

**Report of the IAJ 1st Study Commission on measures to promote integrity and combat corruption
within the judiciary**

The Hon Justice RG Atkinson AO, Supreme Court of Queensland, Australia

Distinguished colleagues,

It is a pleasure to address you on these issues in this beautiful city of Mexico City where we have been made to feel so welcome and where the President of Mexico has announced at this conference a number of reforms particularly to the criminal justice system of this country; and it is an honour to address you on behalf of the First Study Commission with regard to our conclusions on this important topic.

Introduction

Recent events in Turkey involving the arbitrary detention and dismissal of judicial officers represent the antithesis of the conditions necessary for a stable, independent system for the administration of justice. Those events highlight the importance of the issues raised by the First Study Commission and the promotion of practices to protect the values of equal, fair and non-corrupt judicial decision-making.

As a preliminary matter to the discussion of integrity and anti-corruption measures, the view of the First Study Commission is that there are two important preliminary matters. The first is that the appointment of judges must be transparent and merit-based to endeavour to ensure that those appointed are not corrupt nor susceptible to corruption and the second is that there must be transparency in court proceedings to ensure public confidence.

Supporting Integrity and Preventing Corruption

Key Themes

Three main themes emerged in relation to this issue. First, the Study Commission believes that there must be secure and adequate working conditions for judges. Second, there should be ongoing judicial education that reinforces standards of appropriate conduct. Third, many jurisdictions contributed to desirable approaches for responding to complaints of judicial misconduct.

As regards judicial conditions, judicial salaries, pensions and entitlements should be reasonably generous, in order to reduce the likely effectiveness of bribery.¹ These conditions should be safeguarded from reduction by the executive during the tenure of the judge, in order to avoid threats to judicial independence.² Similarly, judges should have security of tenure.³ One respondent reflected on the importance of the judicial office holding high social status or

¹ Armenia; Australia; Austria; Croatia; Denmark; France; Georgia; Germany; Ireland; Liechtenstein; Sweden; United Kingdom. France also noted that judicial remuneration should not be fixed and not associated with performance metrics (“quantitative results”). Norway indicated that a judge’s salary and pension should reflect the judge’s responsibilities and position.

² Australia; France; Georgia; Ireland; Liechtenstein; Japan; United Kingdom. Greece advocated for the establishment of an institutional framework that made provision for all aspects of judicial functioning, including working conditions, salaries and pensions. Israel proposed that financial benefits should be paid directly to the judge, but not as an “employee”, to ensure judges are not perceived as beholden to the executive.

³ Australia; Greece; Ireland; Italy; Japan; Liechtenstein; United Kingdom.

esteem, the loss of which might act as a deterrent to poor conduct.⁴ A problem arises with regard to whether there should be exceptions to the protection of judicial salaries in a time of significant national economic difficulty.⁵ If so, an exception to the principle of non-reduction of salaries may only be made at a time of severe economic difficulty if there is a general reduction of public service salaries and the judiciary is treated no differently.⁶ Finally, there was a clear indication from one respondent that the current state of judicial working conditions (in particular, salary level) is inadequate in that jurisdiction.⁷

In relation to judicial education and support, the Study Commission endorses that this occur upon appointment to the judiciary and for it to be ongoing and include education for leadership. Specific recommendations include the use of courses (potentially delivered through a National Judicial Council, if established);⁸ workshops/seminars covering topics such as conflict of interest, receipt of gifts, etc.;⁹ and, in particular, the discussion of case scenarios on such topics.¹⁰ The Commission endorses the judicial-led development of a code or principles of ethical conduct, incorporating practical advice on appropriate responses to ethical issues, which could be referenced in ongoing judicial education activities, updated to deal with contemporary circumstances such as the use of social media.¹¹ Indeed, the process of judges working together to develop a code of ethics is valuable in itself.¹² Other suggestions accepted by the Commission refer to the value of advisory or guideline opinions being produced on issues relating to ethics or integrity by a special judicial body (e.g., a Judicial Commission made up only of judges) and the use of structured debates on those issues.¹³ In addition to formal or structured support of ethical conduct, the Study Commission emphasises the importance of peer group support within the judiciary, where colleagues can feel comfortable sharing experiences and can receive confidential counsel in relation to any concerns they may have.¹⁴

The Study Commission supports an emphasis on the importance of fostering a culture of integrity within the judiciary and the courts more generally.¹⁵ Informal discussion between judges is often a very good way to encourage that culture. The Commission endorses the practice of declaring conflicts of interest and the avoidance or declaration by judges of any affiliation with public causes which might engender a perceived or actual conflict.¹⁶ If there is any doubt, the judge should formally consult with the judge's colleagues about the issue. Some

⁴ United Kingdom.

⁵ Ireland.

⁶ Ireland, citing the ENJ 2015/2016 *Report on Funding of the Judiciary*.

⁷ Armenia. Georgia suggested that there may have been a connection between increases in judicial salaries, along with tighter controls on corruption, and the reduction in corrupt practices in that country since these measures were introduced in 2004.

⁸ Australia; Bermuda; Brazil; Canada; Denmark; Georgia; Ireland; Israel; Italy; Sweden; Switzerland.

⁹ Armenia; Bermuda; Croatia; Denmark; Israel; Italy; Slovenia.

¹⁰ Portugal. Serbia refers to the organisation of debates on matters concerning judicial integrity.

¹¹ Bermuda; Brazil; Croatia; Denmark; France; Georgia; Germany; Ireland; Israel; Italy; Liechtenstein; Norway; Portugal; Serbia; Slovenia; United Kingdom.

¹² Switzerland.

¹³ Portugal; Serbia; Slovenia.

¹⁴ Australia; Canada; Croatia; Denmark; Germany; Israel; Liechtenstein; Slovenia; Sweden. France referred favourably to judges having an avenue for seeking advice from an independent, experienced body about any ethical issues they might have.

¹⁵ Australia; Germany. Denmark referred to a longstanding tradition of fostering integrity in its public officials, where merit-based appointments stand in the face of attempts to secure positions by rank or bribery.

¹⁶ Australia; Bermuda; Georgia; Israel; Liechtenstein; Spain; Sweden; Taiwan. Israel expressed the view that private work should only be undertaken by judges if special permission is sought and granted.

countries have a private register of a judge's assets and income and others a public register of the judge's assets and the assets of the other members of the judge's household. The majority of the members of the Commission do not support the necessity for any register to be made public unless there is justified suspicion of misconduct of the individual judge or of the judiciary as a whole in that country. The Commission accepts that it would be a good measure to prevent corruption but stresses that such measures are only acceptable where required by the concrete circumstances and that the measures must be proportionate to the situation that exists. Therefore, if there is no suspicion of corruption of a single judge or of the judiciary in general, a register of assets and income of judges would be disproportionate to the reduction of the judge's privacy and personal security. The Commission opposes any requirement for a judge to reveal that a judge is a member of a judicial association as this information could be misused in some countries to unfairly discriminate against the judge or the association.

There should be appropriate decorum in the interaction between judges and other members of the legal profession, such that breach of formal protocols in the form of inappropriate familiarity (which could be or suggest corrupt practice) would be noticeable.¹⁷ Judges must conform to the highest standards and avoid any inappropriate behaviour in their public and private lives. Being a judge is an obligation to society and not only a job, but a way of life.¹⁸ Finally, the Study Commission endorses that the obligation of judges to take an oath to adhere to the fundamental principles of independence and impartiality has more than just ceremonial significance; it is an important practical step in ensuring a culture of independence and integrity be maintained.¹⁹

With regards to establishing a system to handle complaints of misconduct made against judges, the Study Commission expresses the view that the body which deals with complaints should be independent of the executive and legislative branches of government.²⁰ The Commission expresses the view that to increase transparency and therefore public confidence, one approach, which is generally supported, would be to make the body partly external to the courts.²¹ There should be strict treatment of ill-founded complaints against judges;²² judges should have an obligation to report witnessed corruption or attempts to corrupt;²³ and "sanctions" should be imposed on judges who are subject to well-founded complaints.²⁴ As to what any sanctions imposed might be, some respondents referred to suspension or removal from office by the executive or the legislative body when very serious complaints (e.g., of corruption) are made

¹⁷ Australia.

¹⁸ Israel. See also Georgia, which noted that judges should act in a manner that promotes public confidence in their integrity.

¹⁹ Bermuda; Israel; Italy.

²⁰ Australia; Brazil; Croatia; Georgia; Germany; Ireland; Portugal; Slovenia. Bermuda noted that although the Head of the Civil Service has overall disciplinary responsibility, as an incidence of judicial independence the Registrar of the Courts is operationally responsible for discipline in that jurisdiction. Bermuda also noted an important step in promoting ethical conduct in that country was the voluntary adoption by the judiciary of a Judicial Complaints Protocol to facilitate judicial conduct complaints being made to the judicial and Legal Services Committee for conduct falling short of the constitutional threshold for removal from office.

²¹ Australia. Germany supported an independent prosecution service prosecuting cases of judicial corruption.

²² Croatia; Slovenia.

²³ Austria.

²⁴ Brazil; Croatia; Ireland; Spain; United Kingdom.

out.²⁵ The penal or criminal codes should apply to judges for corrupt behaviour or behaviour outside their judicial work, in the same way they would be applied to any other citizen.²⁶

Other Suggestions

The Commission noted that it might be useful to have matters decided by panels of judges, rather than individual judges, as it is easier to corrupt one judge than a number of judges and it can protect individual judges against unfair criticism.²⁷ It was noted that the availability of requesting an *en banc* hearing of the case was a useful protocol.²⁸

Threats to Integrity & Non-Corruptibility

Key Themes

Many of the major threats identified are implicit from the suggested best practice procedures identified for resolving them.²⁹ However, two threats, in particular, were explicitly identified.

The first key threat relates to court resourcing. This could manifest as inadequate working conditions for judges, potentially increasing their susceptibility to bribes.³⁰ It could also manifest as inadequate resourcing of the court system more generally and an excessive workload for judges.³¹ Finally, it might manifest in a lack of financial independence for the courts and the opportunity for the Executive to abuse its power by using decisions around funding as a threat to secure or influence a particular court outcome.³²

The second key threat identified by the Study Commission relates to attempts by external parties to exert influence over the exercise of judicial functions. There is a particular threat attendant upon excessive proximity between judges and those who exercise political or economic power.³³ The politicisation of judicial appointments is a particular area of concern.³⁴ The Study Commission also expressed concern about corrosive commentary by politicians or

²⁵ Australia; Brazil; Ireland; Israel; Portugal; Spain.

²⁶ Denmark; Germany; Israel; Japan; Spain. Bermuda refers to a specific provision in its Criminal Code making judicial corruption an offence punishable by a fine or imprisonment.

²⁷ Austria; Switzerland.

²⁸ Switzerland. A case is heard 'en banc' if it is heard by all available judges of the court and not just a subset.

²⁹ Serbia's response to this item illustrates the point well by denoting the following as threats, in counterpoint to its best practice suggestions: interference by the executive and legislative branches of government in the operations of the judiciary; lack of argumentation leading up to decisions affecting the judiciary such as selection and advancement of judges; absence of a judicial code of conduct; lack of training for judges on integrity and corruption; inadequate working conditions for judges; and, more broadly, lack of systemic measures for prevention of corruption.

³⁰ Armenia; Austria; Denmark; France; Ireland; Israel; Portugal; Sweden; Switzerland; United Kingdom. The threat Taiwan refers to, of illegal lobbying through offers of money or sexual favours, would be more pronounced if judges were poorly remunerated.

³¹ Austria; Denmark; France; Georgia; Ireland.

³² Georgia; Greece; Ireland; Switzerland; United Kingdom.

³³ Austria; Brazil; France; Greece; Portugal. France referred specifically to concerns expressed by the European Court of Human Rights regarding the lack of independence of French prosecutors, who are appointed, transferred and promoted by the Executive.

³⁴ Australia; Ireland.

the media, seeking to influence the determination of cases.³⁵ The Commission identified pressure to conform to a particular ideological view, backed with vigorous press reporting, as an insidious threat which is as much a threat to the integrity of the judiciary as bribery or secret representations.³⁶ Related to this is the concern about inaccurate publicity of court sessions³⁷ and the impact of social media.³⁸

Other Threats

The Commission identified other sources of threat to judicial integrity.

One source of threat was expressed to be the conditions of the society in which the court system operates. For instance, increased consumerism and the rise of a ‘society of celebrities’ (in which fame is seen as valuable in and of itself) will likely mean that members of that society, from which judges are not a world apart, will be more susceptible to personal temptations.³⁹ Another example raised was that wide-scale corruption in daily life, especially in politics, can have a flow-on effect to the operation of the courts,⁴⁰ perhaps because such behaviour can become normalised.

Another potential source of concern relates to the recruitment of judges and allocation of cases. The process must be consistent, merit based, open and transparent. If the status of the judicial office is decreased, the result may be a reduction in the number of high-quality lawyers who choose to accept appointment as judges.⁴¹

Conclusion

It is heartening that so many written responses to the Study Commission indicated that judicial corruption is not presently a problem for their jurisdiction. It is equally heartening that there is no indication that this positive status was being taken for granted. Steps to improve the transparency of the court system along with the implementation of measures to support and enhance the integrity of judges should continue to be examined and, where appropriate, put into practice, in order to reduce the risk of corrupt behaviour by judicial officers into the future.

Topic for 2017

The topic for next year is “The Threats to the Independence of the Judiciary and the Quality of Justice: workload, resources and budgets.”

New Officers elected

President: Roslyn Atkinson AO (Australia)

³⁵ France; Portugal; Slovenia; United Kingdom. Canada referred to the issue of micro-management by government and the media, particularly where the judiciary is not in a position to make public comment on the issues raised. Japan referred to the threat of ‘unjustifiable internal or external interference.’

³⁶ United Kingdom.

³⁷ Georgia.

³⁸ Canada.

³⁹ Brazil; France.

⁴⁰ Germany.

⁴¹ Sweden.

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The First Study Commission expressed its thanks to Peter Hall for his leadership as President of the Study Commission.