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 1stStudy 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."[1] 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 1st 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[2] 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.

2 IBA Judicial Integrity Initiative - Survey

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)

1- International report Transparency International' s Global Corruption Report 2007[3]

2- Judicial corruption fuels impunity, corrodes rule of law, says new Transparency[4]

3- Combating Corruption in Judicial Systems Advocacy Toolkit[5]

4- Independence And Impartiality Of Judges, Prosecutors And Lawyers[6]

5- Judicial Ethics: Exploring Misconduct and Accountability For Judges[7].

6- Corruption And Anti-Corruption In The Justice System[8]

7- Innovative Anti-Corruption Reforms In The Judiciary[9]

8- United Nations Activities Against Corruption In The Judiciary, Prosecution And Law Enforcement Authorities[10]

9- IBA REPORTS: Minimum Standards of Judicial Independence, 1982; IBA Standards for the Independence of the Legal Profession, 1990; IBA statement of General Principles for Ethics of Lawyers; IBA Resolution on Non-Discrimination in Legal Practice; IBA paper Judicial Corruption Identification, Prevention and Cure of 14 April 2000[11].

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[12]

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 observance[15]

14-Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia , OECD Anti-Corruption Network for Eastern Europe and Central Asia[16].

Relevant Legal Universal Instruments

3https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/TIglobalcorruptionreport07_complete_final_EN.pdf

4http://www.transparency.org/news/pressrelease/20070523_judicial_corruption_fuels_impunity_corrodes_rule_of_law_says_report

5http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judiciary_Advocacy_ToolKit.pdf

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

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

8 http://www.kas.de/wf/doc/kas_22459-1522-1-30.pdf?110411094607

9http://www.transparency.org/files/content/corruptionqas/Innovative_anticorruption_reforms_in_the_judiciary_2014.pdf

10 http://www.unafei.or.jp/english/pdf/RS_No80/No80_28VE_Park.pdf

11 http://www.ibanet.org/

12 https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2002)OP3.

13 https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2007)OP10

14 https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707925

15 http://www.iaj-uim.org/site/modules/mastop_publish/?tac=44.

16http://www.oecd.org/corruption/acn/ACN-Prevention-Corruption-Report.pdf ; http://www.oecd.org/corruption/acn/

- "The International Covenant on Civil and Political Rights", 1966
- "Basic Principles on the Independence of the Judiciary", 1985
- "Guidelines on the Role of Prosecutors", 1990
- "Basic Principles on the Role of Lawyers", 1990
- "United Nations Convention against Corruption", 2003[17]
- "Mechanism for the Review of Implementation of the United Nations Convention against Corruption"[18]
- "Open-ended Workshop on International Cooperation Between Public International Organizations and States Parties" Vienna, 2009[19]
- "Strengthening Judicial Integrity Against Corruption ; Global Programme Against Corruption Conferences"; "United Nations Global Programme against Corruption, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention", Vienna, 2000[20].
- "Anti-Corruption Network Istanbul Action Plan"[21]
- "ACN Work Programme for 2013-2015"[22].

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
- 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.

17 http://www.unodc.org/unodc/en/treaties/CAC/index.html

18 http://www.unodc.org/unodc/en/treaties/CAC/IRG.html

19

http://www.unodc.org/unodc/en/treaties/CAC/bribery-of-officials-of-public-internationalorganizations.

html

20https://www.unodc.org/documents/nigeria//publications/Otherpublications/Strengthening_Judicial_Integ

rity_Against_Corruption_2001.pdf

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

22 http://www.oecd.org/corruption/acn/ACNWorkProgramme2013-2015_EN.pdf

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. (Article79, 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(Article80, 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(Article79, 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

質問

次回の IAJ 第１研究委員会定例会議において，議論するため，以下の質問の答えを２０１６年６月２０日までに用意してください。

1　以下の透明性を保護するのに，最もよい手法（ベストプラクティス）は何だと思いますか？

a）裁判手続

（回答）

我が国では，憲法上，裁判の対審及び判決は，公開法廷で行うものとされており（８２条１項），例外的に，政治犯，出版に関する犯罪又は憲法第３章で保障する国民の権利が問題となっている事件以外の事件の対審のみについては，裁判所が裁判官の全員一致で，公の秩序又は善良の風俗を害するおそれがあると決した場合に，公開しないでこれを行うことができるとされている（同条２項）。

このように，憲法は，裁判手続の重要な部分について公開し，国民の傍聴の自由を認め，非公開とする場合をきわめて例外的な場合に限定することで，裁判手続が秘密裡に行われることを防止している。これは，裁判の公正を保障するうえでは極めて基本的かつ重要な制度であり，これによって，裁判手続の透明性が確保されている。

b）裁判官の選任

（回答）

我が国における裁判官の任命手続は，以下のようになっている。

最高裁判所長官は，内閣の指名により，天皇が任命する（憲法６条２項，裁判所法３９条）。長官以外の最高裁判所裁判官は，内閣が任命する（憲法７９条１項，裁判所法３９条２項）。

下級裁判所の裁判官は，最高裁判所の指名した者の名簿によって，内閣が任命する（憲法８０条１項，裁判所法４０条１項）。このように司法府の自主性を保障するため，下級裁判所裁判官については，最高裁に指名権が認められている。

簡易裁判所判事を除いて，下級裁判所の裁判官の指名については，下級裁判所裁判官指名諮問委員会に諮問し，その答申を踏まえて行われている（下級裁判所裁判官指名諮問員会規則３条）。同委員会は，平成１５年（２００３年）５月に設置されたもので，法曹三者及び学識経験者により構成され，最高裁判所の諮問に応じ，下級裁判所の裁判官の指名の適否について審議し

て，その結果を答申している（同規則２条）。

以上のとおり，国民の意見を反映させるため，国民的視野に立って多角的見地から意見を述べる機関を設置することで，裁判官の指名過程の透明性を確保している。

c) 司法行政事務

（回答）

我が国では，「政府の有するその諸活動を国民に説明する責務が全うされるようにするとともに，国民の的確な理解と批判の下にある公正で民主的な行政の推進に資すること」を目的として，行政機関の保有する情報の公開に関する法律が定められている（同法１条）。

上記の法律は，我が国の裁判所に直接適用されるものではないが，我が国の裁判所では，上記の法律の趣旨を踏まえ，司法行政上の便宜供与の一環として，保有する司法行政文書の開示の申出があった場合は，何人に対しても，当該司法行政文書を開示するものとしている（「裁判所の保有する司法行政文書の開示に関する事務の取扱要綱について」第２の１）。

このような制度は，裁判所が取り扱う司法行政事務について，国民に対する説明責任を果たすものであり，また，間接的にも公正な司法行政事務の推進に資するものであるから，司法行政事務の透明性の保護に役立っている。

２　裁判官の清廉性を支え，促進するために最もよい手法は何だと思いますか？このような手法を用いた経験がありますか？どの手法ですか？

（回答）

我が国では，憲法上，司法権はすべて裁判所に属するものとされ（憲法７６条１項），行政機関による終審裁判が禁止されている（同条２項）ほか，司法行政権が最高裁判所に属するものとされ，裁判所の人事，予算等の運営が裁判所自身によって自主的に行われるなど，司法権の独立が強く保障されている。

また，「すべて裁判官は，その良心に従ひ独立してその職権を行ひ，この憲法及び法律にのみ拘束される。」（憲法７６条３項）と規定され，裁判官の職権行使の独立の保障がうたわれており，裁判官の職権行使の独立を担保するため，裁判官の身分保障が十分に図られている。

最高裁判所裁判官は任期の定めがないが，任命後初めて行われる衆議院議員総選挙の際に（その後１０年を経過した後初めて行われる総選挙の際も同じ。），その任命について国民審査を受ける（憲法７９条２項から４項）。投票者の多数が裁判官の罷免を可とするときは，その裁判官は罷免される

が，これまで国民審査により罷免された最高裁判所裁判官はいない。

下級裁判所裁判官の任期は，憲法上，１０年間と定められており，再任されることができる（憲法８０条１項本文）。再任についても，任命の場合と同様に下級裁判所裁判官指名諮問委員会に諮問されているが，職務上裁判官に相応しくないことが顕著であるなどの特段の事情がある場合を除いて，再任されるのが通常である。

憲法上，裁判官が定期に相当額の報酬を受けることと在任中報酬を減額できないことが規定されている（憲法７９条６項，８０条２項）。裁判官の報酬等に関する法律により，具体的な報酬額が決められており，各裁判官が受ける報酬（昇給を含む。）は，最高裁判所が定めるものとされている。裁判官の担う重責と使命を考えて，行政職公務員よりも高い報酬水準が定められており，裁判官の生活を保障するのに十分なものといえる。

以上のとおり，司法権の独立が保障され，裁判官の身分及び報酬が保障されていることが，裁判官の清廉性を支えている。

3　司法制度における腐敗の防止のための最もよい手法は何だと思いますか？このような手法を用いた経験がありますか？どの手法ですか？

（回答）

前記２の回答のとおり，我が国の裁判官については，司法権の独立や裁判官の職権行使の独立が保障されており，これによって，制度上，司法運営の中核的存在たる裁判官が外部的又は内部的な不当な干渉を受けないような制度が確保されている。

また，我が国においては，高潔な人格を有するとともに，高度の一般的教養と法律的素養を身に付けた者が司法に携わるよう，その直接の担い手である裁判官，検察官及び弁護士については，一定の資格試験に合格し，一定期間の高度の専門的修習を経た者にのみその資格を与えるものとしている（裁判所法６６条，６７条）。

さらに，我が国の刑法は，公務員一般について，贈収賄を処罰する規定（１９７条ないし１９８条）を設けている。

このように，憲法や法律で，司法関係者が不適当な影響を受けることを抑止・防止する制度を設けていることが司法制度の腐敗の防止につながっている。

4　あなたの経験の中で，透明性や清廉性や腐敗のない司法制度を脅かす主な脅威は何ですか？これらの脅威にどのように対抗しますか？

（回答）

裁判官の清廉性や腐敗のない司法制度を脅かす脅威としては，一般的に，外部的又は内部的な不当な干渉などが考えられる。これらの脅威については，既に説明したように，司法権の独立や裁判官の職権行使の独立を保障した憲法規定の存在が重要な対抗手段となり，我が国の経験上，具体的な脅威として感じられるものではない。

Second Study Commission

Civil Law and Procedure

2016 Questionnaire

59th Annual Meeting of IAJ – Mexico City (Mexico)

CLASS ACTIONS

In Barcelona (Spain), we decided that in 2016, our Second Study Commission will focus on class proceedings. We have limited the questionnaire to five questions and we expect to receive short but concise answers.

1. Do you have class proceedings in your jurisdiction? If so, what is the nature of those class proceedings?

There are court proceedings for redress for damages prescribed in the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers as proceedings similar to class action proceedings. This Act will be enforced on October 1, 2016.

This system establishes two-stage proceedings to achieve collective redress for damage incurred by consumers in consideration of the characteristics of consumer damage that the damage of the same type diffusely and frequently arises.

2. What are the advantages or disadvantages to class action proceedings in your jurisdiction?

The advantages of court proceedings for redress for damage are, (i) the effort and cost for redress for consumer damage decrease and (ii) a dispute may be resolved more quickly and collectively than individual litigations by each consumer.

On the other hand, the disadvantages of this system are not particularly seen at present and it may be pointed out that the subject cases are limited.

3. Is there an access to justice component to class action proceedings in your jurisdiction?

Court proceedings for redress for damage are proceedings for bringing an action to the courts and access to justice has been established.

4. How is case management achieved in class proceedings in your jurisdiction?

In principle, the court proceedings for redress for damage shall be conducted by the Specified Qualified Consumer Organization certified by the Prime Minister as a party, instead of individual consumers. Therefore, cases are managed by considering such organization as a party.

5. If you do not have class action proceedings, how are the cases involving a large quantity of victims or involving a group of individuals with a collective interest dealt with?

An action may be brought for cases in which a large number of victims or a group of individuals associated with collective interests are involved instead of using the court proceedings for redress for damage.

In such cases, if a large number of victims collectively bring an action, the action the parties to which are such victims will be pending before a court and litigation proceedings will be carried out. On the other hand, even if it is a case in which a large number of victims are involved, if only some of such victims bring an action as a plaintiff, other victims are not treated as parties to such action.

第２研究委員会
民事法と手続
２０１６年質問票
第５９回ＩＡＪ中央評議会ーメキシコシティ（メキシコ）

クラスアクション
（集団訴訟）

バルセロナ（スペイン）において，我々第２研究委員会は，２０１６年の会議においてクラスアクション手続に焦点を当てることを決定した。我々は，質問票を５つの質問に限定し，短くかつ簡潔に回答がなされることを期待する。

１．　貴国の司法制度には，クラスアクション手続はありますか。もしあるとすれば，それらの手続はどのような性質のものですか。

（答）クラスアクション手続に類似する手続として，「消費者の財産的被害の集団的な回復のための民事の裁判手続の特例に関する法律」が定める被害回復裁判手続がある。この法律は，２０１６年１０月１日に施行される。

この制度は，同種の被害が拡散的に多発するという消費者被害の特性に鑑み，消費者被害の集団的な回復を図るための二段階型の手続を設けたものである。

２．　貴国の司法制度におけるクラスアクション手続の便利な点，あるいは不便な点は何ですか。

（答）被害回復裁判手続の便利な点としては，①消費者被害の回復の労力・費用が低減する点，②消費者がそれぞれ個別に訴訟するよりも紛争を迅速にまとめて解決できる点がある。

他方で，現時点でこの制度の不便な点は特段見当たらないが，対象となる事案が限定されていることが指摘されることがある。

３．　貴国の司法制度におけるクラスアクション手続に関して，司法アクセスの面は整備されていますか。

（答）被害回復裁判手続は，裁判所に対して訴訟提起等をする手続であり，司法へのアクセスは整備されているといえる。

4．　貴国の司法制度におけるクラスアクション手続における事件管理はどのようになされていますか。

（答）被害回復裁判手続は，基本的には，個々の消費者ではなく，内閣総理大臣の認定を受けた特定適格消費者団体が当事者となって手続を追行するものである。そのため，当該団体を当事者として事件管理がされる。

5．　もし貴国においてクラスアクション手続がなかった場合，多数の被害者や集団的利害を伴う個人のグループが関わる事件はどのように扱われていますか。

（答）被害回復裁判手続を用いることなく，多数の被害者や集団的利害を伴う個人のグループが関わる事件について訴訟提起される場合がある。

この場合，当該多数の被害者が集団で訴訟提起をすれば，これらの者を当事者とする訴訟が裁判所に係属し，訴訟手続が進められることとなる。他方で，多数の被害者が関わる事件であっても，そのうちの一部の者のみが原告として訴訟提起した場合には，他の者は当該訴訟の当事者として扱われない。

Third Study Commission Questionnaire

For 2016

For 2016, the Third Study Commission, which focuses on Criminal Law, decided to study "The Sentencing of Criminal Offenders."
That is, we decided to critically examine one of the most important and difficult tasks that a judge performs, namely the imposition of a sanction upon a person who has violated a criminal law.
Of course, the range of sanctions available is very broad, and is driven by many factors. These include, but are not limited to, the seriousness of the crime, the impact of the crime on victims, the need to promote respect for the Rule of Law, the personal characteristics of the perpetrator, and the goal of achieving justice.
In order to facilitate discussion, provoke thinking, and to assist us in learning from colleagues, we ask that each country answer the following general questions:

1. In your country, do judges have broad discretion in choosing a sanction, or are the available sanctions limited by law, guidelines or regulations such as mandatory minimum sentences?

The Penal Code of Japan prescribes the upper limit and lower limit of the statutory penalty and judges may determine sentences depending on the case within the extent of the upper limit and lower limit of the statutory penalty. However, since unreasonable sentencing may be the grounds of appeal, for the sentencing to be approved as a court ruling, it is necessary for the elements of sentencing to be appropriately and objectively evaluated and the result to be fair.

2. Are practical considerations taken into account by the judge, such as the cost to the government of imprisoning a person or the fact that a foreign perpetrator will be expelled after having served a prison sentence? Or are these irrelevant?

Since it is a matter that each judge determines individually for each case, it is

difficult to make general statements.

3. Are victims of the crime permitted any input in the sanction process? If yes, is such input required to be given any weight by the judge?

The victims and others (meaning the victim or in cases where the victim has died or suffers from a serious physical or mental disorder, his/her spouse, a lineal relative, brother or sister) of certain cases such as murder may participate in the proceedings of the case, examine a witnesses, question the accused and state their opinions at the trial (Article 292-2 and Article 316-33 to the end of Article of the Code of Criminal Procedure). The judges may take the statement into consideration as one of the exhibits for the sentencing (Refer to Article 292-2, Paragraph (9) of the Code).

4. Please describe what information is provided to the judge regarding the crime, the victims, and the perpetrator. Specifically, whether the judge receives information before imposing a sanction on:

A) The details of the crime, including the circumstances, the investigation and the harm done.

B) The personal characteristics of the perpetrator, including education, family background, health, financial resources, prior crimes, etc.

C) The characteristics of the victim or victims, if any, including the effects of the crime on them and the nature and extent of any injury caused by the crime.

Since, in principle, the information given to judges in trials is determined for each case in accordance with the assertion and proof of the public prosecutor and defense counsel, it is difficult to make general statements.

5. What may a judge NOT consider in crafting a sanction?

The answer is the same as that to Question 2.

6. Indicate whether the judge is required to give the reasons for the sanction which is imposed either in writing or orally.

It is not required to show the grounds for sentencing under any law (Refer to Article 335, Paragraph (1) of the Code of Criminal Procedure). The fact is, however, judges show the grounds for sentencing depending on the case.

7. If your country has mandatory sentences, or mandatory minimum sentences, are such sentences more or less common than previously? Please explain.

As mentioned in the answer to Question 1, the lower limit of penalty has been set by law and the question is a matter related to the legislative process. Accordingly, it is difficult to answer the question.

8. Please identify the country providing these answers.

Japan

FURTHER DISCUSSION TOPICS

Please consider these areas of inquiry and be prepared to discuss during the meetings of the Third Study Commission.

What are the rights of the victims? Can a victim speak in court? Can the victim address the perpetrator, or only the judge?

Can family of the victim and/or the perpetrator speak?

Can police, friends, politicians or religious leaders speak?

Is information given to the judge confidential, or open to the public or the media?

1　貴国では，裁判官に処罰を選択する幅広い自由裁量がありますか，それとも法，指針，規則によって，強制的な量刑の下限が定められているというように，適用できる処罰に制限はありますか。

（回答）

我が国の刑法は，法定刑の上限及び下限を定めており，裁判官はその法定刑の上限及び下限の範囲内で，事案に応じて刑を定めることができる。もっとも，量刑不当は控訴理由となり，量刑が裁判の判断として是認されるためには，量刑要素が客観的に適切に評価され，結果が公平性を損なわないものであることが求められる。

2　裁判官は，収監にかかる政府の負担または外国人犯罪者が実刑を終えた後強制退去させられる事実のような，実際的に配慮すべきことを考慮に入れていますか。または，これらとは無関係ですか。（無関係に量刑を決めていますか）

（回答）

事案ごとに各裁判官が個別に判断する事柄であるので，一般論として述べることは困難である。

3　犯罪の被害者は，処罰の手続に参加することができますか？もしできるのであれば，そのような被害者の参加は，裁判官が重視することが必要とされていますか。

（回答）

殺人等一定の事件の被害者は，公判手続に参加し，証人尋問や被告人質問を行い，意見を陳述するなどの行為をすることができる（刑訴法２９２条の２，３１６条の３３以下）。裁判官は，意見陳述の結果を量刑の一資料として考慮することができる（同法２９２条の２第９項参照）。

4　犯罪，被害者，犯罪者に関して，裁判官にどのような情報が与えられるのか記載してください。すなわち，裁判官は，処罰を科す前に以下の情報を得ることになりますか。

A) 状況，行われた捜査，被害を含めた犯罪の詳細
B) 教育，家庭環境，健康，財産，前歴を含む，犯罪者の特徴

C) 被害者の特徴，または犯罪が被害者に与えた影響，その犯罪によって引き起こされた権利侵害の特質，範囲

（回答）

公判において裁判官に与えられる情報は，原則として，事件ごとに，検察官及び弁護人の主張・立証に基づいて定まるものであるため，一般論として述べることは困難である。

5　処罰をつくる（考える）とき，裁判官が考慮に入れないことは何ですか？

（回答）

問２に対する回答と同様である。

6　裁判官は，処罰の理由を書面または口頭で示すことが必要とされているかどうかご教示ください。

（回答）

法律上，量刑の理由を示すことが要求されているわけではない（刑訴法３３５条１項参照）。もっとも，裁判官は，事案によっては量刑の理由を示しているのが実情である。

7　もし貴国が，強制的な量刑，強制的な量刑の下限があるのであれば，このような刑罰は，以前よりもより一般的なものですか，以前よりあまり一般的ではありませんか？ご説明ください。

（回答）

問１に対する回答のとおり，刑の下限は法律によって定められており，質問は立法に関する事項であるため，裁判所としてはお答えすべき立場にない。

Mexico City – 2016

FOURTH STUDY COMMISSION

« Social networks and labour relations »

Preamble

The workplace is part of the public sphere which includes the right to privacy.

It is generally considered appropriate to balance between the worker's interest to the protection of his privacy and the competing interests of the employer and the society to disclosure of information and to preventive surveillance of workers. These competing interests are most often dictated by security and productivity concerns.

The technological innovations facilitate the employer's control over the worker's activities in the workplace and thus increase the risk of conflict between the interests of the enterprise and the worker's right to privacy. The border that separates professional life from privacy is therefore very fragile and it reveals that the two spheres (private and public) are not perfectly sealed anymore.

Therefore, the purpose of this study is the protection of privacy that a worker can expect both with regard to his future employer (recruitment phase) or his employer (during his employment period), when information about him circulate on social networks (Facebook, LinkedIn, etc ...) or on blogs depending on:

- whether the worker is circulating this information by himself or it is done by third parties;
- whether there is a direct and free access to the information (« open profile ») or not (« closed profile »);
- whether we are talking about collecting information or using this information;
- the fact that the gathering and use of information is done by the employer or the information is collected by a third party and then made available to the employer who will use it.

* * *

Questions

[1] Does your country have laws or regulations that protect the confidentiality of electronic communications?

The major provisions to protect the secrecy of telecommunication are as follows.

a The second sentence of Article 21 of the Constitution stipulates that "the secrecy of any means of communication shall not be violated."

b Article 4, Paragraph (1) of the Telecommunications Business Law stipulates that "the secrecy of communications being handled by a telecommunication carrier shall not be violated."

c Article 3 of the Act on Prohibition of Unauthorized Computer Access stipulates that "it is prohibited for any person to engage in an Act of Unauthorized Computer Access."

[2] If so, are these provisions applicable when the information are collected on social networks or blogs?

The provisions of [1] shall also apply to communication on social networks or blogs. Under these provisions, for example, the details of communication between specified people on the social networks and information concerning the sender of the information sent anonymously on the blogs shall be protected. On the other hand, information to which people have direct, free access is not protected under these provisions.

[3] If so, are these provisions protecting the information collected or used by an employer:

- **during the recruitment phase?**
- **In the course of the employment for disciplinary reasons or others?**

In principle, in no case may an employer collect or use information concerning workers protected pursuant to the provisions of [1].

Although it is not related to the secrecy of telecommunication, Article 5-4, Paragraph (1) of the Employment Security Act stipulates the matters concerning the collection and use of the information by the employer at the stage of recruitment. More specifically, Paragraph (1) stipulates that unless the person concerned consents or there is other good cause, those who recruit workers shall, in collecting, retaining and using the personal information of those who intend to become workers in response to recruitment with respect to their businesses, collect the personal information within the scope necessary to achieve the purpose of their businesses and retain and use the same within the scope of the purpose of said collection. In this regard, the Ministry of Health, Labour and Welfare announced guidelines for the handling of personal information by a person recruiting workers (the "Guidelines" as a public notice). The Guidelines provide that a person who recruit workers shall collect personal information within the scope of purpose of its business and shall not collect the following personal information unless there is a special necessity for the duties or it is

otherwise essential for the achievement of business purpose and the personal information is collected from the person concerned after showing the purpose of collection.

a Race, ethnic group, social status, family origin, registered domicile, place of birth or any other matter which is likely to be the cause of social discrimination

b Thought and creed

c Whether or not the worker has joined a labor union

The Guidelines also provide that in collecting the personal information, a person who recruits workers must use lawful and fair means such as collecting the information directly from the person concerned or from a person other than the person concerned with the consent of the person concerned.

While there is no provision that directly provides for the matters concerning the collection and use of information by an employer while examining the grounds for disciplinary action, the obligations that a business operator handling personal information should observe have been prescribed by the Act on the Protection of Personal Information in general. With respect to the acquisition of the personal information, Article 17 of the Act provides that a business operator handling personal information must not acquire personal information through deception or other wrongful means.

[4] Are the employees allowed to use social networks during working hours? If so, in which way?

There are no provisions of laws or ordinances prescribing whether or not workers are allowed to use social networks during their working hours or Supreme Court precedents instructing this point.

Generally speaking, since workers have an obligation to devote themselves to their duties, the private use of social networks by the workers during their working hours may breach such obligation.

[5] Can the employer monitor the use of social networks by his employees during working hours? Outside of the working hours?

There are no provisions of laws or ordinances prescribing whether or not an employer may monitor workers' use of social networks.

There are Supreme Court precedents which held that a company may generally prescribe necessary matters in the rules and give concrete instructions or orders to workers to maintain and ensure the order of the company and investigate the facts concerning the case of disturbance of the company order, but there are no Supreme Court precedents which held that an employer may monitor workers' use of social networks.

In theory, some think that if the authority to monitor whether or not the personal computers provided by an employer are privately used and to monitor the extent of private use has been specified in the regulations for use of such computers, the employer may monitor the use in accordance with such regulations and even if there are no such regulations, monitoring is allowed as long as it is reasonably necessary for business operation such as when it is necessary to investigate whether or not the use breaches the corporate order and the means of monitoring is reasonable.

* * *

[1]　貴国では，電気通信上の秘密を保護する法や規則はありますか。

電気通信上の秘密を保護する主な規定は，以下のとおりである。

a　憲法２１条後段は「通信の秘密は，これを侵してはならない。」と規定する。

b　電気通信事業法４条１項は「電気通信事業者の取扱中に係る通信の秘密は，侵してはならない。」と規定する。

c　不正アクセス行為の禁止等に関する法律３条は「何人も，不正アクセス行為をしてはならない。」と規定する。

[2]　もしあるとすれば，それらの規定は，ソーシャルネットワーク又はブログ上の情報が収集されるときに適用されるものでしょうか。

[1]の各規定はソーシャルネットワーク又はブログによる通信にも適用される。これらの規定により，例えば，ソーシャルネットワークにおいて特定の人の間で行われたコミュニケーションの内容や，ブログにおいて匿名で発信された情報の発信者に関する情報は保護されることとなる。他方，直接自由にアクセスできる情報（“open profile”）は，これらの規定による保護の対象にならない。

[3]　もしそうであれば，これらの規定は，次の場合に，使用者によって収集又は使用される情報を保護しているのでしょうか。

・（社員の）募集段階
・懲戒理由等の検討中

使用者は，いずれの場合であるかにかかわらず，原則として，[1]の各規定により保護される労働者に関する情報を収集又は使用することができない。

電気通信上の秘密に関するものではないが，職業安定法５条の４第１項は，募集段階における使用者による情報の収集や使用について，規定している。すなわち，同項は，労働者の募集を行う者は，本人の同意がある場合その他正当な事由がある場合を除き，その業務に関し，募集に応じて労働者になろうとする者の個人情報を収集し，保管し，又は使用するに当たっては，その業務の目的の達成に必要な範囲内で上記個人情報を収集し，並びに当該収集の目的の範囲内でこれを保管し，及び使用しなければならないとしている。この点に関し，厚生労働省は，告示により，労働者の募集を行う者による個人情報の取扱いについての指針を示しているところ，同指針は，特別な職業上の必要性が存在す

ることその他業務の目的の達成に必要不可欠であって，収集目的を示して本人から収集する場合を除き，労働者の募集を行う者は，その業務の目的の範囲内で個人情報を収集することとし，次に掲げる個人情報を収集してはならないとしている。

a　人種，民族，社会的身分，門地，本籍，出生地その他社会的差別の原因となるおそれのある事項

b　思想及び信条

c　労働組合への加入状況

また，同指針は，労働者の募集を行う者は，個人情報を収集する際には，本人から直接収集し，又は本人の同意の下で本人以外の者から収集する等適法かつ公正な手段によらなければならないとしている。

懲戒理由等の検討中における使用者による情報の収集や使用について，直接に定めた規定は見当たらないが，個人情報を取り扱う事業者の遵守すべき義務については，一般的に，個人情報の保護に関する法律が規定しているところ，個人情報の取得については，同法１７条が，個人情報取扱事業者は，偽りその他不正の手段により個人情報を取得してはならないと規定している。

[4]　労働者は，勤務時間中にソーシャルネットワークを使用することを許されていますか。もしそうであれば，どのような方法ですか。

労働者が勤務時間中にソーシャルネットワークを使用することが許されているかどうかについて定めた法令の規定やこの点について説示した最高裁判例は見当たらない。

労働者は職務専念義務を負っているため，労働者が勤務時間中に私的にソーシャルネットワークを使用することは，一般的には，同義務に違反する行為となり得るといわれている。

[5]　使用者は，労働者による勤務時間中のソーシャルネットワークの使用について監視することができますか。勤務時間外ではどうですか。

使用者が労働者によるソーシャルネットワークの使用を監視することができるかについて定めた法令の規定は見当たらない。

企業は，企業秩序を維持確保するため，必要な諸事項を規則をもって一般的に定めたり，具体的に労働者に指示，命令したりすることができ，また，企業秩序違反事件について事実関係の調査をすることができるなどと説示した最高裁判例はあるが，使用者が労働者によるソーシャルネットワークの使用を監

視することができるかについて説示した最高裁判例は見当たらない。

学説には，使用者が貸与したパソコンに関する使用規程において私的使用の有無・程度を監視する権限を明らかにしておけば，これに基づき監視することができ，そのような規程がない場合であっても，企業秩序違反の有無の調査に必要である場合など事業経営上の合理的な必要性があり，その手段方法が相当である限り許容されるとする考え方がある。