court Judges. They are usually reappointed unless there are special circumstances such as they are clearly unsuitable as judges in light of the duties thereof.

The Constitution of Japan provides that judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their term of
office(Article 79, Paragraph(6), and 80, Paragraph(2)). The specific amount of judges’
salaries is prescribed by brackets under the Act on Remuneration of Judges, and the
salary bracket to be applied to each judge (including an increase in salary) shall be
determined by the Supreme Court. In consideration of their grave responsibility and
mission, the salary level applied to judges is set higher than that for public officials in
administrative duties, and it is sufficient to secure the livelihood of judges.

As stated above, the integrity of judges has been supported by the guaranteed
independency of judicial power and guaranteed status and remuneration of judges.

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

As answered in Section 2 above, the independency of judicial power and
independency of judges in the exercise of authority have been guaranteed for judges,
and thereby a system under which judges who play a key role in legal procedures are
not subject to unjustifiable internal or external interference has been secured.

In Japan, only those who have passed a certain qualification examination and
undergone an advanced specialized training for a certain period of time shall be
qualified as judges, public prosecutors or lawyers who play roles in the judicial process
so that a virtuous person who has advanced general learning and basic grounding in
judicial affairs engages in judicial affairs (Articles 66 and 67 of the Court Act).

Moreover, the Penal Code of Japan has provisions to punish public official who
accept or give bribes (Articles 197 and 198).

As mentioned above, the establishment by the Constitution or other acts of the
system to inhibit or prohibit judicial personnel concerned from being inappropriately
affected leads to the prevention of corruption of judicial system.

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

In general, an unjustifiable internal or external interference is considered as a threat to the integrity of judges and corruption-free judicial system. As explained above, the existence of the provisions of the Constitution under which the independence of judicial power and independence of judges in the exercise of authority are guaranteed is an important countermeasure against such threat, and experience shows that it is not seen as a specific threat in Japan.

Please send your answers – not later than 20 June 2016 – to the board of the

First

Study Commission: first_sc@iaj-uim.org