Questionnaire 2017 of the 1st Study Commission

"The Threats to the Independence of the Judiciary and the Quality of Justice: workload, resources and budgets."

Introduction

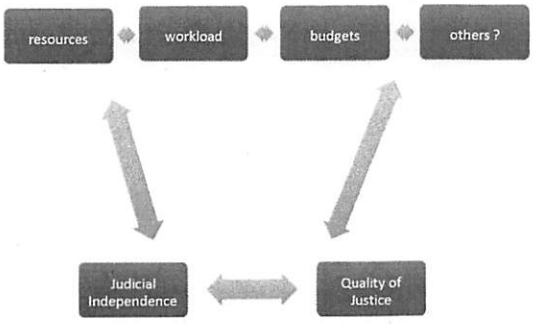
The aim of the work of the 1st Study Commission of IAJ is to identify possible problems and threats to the judiciary regarding a specific topic, and to provide potential solutions by compiling examples and proposals from member associations. Based on this compilation the Study Commission then formulates its conclusions and gives its opinion on how to avoid such threats and problems. Last year – 2016 – the Commission was explicitly searching for best practice, at that time regarding ensuring transparency and integrity and preventing corruption.

In preparing the questionnaire for 2017 the presidency of the 1st Study Commission considered it to be useful to proceed in the same manner as the year before, albeit that best practice is not mentioned in the title of the topic. Therefore the commission decided to a- identify possible aspects of the topic; b- examine already existing opinions, statements etc. on these aspects; c- formulate questions regarding the different aspects (taking into account already existing opinions, statements, etc); and d- considering the above-mentioned sources, discover which measures could help to diminish or eliminate the different threats.

1) Possible aspects

The topic chosen for this year mentions three possible threats - workload, resources and budgets – and two endangered values - Independence of the Judiciary and Quality of Justice.

By choosing those three threats, the commission was well aware that there are many other threats which could endanger the independence of the Judiciary and Quality of Justice. But the naming of those threats was to express that the focus should be on working conditions, such as workload, resources and budgets while accepting it might be possible that there are additional threats and problems in this field.



Therefore the task of the commission in 2017 will be
a) to describe what possible negative impacts all the identified threats might have – whether on judicial independence or on the Quality of Justice or both – whereby everybody is invited

to identify also possible additional threats, concerning working conditions; and b) to identify measures which could diminish or eliminate such threats.

As one can see, as listed below, there are already numerous statements, opinions and the like demanding sufficient resources for the judiciary, and referring to workload and budgets. So the task for the 1st Study Commission in 2017 should be a twofold one: on the one hand the commission should – based on existing documents – consider if the proposed measures are useful or if they need improvement. And on the other hand – and that will be the most important part – the goal will be to identify and propose concrete – additional – measures for fostering and ensuring both judicial independence as well as quality of justice.

2) existing opinions, statements etc.

1. THE SYRACUSE DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY (1981)[1]
   Art. 24. To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.
   Art. 25. The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. The judiciary should be able to submit their estimate of their budgetary requirements to the appropriate authority.

2. INTERNATIONAL BAR ASSOCIATION (IBA) MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE (1982)[2]
   10 It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.

3. THE (MONTREAL) UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (1983)[3]
   2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

4. UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY (1985)[4]
   7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

5. DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE ["Singhvi Declaration"] (1985)[5]
   32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.
   33. It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.
   34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

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[1] Source: Stephan Gass/Regina Kiener/Thomas Stadelmann, Standards on Judicial Independence, Editions Weblaw, Bern 2012, p. 35 ff.

[2] http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427cad25- a6409b49fe29

[3] Source: Gass/Kiener/Stadelmann, p. 42 ff.

[4] http://www2.ohchr.org/english/law/indjudiciary.htm

[5] http://daccess-ddsny.un.org/doc/UNDOC/GEN/G87/124/32/PDF/G8712432.pdf?OpenElement

6. Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary [Resolution 1989/60, 15th plenary meeting, 24 May 1989], The Economic and Social Council[6]

Procedure 5

In implementing principles 8 and 12 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

7. IAJ 1st SC CONCLUSION 1994: Participation of the judicial power in the administration of justice [IAJ Meeting in Athens, October 9-13 1994][7] **see Appendix**

8. African Commission on Human and Peoples' Rights Resolution on the Respect and the Strengthening on the Independence of the Judiciary
[The African Commission at its 19th Ordinary Session held from 26th March to 4th April 1996 at Ouagadougou, Burkina Faso][8]

1. CALLS UPON African countries to:

[....]provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system fulfil its function;

9. Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1997)[9]

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the rule of law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

10. EUROPEAN CHARTER ON THE STATUTE FOR JUDGES (1998)[10]

1.8 The Charter provides that judges should be associated through their representatives, particularly those that are members of the authority referred to in paragraph 1.3, and through their professional associations, with any decisions taken on the administration of the courts, the determination of the courts' budgetary resources and the implementation of such decisions at the local and national levels. Without advocating any specific legal form or degree of constraint, this provision lays down that judges should be associated in the determination of the overall judicial budget and the resources earmarked for individual courts, which implies establishing consultation or representation procedures at the national and local levels. This also applies more broadly to the administration of justice and of the courts. The Charter does not stipulate that judges should be responsible for such administration, but it does require them not to be left out of administrative decisions.

11. IAJ 1st SC CONCLUSION 2000: The independence of the individual judge within his own organization [IAJ Meeting in Recife, 17-21 September 2000][11]

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[6] http://legislationline.org/documents/action/popup/id/7739

[7] http://www.iaj-uim.org/site/modules/mastop_publish/?tac=35

[8] http://www.achpr.org/english/resolutions/resolution26_en.html

[9] http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf

[10] https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=DAJ/DOC(98)23

[11] http://www.iaj-uim.org/site/modules/mastop_publish/?tac=41

3. The proper administration of the Judicial system must create and ensure the conditions necessary for judicial independence. This includes appropriate remuneration and security of office. However, the judge and the judiciary as a whole have an obligation to ensure the effective handling of the workload and the management of resources. Among the matters which could compromise the independence of the judge are an excessive workload, insufficient resources for the fulfilment of the judge's duties, the arbitrary imposition of quotas and assignment of cases, procedures and criteria for promotion. Where a judge's work is evaluated, it must be done in a manner which does not undermine his independence. For example it may be dangerous to evaluate the work of a judge by reference to the percentage of decisions which were reversed on appeal.

12. Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights[12] **see Appendix**

13. IAJ 1st SC CONCLUSION 2001: The appointment and the role of presidents of courts [IAJ Meeting in Madrid, 23-27 September 2001][13]

5 As regards budgetary matters and the allocation of resources for the functioning of the judicial system, this should be sufficient to enable the judiciary to fully exercise its functions, but in particular, should not be a means by which pressure is placed on judges which could affect their independence. Presidents of courts should at least be consulted as to the budgetary and other resources required by the courts to carry out their judicial functions.

14. Commonwealth (Latimer House) Principles on the Three Branches of Government (2003)[14]

IV) (c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;

2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary. Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary. As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

15. IAJ 1st SC CONCLUSION 2003: The role and function of the high council of justice or analogous bodies in the organisation and management of the national judicial system [IAJ Meeting in Vienna, 9-13 November 2003][15]

The independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources.

16. The Burgh House Principles on the Independence of the International Judiciary (2004)[16]

6. Budget States parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

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[12] https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2001)OP2

[13] http://www.iaj-uim.org/site/modules/mastop_publish/?tac=42

[14] http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744

[15] http://www.iaj-uim.org/site/modules/mastop_publish/?tac=43

[16] http://www.ila-hq.org/download.cfm/docid/D18ED684-4653-49A8-9857773C7D5C9C69

17. IAJ 1st SC CONCLUSION 2005: Economics, Jurisdiction and Independence [IAJ Meeting in Montevideo, 21-24 November 2005][17]

3) NPM can be used for the management of the courts. But even here care must be taken not to infringe the independence of the judiciary in an indirect way. A lack of resources (number of judges, staff) could put judges under pressure to act in a certain way in proceedings.

4) The judiciary (high judicial council, single courts) should be involved in the process of budget drafting and in the allocation of given resources.3

5) Nevertheless the practice of providing for budgets for individual judges and/or panels of judges should be avoided, because that practice could constitute a danger to judicial independence. That is because the judge would be forced to keep in mind the effects of his decision on his personal budget (or the budget of the panel).

6) Cost of lawsuits (witnesses, experts, interpreter) must no be subjected to a strict budget as these resources have to be available sufficiently and without restrictions.

7) Monetary Incentives of some kind, such as bonus related salaries for judges, workload norms for judges and bonus related salary systems, could seriously jeopardize judicial independence. At the least such incentives might give an appearance of jeopardizing judicial independence since the parties might have the perception that the financial interest of judges would prevail over the principle of giving an impartial decision.

18. Mt. Scopus Approved Revised International Standards of Judicial Independence [Approved March 19, 2008][18]

2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

15. BUDGET 15.1. States, parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively.

19. Declaration of Minimal Principles about Judiciaries and Judges' Independence in Latin America (Campeche Declaration) [Federación Latinoamericana de Magistrados, Campeche, April 2008][19]

5. c) That for the compliance of their constitutional duties, the Judiciaries are the ones to fix the judicial politics, having all the necessary resources that would allow them to act with independence, swiftness and efficacy. For that purpose, it is necessary to recognize the power of the judiciary to elaborate its own budget and participate in all the decisions related to the material means for their acting.

d) That the management of the budgetary resources should be exercised by each Judiciary, in an autonomous way.

14. – MATERIAL RESOURCES. It is the duty of other State public authorities to provide the judiciary with the necessary resources for its independent, efficient and swift performance.

20. RECOMMENDATION CM/REC (2010) 12 OF THE COMMITTEE OF MINISTERS [20]

32. The authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality.

33. Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.

34. Judges should be provided with the information they require to enable them to take pertinent procedural decisions where such decisions have financial implications. The power of a judge to make a

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[17] http://www.iaj-uim.org/site/modules/mastop_publish/files/files_486e93aae7b65.pdf

[18] http://law.huji.ac.il/upload/InternationalStandardsJudicialInd2008.doc

[19] http://www.fam.org.ar/FAM.asp?id=312

[20] https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707137

decision in a particular case should not be solely limited by a requirement to make the most efficient use of resources.

35. A sufficient number of judges and appropriately qualified support staff should be allocated to the courts.

36. To prevent and reduce excessive workload in the courts, measures consistent with judicial independence should be taken to assign non-judicial tasks to other suitably qualified persons.

37. The use of electronic case management systems and information communication technologies should be promoted by both authorities and judges, and their generalised use in courts should be similarly encouraged.

21. Opinion No14 .(2011) of the Consultative Council of European Judges (CCJE), "Justice and information technologies (IT)"

see Appendix

22. Opinion No18 .(2025) of the Consultative Council of European Judges (CCJE), "The position of the judiciary and its relation with the other powers of state in a modern democracy"

(6) Budgetary autonomy

50. The consequences of public financial difficulties, especially those resulting from the economic crisis since 2008, have caused serious problems in many member states. Access to courts and legal aid has been reduced, the workload of the courts has increased and the judiciary has been restructured. In their answers to the questionnaire, many member states reported discussions concerning the remuneration of judges. Salaries for judges have been frozen for many years or even lowered in recent years.

51. It is accepted that, subject to constitutional provisions, ultimately the decisions on the funding of the system of justice and the remuneration of judges must fall under the responsibility of the legislature. However, European standards should always be obeyed. The CCJE has made recommendations about the funding of the judiciary106. The judiciary should explain its needs to parliament and, if applicable, to the ministry of Justice. In the case of a severe economic downturn, judges, like all other members of society, have to live within the economic position of the society they serve. However, chronic underfunding of the judicial system should be regarded by society as a whole as unacceptable. This is because such chronic underfunding undermines the foundations of a democratic society governed by the rule of law. **VIII: Summary of principal points**

17. Chronic underfunding of the judiciary should be regarded by society as a whole as an unacceptable interference with the judiciary's constitutional role, because it undermines the foundations of a democratic society governed by the rule of law (paragraph 51).

23. Opinion no 19 (2016) of the Consultative Council of European Judges (CCJE), THE ROLE OF COURT PRESIDENTS[21]

17. Court presidents should also be empowered to monitor the length of court proceedings. This is closely linked to the reasonable length clause of Article 6 of the ECHR and the requirements of national legislation. Monitoring of the length of proceedings and actions to be undertaken by court presidents to speed up the disposition of cases must be balanced with the judges' impartiality, independence and with judicial confidentiality. C. Managerial role

24. The CCJE recognises that the managerial role of court presidents in member states varies. There is, however, a general trend towards a wider managerial role for court presidents. This is a result of demands for a better service to court users and society and reflects the general view that presidents playing that role can enhance court performance. In this regard, the CCJE stresses that various models focusing on the managerial function are possible. Any managerial model must serve the better administration of justice and not be an objective in itself. The CCJE considers that any central authority responsible for managing the judiciary should only perform those tasks which cannot be performed effectively at the level of courts.

25. While judicial systems vary, the managerial functions have to be framed and adapted to the specific

[21] https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2016)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true

environment of the judicial organ of state respecting its independence and the independence and impartiality of individual judges. As it is in the case of relations between court presidents and other judges, the managerial functions of the presidents are also based on these fundamental values. The presidents should never engage in any actions or activities which may undermine judicial independence and impartiality.

26. Replies of the CCJE members show that in some cases, court presidents have an explicit strategic planning function. The CCJE takes the view that the obligation of court presidents to provide fair and impartial justice will inevitably require that goals are defined and strategies developed in order to address various challenges and issues affecting the judiciary.

27. Court presidents are responsible for managing the operation of the court, including managing court staff and material resources and infrastructure. It is crucial that they have the necessary powers and resources to fulfil this task efficiently.

28. The role played by court presidents in managing the court staff varies quite significantly among the member states. The replies to the questionnaire show that in some member states, the powers of the court presidents can be very broad. They can deal with selection and recruitment, setting remuneration levels, transfer, discipline, performance assessment and dismissal. In other member states, the powers of the presidents are very limited and most of the managing tasks are fulfilled by an outside body or person.

29. Replies submitted by the CCJE members also show that court presidents have functions in relation to the maintenance and security of court infrastructure. If all these powers are exercised by organs appointed by, and accountable to the executive, for example to the Ministry of Justice or to the central authority, the CCJE's view is that court presidents should be involved and should have significant influence on how these services are provided.

30. These powers should be exercised in a way that is both professional and transparent. There is a clear advantage if this responsibility is shared with the "court manager" or "administrative director", who can have a different level of authority in the management of court personnel. In such cases, these officials should be appointed by, and be accountable to, court presidents.

31. Court presidents should also have the authority to establish organisational units or divisions in the court, as well as individual posts and positions in order to respond to various needs within the court operations. Where court presidents intend to make significant changes in the organisation of the court, the judges should be consulted.

32. In some member states, court presidents have some functions in the allocation of the court budget. For example, they analyse the resources needed to deal with the caseload within a reasonable time, and then negotiate with the central authorities in charge of budget allocation. This is a significant issue: it depends heavily on the administration framework of the judicial system, on the extent of its autonomy, and on the division of responsibilities within the system. The criteria used in the process of the allocation of financial and human resources to different courts are a key factor for defining the role of the court presidents. That role, if not decisive, should be significant. This is especially important in view of the existence, in some member states, of judicial systems where the allocation of resources is strictly centralised, and the discretion of the court presidents is very limited.

33. However, presidents should have the power to manage the budget within their courts. This power implies that court presidents are accountable. In order to perform this task, court presidents should be assisted by skilled professionals from among the non-judge court staff.

V. Conclusions and recommendations

4. Where court presidents have a role in collecting data and assessing the work of the court and of individual judges, appropriate safeguards must be in place to ensure impartiality and objectivity (paragraph 22).

5. Any managerial model in courts must facilitate the better administration of justice and not be an objective in itself. The court presidents should never engage in any actions or activities which may undermine judicial independence and impartiality (paragraphs 24 and 25).

6. The role of court presidents in the allocation of budgetary means to the court should be significant, if not decisive (paragraph 32), and they should have the power to manage the budget within their courts (paragraph 33).

24. See also:

INTERNATIONAL ASSOCIATION OF JUDGES: UPDATING THE UNIVERSAL CHARTER OF THE JUDGE (Project 2017)

New Article 2-4 – Resources for Justice

The other institutions of government of the State must provide the judiciary with sufficient resources to be able to properly perform its function.

The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to the budget of the Judiciary and material and human resources allocated to the courts.

25. New Article 8 – 1 – Remuneration

The judge must receive sufficient remuneration to secure true economic independence, and, through this, his/her dignity, impartiality and independence.

The remuneration must not depend on the results of the judge's work, or on his/her performances, and must not be reduced during his or her judicial service.

Rules on remuneration must be enshrined in legislative texts at the highest possible level.

3) Questions

1. Have you experienced threats to judicial independence or to the quality of justice regarding

(a) resources
(b) workload
(c) budget regulation or allocation;
(d) judicial terms and conditions including entitlement to an appropriate salary and pension: and
(d) others (please provide details)?

Please differentiate between threats to judicial independence and threats to the quality of justice. Describe how exactly judicial independence and/or the quality of justice were or might be influenced negatively.

○ Courts in Japan have strived to develop systems necessary to ensure the proper and prompt handling of cases in light of the trends of cases and other circumstances at each court, and have never experienced any threat to judicial independence or the quality of justice from the aspect of resources or workload.

○ In Japan, judicial administration power shall be vested in the Supreme Court and the personnel affairs of a court, the operation of budget and so forth are conducted by the court itself. In this way, we have never experienced any threat to judicial independence or the quality of justice from the aspect of budget regulation or allocation.

○ In Japan, the status and remuneration of judges are guaranteed by the Constitution, and judges are on the public pension system as with all other national government officials. Therefore, judges have never experienced any threat to judicial independence or the quality of justice from the aspect of their terms or working conditions.

2.

(a) Do you know of measures which can diminish or eliminate threats to judicial independence and/or to the quality of justice due to working conditions (resources, workload, budget regulations, others)?

The reasons for the absence of threat to judicial independence and the quality of justice in Japan that would be caused by working conditions including resources, workload, or budget regulations include ,as described in the answer to Question 1, the fact that efforts have been made to develop systems necessary to ensure the proper and prompt handling of cases in light of the trends of cases and other circumstances at each court, that courts manage themselves independently in terms of personnel affairs, budget, and so forth, and that the status and remuneration of judges are guaranteed by the Constitution.

(b) Do you have experience with such measures?

As stated in the answer to (a).

3. Are there decisions of your national courts or tribunals or constitutional measures that give guidance on
(a) what is a sufficient budget for an effective justice system;

There has been no court decision or constitutional provision that would provide guidance on court budget.

(b) judicial terms and conditions including entitlement to salary and a pension.

The status and remuneration of judges are guaranteed by the Constitution as described below.
While no term is specified for Supreme Court justices, their appointment is subject to a national review conducted concomitantly with the first general election of the members of the House of Representatives held after the appointment of Supreme Court justices (the same applies to the first general election held after the elapse of 10 years from their appointment) (Article 79, Paragraph (2)-(4) of "The Constitution of Japan"). If a majority of voters vote for the dismissal of any justice, the justice may be dismissed; however, no Supreme Court justices have been dismissed through such a review so far. Lower court judges shall hold office for a term of 10 years and may be reappointed (Article 80, Paragraph (1) of "The Constitution of Japan"). Their appointment, including reappointment thereof, is consulted with the Advisory Committee for the Nomination of Lower Court Judges. They are however normally reappointed unless there are exceptional circumstances, such as being obviously inappropriate for the duties of a judge. The Constitution provides that judges shall receive at regular stated intervals, adequate compensation which shall not be decreased during their terms of office (Article 79, Paragraph (6), and 80 Paragraph (2) of "The Constitution of Japan").

4.
(a) Is the Council of Justice, or any other independent organisation in your country if there is one, consulted about court resources, workload and budgets for the courts?

While there is no organization from which advice on courts' workload or budget is sought, the nomination of a portion of the court personnel resources, namely, 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 (Article 3 of the " Rules of the Advisory Committee for the Nomination of Lower Court Judges").

(b) If so, what form does that consultation take?

The committee, which consists of the three categories of legal professionals (judges, public prosecutors and attorneys) and persons with relevant knowledge and experience examines the appropriateness of the nomination of prospective lower court judges when consulted by the SC and reports the result of such examination (Article 2 of the " Rules of the Advisory Committee for the Nomination of Lower Court Judges").

(c) What effect does that consultation, or lack of consultation, have on judicial independence or the quality of justice?

The transparency of the process of appointing judges is ensured by establishing an organ which states its opinion with the mindset of the general public and from a diversified perspective in order to reflect public opinion.

5.

(a) Is the workload of your courts or the quality of justice adversely affected by changing procedures that judges are required by the government to follow?

In Japan, there is no chance that judges are adversely affected by any changes in procedures that the government requires them to follow with, since, as stated in the answer to Question 1, judicial administrative authority is vested in the Supreme Court and the personnel affairs of a court, the operation of budget and so forth are conducted by the court itself.

(b) Is the judiciary in your country consulted before any such changes are implemented?

In Japan, no consultation on changes in procedures is sought from courts, since the personnel affairs of a court, the operation of budget and so forth are conducted by the court itself.

(c) What effect does that consultation, or lack of consultation, have on judicial independence or the quality of justice?

In Japan, the lack of consultation does not affect judicial independence or the quality of justice, since the personnel affairs of a court, the operation of budget and so forth are conducted by the court itself.

The Presidency Committee also invites each national organization to provide details of any other threat to judicial independence which has been experienced in your country or region in the past year.

Proposal for topic 2018

The presidency is asking you to submit your proposals for possible topics to be treated in 2018 together with the answers to the questionnaire. The reason for this is that we would like to do some research before the meeting in Santiago to know whether a topic has been handled with before and if there exist already standards, opinions, recommendations in relation to a topic.

Please send your detailed answers – not later than 19 June 2017 – to the board of the First Study Commission: first_sc@iaj-uim.org

The presidency of the 1st Study Commission

２０１７年第１研究委員会質問票

「司法権の独立及び司法の質に対する脅威：業務量，資源及び予算」

質問

１　以下の事項に関連して，司法権の独立又は司法の質に対する脅威を経験したことがありますか。

(a)　資源
(b)　業務量
(c)　予算規則又は分配額
(d)　裁判官の任期並びに適切な給与及び年金の受給資格を含む労働条件
(e)　その他（詳細を御教示ください。）

司法権の独立に対する脅威と司法の質に対する脅威とに分けて回答してください。司法権の独立又は司法の質に対してどのような負の影響があったか又はその可能性があったかについて記述してください。

(回答)

○　我が国の裁判所は，各裁判所の事件動向等を踏まえて，適正かつ迅速な事件処理が図れるよう必要な態勢整備に努めており，資源，業務量の観点から司法権の独立又は司法の質に対する脅威を経験したことはない。

○　我が国では，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ており，予算規則又は分配額の観点から司法権の独立又は司法の質に対する脅威を経験したことはない。

○　我が国では，裁判官の身分及び報酬が憲法上保障され，他の国家公務員と同様に厚生年金制度の適用を受けていることから，裁判官の任期及び労働条件の観点から司法権の独立又は司法の質に対する脅威を経験したことはない。

2

(a)　労働条件（資源，業務量，予算の規制など）を原因とする司法権の独立又は司法の質に対する脅威を減じ又は除去することのできる対策を御存じですか。

（回答）質問１の回答で記載したとおり，各裁判所の事件動向等を踏まえて

適正かつ迅速な事件処理が図れるよう必要な態勢整備に努めていること，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ていること，裁判官の身分及び報酬が憲法上保障されていることなどが，我が国において，資源，業務量，予算の規制を含む労働条件を原因とする司法権の独立又は司法の質に対する脅威が生じていない理由となっている。

(b)　このような対策の経験をしたことがありますか。

(回答) (a)の回答のとおり。

3　貴国において，次の各事項について指針を与える裁判所の判断又は憲法基準はありますか。

(a)　実効的な司法制度のために十分な予算とは何か。

(回答)

裁判所予算について指針を与える裁判所の判断又は憲法上の規定はない。

(b)　裁判官の任期並びに適切な給与及び年金の受給資格を含む労働条件

(回答)

裁判官の身分及び報酬については以下のとおり憲法上保障されている。

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)。

4

(a) 貴国において，司法評議会その他の独立機関がある場合，当該機関は，

裁判所の資源，業務量及び裁判所予算について諮問を受けますか。

（回答）

裁判所の業務量及び予算について諮問を受ける機関はないが，裁判所の人的資源のうち，簡易裁判所判事を除く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委員会規則３条）。

(b) 諮問を受ける場合，それはどのような形式で行われますか。

（回答）

同委員会は，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）。

(c) 諮問又はその欠缺が司法権の独立又は司法の質に及ぼす効果はどのようなものですか。

（回答）

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。

5

(a) 貴国の裁判所の業務量又は司法の質は，裁判官が政府から従うよう求められる手続の変更により，不利な影響を受けますか。

（回答）

質問１の回答のとおり，我が国では，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，予算等の運営等が裁判所自身によって自主的に行われていることから，裁判官が政府から従うよう求められる手続の変更により，不利な影響を受けることはない。

(b) 貴国の司法権は，このような変更が行われる前に諮問を受けますか。

（回答）我が国では，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，予算等の運営等が裁判所自身によって自主的に行われていることから，手続の変更について諮問を受けることはない。

(c) 諮問又はその欠缺が司法権の独立又は司法の質に及ぼす効果はどのようなものですか。

（回答）我が国では，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，予算等の運営等が裁判所自身によって自主的に行われていることから，諮問の欠缺が司法権の独立又は司法の質に影響を及ぼすことはない。

Second Study Commission

Civil Law and Procedure

2017 Questionnaire

60th Annual Meeting of IAJ – Santiago (Chile)

THE USE OF TECHNOLOGY IN CIVIL LITIGATION MATTERS

In Mexico City (Mexico), we decided that in 2017, our Second Study Commission will focus on the use of technology in civil litigation matters. We have limited the questionnaire to five questions and we expect to receive short but concise answers.

1. Can technology be used effectively in civil litigation matters in your jurisdiction? If so, please give examples (electronic filing of documents, digital recording of court proceedings, the use of video conferencing, paperless trials, etc.).

   (1) Under the Japanese civil litigation system, the use of a video or telephone conferencing is allowed under certain requirements in such proceedings as examination of witnesses or preparatory proceedings in a civil case (Article 92-3, 170, Paragrah (3), 176, Paragraph (3), 204, 210, 215-3, and 372, Paragraph 3 of the "Code of Civil Procedure", Article34-2, 96 of the "Rules of Civil Procedure").

   (2) In addition, the procedure of a Demand for Payment concerning certain types of claims at a summary court provides online facility for filing an application, paying fees, and so forth (Article 397 through 402 of the"Code of Civil Procedure" etc.).

2. Are there rules or guidelines for the use of technology in civil litigation matters in your jurisdiction?

There are no general rules or guidelines for the use of technology.

3. Can technology be used effectively in pre-trial case management **conferences** in your jurisdiction?

On a date other than the appearance date, such as a date for preparatory proceedings and scheduling conference, a video or telephone conferencing system may be used.

4. Who incurs the costs of the use of technology in civil litigation matters in your jurisdiction?

(1) The expense incurred in the use of a telephone or video conferencing system in an examination of witnesses and others must be borne by the parties to the procedure (Article2(ii), and 11, Paragraph 1 of the " Act on Costs of Civil Procedure"). However, the video conferencing system currently used by courts in Japan generates no expense to be borne by the parties who use it.

(2) The expense incurred in the use of a telephone or video conferencing system in any procedure other than that mentioned in (1) above is borne by the national treasury.

(3) The expense incurred in the use of the online services in the Demand for Payment procedure above is borne by the national treasury (i.e., the parties are not required to pay any usage fee beyond the normal fee).

5. Does the use of technology in your jurisdiction raise security issues? If the answer is "yes", please give examples.

No.

第２研究委員会

民法及び民事手続

２０１７年質問票

ＩＡＪ第６０会年次総会 - サンティアゴ（チリ）

民事訴訟事件におけるテクノロジーの利用

我々第２研究委員会は，メキシコシティ（メキシコ）において（昨年開催された年次総会の際），２０１７年総会では民事訴訟事件におけるテクノロジーの利用に焦点を当てることを決定しました。質問事項を５つにまとめましたので，簡潔な回答を御提出ください。

１　貴国の司法制度の下では，民事訴訟事件において，テクノロジーを実質的に利用することができますか。利用することができるとすれば，その例を挙げてください（書面の電子的な提出，裁判手続のデジタル記録，テレビ会議の利用，ペーパレス裁判等）。

（回答）

(1) 我が国の民事訴訟制度の下では，民事訴訟事件において，一定の場合，証人尋問，弁論準備手続等の手続につきテレビ会議又は電話会議を利用することができる（民事訴訟法９２条の３，１７０条３項，１７６条３項，２０４条，２１０条，２１５条の３，３７２条３項，民事訴訟規則３４条の２，９６条）

(2) また，簡易裁判所の支払督促の手続においては，一定の類型の請求権について，申立てや手数料納付等をオンラインですることができる（民事訴訟法３９７～４０２条等）。

２　貴国の司法制度の下では，民事訴訟事件におけるテクノロジーの利用についての規則又は指針がありますか。

（回答）

テクノロジーの利用についての一般的な規則又は指針はない。

3　貴国の司法制度の下では，口頭弁論期日外で行われる進行協議等のための打合せにおいて，テクノロジーを実質的に利用することができますか。

（回答）

弁論準備手続期日，進行協議期日等において，テレビ会議システム及び電話会議システムを利用することができる。

4　貴国の司法制度の下で，民事訴訟事件におけるテクノロジーの利用費を負担するのは誰ですか。

（回答）

(1) 証人等の尋問における電話会議又はテレビ会議の利用費は，当事者が負担することとされている（民事訴訟費用等に関する法律２条２号，１１条１項)。ただし，我が国の裁判所が現在利用しているテレビ会議システムでは，当事者が負担すべき利用費は発生しない。

(2) 上記(1)以外の手続における電話会議又はテレビ会議の利用費は，国庫負担とされている。

(3) 督促オンラインシステムの利用費は，国庫負担とされている（当事者は，通常の手数料以外の利用費を負担しない。)。

5　貴国の司法制度の下において，テクノロジーの利用によるセキュリティ上の問題が生じていますか。生じている場合，その例を挙げてください。

（回答）

生じていない。

Third Study Commission Questionnaire

2017

Santiago de Chile

For 2017, the Third Study Commission, which focuses on Criminal Law, decided to continue our study of "The Sentencing of Criminal Offenders."

In 2016 in Mexico City, we had excellent discussions of the factors judges take into consideration when imposing a sanction on a guilty offender. In addition to general considerations, we discussed sanctions in drug-trafficking cases and child pornography cases.

In 2017, we will discuss appropriate sanctions in some additional fictional cases involving embezzlement, and gun possession. (maybe more to be added)

In addition, we will discuss the role of the victim in a criminal prosecution as well as mandatory sanctions which leave the judge no discretion. Finally, we will discuss "settlement" of criminal prosecutions involving the prosecutor, the criminal, and perhaps the victim.

To aid our discussions, we ask that each country answer to following questions:

1) In your country, can a victim participate in the prosecution of a criminal, not as a witness but as a party?

   The victim of a murder or certain other crimes is allowed to participate in criminal trials, where he/she may examine other witnesses, ask the accused questions, state his/her opinion, and so forth(Article 292-2 and 316-33 et seq. of the "Code of Criminal Procedure").

2) Can a victim have her own lawyer, and can that lawyer assist the prosecutor?

   A victim who participates in criminal trials may have his/her own lawyer (Article 316-33 et seq. of the "Code of Criminal Procedure"). That lawyer may state the victim's opinion and receive explanations with respect to the public prosecutor's exercise of his/her authority (Article 316-35 of the "Code of Criminal Procedure").

3) If the victim sustained injuries as a result of the crime, can the judge order that the criminal must pay the victim for medical expenses, property damage, emotional distress or lost wages? If the judge can order such restitution, who decided how much? Is it the judge or a jury or a panel of judges?

In a murder or certain other cases, a petition may be filed for a restitution order incidental to criminal proceedings. Based on such petition, the judge may order the restitution of the damage suffered as a result of the crime (Article 23 et seq. of the "Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims"). The amount of restitution is determined by the judge or the panel of judges.

4) Is it obligatory for the judge to award restitution to the victim, even if the case becomes very complicated as a result? Or can the judge decline to award restitution, thus forcing the victim to file a separate lawsuit against the criminal?

If the court finds it difficult to conclude the proceeding within four proceeding dates since additional days or hours are required for the proceedings, the court may rule to terminate the restitution order case. If such ruling is made, a civil action is deemed to have been filed (Article 32, Paragraph (1), Paragraph (4) and Article 28 of the " Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims").

5) If the victim is awarded restitution, how can the award be enforced? What if the criminal doesn't pay? What if the criminal can't pay?

(i) If a judicial decision on the petition for a restitution order with a declaration for provisional execution or without a lawful objection is acquired, and (ii) if the accused does not voluntarily pay the restitution money, the accused's property may be seized and realized within the frame of compulsory execution based on the aforementioned decision (Article 32, Paragraph (2) and Article 33, Paragraph (5), of the " Act on Measures Incidental to Criminal Proceedings for Protecting the Rights and Interests of Crime Victims", Article 22, Paragraph (3), item (ii), item (Vii), Article 43, Article 122, Article 143 etc. of the "Civil Execution Act").

Even if the accused is insolvent, the victim of a murder or certain other crimes is entitled to receive Crime Victim Benefit from the national government (Article 3 of the "Act on Support for Crime Victims, etc. Such as Payment of Crime Victims Benefit)".

6) Does your country have mandatory sanctions, where the judge has no discretion? What kinds of cases? Are there ways that the litigants can defeat a mandatory sanction?

The Japanese Criminal Code sets the upper and lower limits of statutory penalties. Judges may give sentence according to the cases within the upper and lower limits of the statutory penalties.

7) In your country, is it possible to settle criminal cases by agreement between the prosecutor and the criminal? Is this common? What role does the judge play? Is settlement of criminal cases a good thing, or not?

In Japan, there is currently no system in which a criminal case is resolved by a settlement agreed between the public prosecutor and the accused (or suspect).

Also, we will try to find time to discuss the following fictional cases and explore the possible sanctions which would be applied in the various countries. So please consider what sanction would be applied in your court.

A) Embezzlement

The criminal is a 43 year old woman, married with 4 children, one of whom has cancer. She has a university degree, no mental or drug abuse issues, and no prior criminal activity. She was employed as an office manager; keeping track of financial records, credit card statements etc. with the authority to make business expenditures on a credit card and to write checks. She used the business's credit card to pay for personal items and wrote business checks to herself. In total, she embezzled $215,265 US dollars.

Does it make any difference if she used the money she took to gamble at a local casino?
Does it make any difference if she used the money she took to pay for medical expenses for her sick child?
What sanction should she receive? Should she have to pay the money back, even if she is poor?

B) Gun Possession

A 37 year old male, married with a small child, has some education but no university degree. He is a truck (lorry) driver. He has a history of abusing prescription pills. He has been previously convicted to drug trafficking, kidnapping, and assaulting his spouse. As a result of these crimes, he is not permitted by the law to purchase or possess a gun.

He gets his wife to buy a gun for him illegally. When the police arrest him and search his home, they find that he has 10 guns.

What would be an appropriate sanction for this criminal?

C) Child Pornography Distribution

A 17 years old boy who goes to college. He has no prior sentences. He comes from a normal family. Both parents are working. Siblings have no records of prior crimes. The boy had a girlfriend who during their relationship sends him a nude picture. The girlfriend is 16 years old at the time when the picture is taken. The boy has kept the picture for no reason in particular. He has not asked for her consent to keep the picture. The boy gets invited by some of his friends to join a facebookgroup. The group exchanges picture of girls. The pictures are all of a pornography character. The boy offers his picture of his ex-girlfriend to the group – yet again without asking for the girls consent. In return he gets 50 similar pictures but of other for him unknown girls. None of these girls have given their consent to the exchange of picture. The boy now has a fine collection of pictures. The other boys in group get more and more sophisticated and now it is not about having must pictures but having series of picture such a series of girls of different nationality, or girls with all kinds of hair colors etc. The boy lacks a picture of a girl with long hair in his collection why he to the facebookgroup offers five pictures of nude girls in exchange for a nude picture of a girl with long hair. The facebookgroup now has more the hundred user and many of pictures are distributed to other facebookgroups and homepages – here among homepages sited in Russia. It is not possible to delete pictures from the internet any longer. This is the situation when he gets arrested by the police.

D) Distribution of Nude Pictures of An Adult

A man at the age of 45. He has no prior sentences. He has two children with two different women. Both children are under age. One of the children lives at his house. The other child is living with its mother from whom the man is recently divorced. They got divorce because she was unfaithful to him. The divorce had been painful and he lost his job in progress. The mother is now living with a new man and she is sabotaging his access to the child which he normally has every second weekend. She feels that is disturbing for the family that she is trying to make with her new boyfriend. The man has therefore not seen his child in several months. The case has been taken to court but the man is still frustrated and feels that they are getting nowhere. One evening when he is sitting alone at home and he has had too much to drink he is looking over photos from old times on the computer. He finds an old photo that was taken when their relationship was new. At the picture you can see a little bite of the man – he is exposed in a mirror and you can see that he is the one who is taking the picture. In front of the picture is the wife – she is in her nude and she is performing a sexual oriented dance for the man. To get even with the wife for being unfaithful to him and for not letting him see their child he decides in his drunkenness to upload the picture on the internet and send the picture to all the people that know the wife and her new friend. Below the picture he writes that this is a picture of at sloth and a whore and that she will do anything for money. He also writes her phone number and sets some prices for different services that she can provide – all of a sexual nature. The next day when he gets sober he regrets his actions and tries to delete the picture but it has already been seen by more people and the wife has received more phone calls from men who

want to buy a service from her but also some hate mails from women in the neighborhood. This is the situation when he gets arrested by the police.

E) Burglary

The accused is a 24 year old healthy, unmarried man, living alone, coming from a poor country and staying illegally in the country. As a member of a gang, he committed 37 burglaries in houses and apartments. They stole money, jewelry and electronic devices equivalent of € 180'000 and caused damages of € 405'000. 4 years ago, he was convicted for burglary and drug trafficking (1 kg marihuana).

What would be an appropriate sanction for this criminal?

Would it make any difference if in some cases the residents of the houses or apartments were at home but didn't notice the burglary?

Would it make any difference if the accused was carrying a loaded gun?

第３研究委員会質問票
２０１７
サンティアゴ・チリ

刑事法に焦点を当てている第３研究委員会は，２０１７年も「刑事犯罪者の量刑」についての研究を継続することを決めました。

２０１６年のメキシコシティ（昨年度の年次総会）では，有罪の被告人に対し刑罰を科すときに裁判官が考慮する要素につき，優れた議論が行われました。また，一般的な考慮要素に加え，我々は，薬物取引の事例及び児童ポルノの事例における刑罰について議論しました。

２０１７年は更に，横領及び銃の不法所持を含む架空の事例（更に追加されるかもしれません。）における適切な量刑について議論します。

さらに，我々は，裁判官に裁量のない必要的刑罰のほか，刑事手続における被害者の役割についても議論します。最後に，我々は，検察官，被告人，あるいは被害者が関与して刑事訴訟手続の中で行われる「和解」について議論します。

我々の議論の一助のため，各国におかれては，次の質問に御回答いただきますようお願いいたします。

１）　貴国では，被害者が，証人としてではなく当事者として刑事手続に参加することはできますか。

（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）。

２）　被害者は，弁護士を選任することができますか。また，当該弁護士は，検察官を補助することができますか。

（回答）
公判手続に参加する被害者は，弁護士を選任することができる（刑訴法

３１６条の３３以下)。当該弁護士は，検察官の権限の行使に関し，意見を述べ，説明を受けることができる（同法３１６条の３５)。

3）　被害者が犯罪の結果として損害を被った場合，裁判官は，被告人に対し，被害者に対する医療費，財産的損害，精神的苦痛又は休業損害の賠償を命じることができますか。もし裁判官がこのような損害賠償を命じることができるのであれば，賠償額を決定するのは誰ですか。それは，裁判官ですか，陪審員ですか，それとも裁判体ですか。

(回答)

殺人等一定の事件については，刑事手続に付随する損害賠償命令を申し立てることができ，裁判官は，これに基づき，被告人に対し，犯罪により被った損害の賠償を命ずることができる（犯罪被害者等の権利利益の保護を図るための刑事手続に付随する措置に関する法律２３条以下)。賠償額を決定するのは，裁判官又は裁判体（the panel of judges）である。

4）　裁判官は，損害賠償の判断をすることにより事案が極めて複雑化する場合であっても，被害者に対する損害賠償について義務的に判断しなければなりませんか。それとも，被害者に被告人に対する別訴の提起を余儀なくするとしても，裁判官は，損害賠償についての判断を拒絶することができますか。

(回答)

裁判所は，審理に日時を要するため，４回以内の審理期日において審理を終結することが困難であると認めるときは，損害賠償命令事件を終了させる旨の決定をすることができ，同決定がなされた場合，民事訴訟の訴えの提起があったものと擬制される（犯罪被害者等の権利利益の保護を図るための刑事手続に付随する措置に関する法律３２条１項，４項，２８条)。

5）　被害者が損害賠償についての判断を取得した場合，その判断はどのように実現されますか。被告人が任意に賠償金を支払わない場合にはどうなりますか。また，被告人に支払能力がない場合はどうなりますか。

(回答)

仮執行宣言が付された損害賠償命令の申立てについての裁判を取得した

場合又は適法な異議の申立てがない損害賠償命令の申立てについての裁判を取得した場合において，被告人が任意に賠償金を支払わないときは，上記の各裁判に基づき，強制執行の枠内で，被告人の有する財産を差し押さえて換価することができる（犯罪被害者等の権利利益の保護を図るための刑事手続に付随する措置に関する法律３２条２項，３３条５項，民事執行法２２条３号の２，７号，４３条，１２２条，１４３条など）。

被告人に支払能力がない場合であっても，殺人等一定の事件の被害者は，国から犯罪被害者等給付金を受給することができる（犯罪被害者等給付金の支給等による犯罪被害者等の支援に関する法律３条）。

6） 貴国には，裁判官が裁量を有しない必要的刑罰がありますか。それはどのような事案において適用されますか。訴訟当事者が必要的刑罰の適用を阻止する手段はありますか。

（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。

7） 貴国では，検察官と被告人（被疑者）との合意により，刑事事件を和解で解決することができますか。それは一般的ですか。裁判官はどのような役割を果たしますか。刑事事件の和解は良いことですか，それとも良くないことですか。

（回答）

現在，我が国においては，検察官と被告人（被疑者）との合意により，刑事事件を和解で解決する制度は存在しない。

Santiago-2017

FOURTH STUDY COMMISSION

"Flexible employment and other emerging types of labor relations"

Preamble

Flexibility (quantitative or qualitative) has become a major issue in the competitiveness of companies, which have to adapt and even react as quickly as possible to unforeseeable events, conjunctures or economic constraints that are less and less predictable.

In order to do so, employers choose to have either external flexibility, by using interim, fixed-term contracts, subcontracting or even the outsourcing of certain skills (computing, accounting, logistics, calling centers, catering, etc.), or internal flexibility 1) by being flexible on "time", adjusting working hours or allowing part-time work, 2) by giving "geographical" flexibility to the employees in the workplace (telework, working remotely, even a change of assignment from one workstation to another for the same employer), 3) by expanding the employee's tasks to modify his or her job in the workplace (specialization by training in order to increase the skills of the worker), or even 4) by training the worker to give her or him the possibility to get a new job in the same company.

From the workers' point of view, this flexibility may be perceived by some as a source of precariousness likely to degrade their living conditions, but for others this flexibility can both be associated with a freer management of their working hours when, for example, more flexible hours have been negotiated or chosen and not imposed, which would constitute a way of making work less monotonous or more diversified.

This year, the theme chosen by the 4th Commission at the 59th International Congress of IAJ tend, on one hand, to examine the different modes of "time and geographical" flexibility introduced by each country in its positive law and, on the other hand, to identify other emerging modes of flexibility that would have appeared in order to ensure greater flexibility in the work schedule and the workplace of an employee.

* * *

Questions

[1] Does your country have laws or regulations on work schedules?

Yes ("Labor Standards Act" and "Ordinance for Enforcement of the Labor Standards Act").

[2] **If so:**

a) **What are the general rules applicable to the duration of working hours?**

The Labor Standards Act provides that Employers shall not have Workers work more than 40 hours per week or more than eight hours per day for each day of the week, excluding rest periods.

○ Labor Standards Act

(Working Hours)

Article 32 Empoyers shall not have Workers work more than 40 hours per week, excluding rest periods.

(2) Employers shall not have Workers work more than 8 hours per day for each day of the week, excluding rest periods.

(Rest Periods)

Article 34 An employer shall provide workers with at least 45 minutes of rest periods during working hours when working hours exceed 6 hours, and at least one hour in when working hours exceed 8 hours.

Articles 34-2 and 34-3 are omitted.

(Days Off)

Article 35 Employers shall provide Workers with at least one day off per week.

(2) The provisions set forth in the preceding paragraph shall not apply to an Employer who provides Workers with 4 days off or more over any four-week period.

b) **Has the legislator considered any general exemptions from these rules?**

The Labor Standards Act provides that the principles on working hours, rest periods, and days off shall not apply to Wokers engaged in certain businesses or services as follows, due to the special nature of such businesses or services.

○ Labor Standards Act

(Exclusions from the Application of Provisions on Working Hours)

Article 41 The provisions regarding working hours, rest periods and days off set forth in this Chapter, Chapter VI and Chapter VI-2 shall not apply to Workers coming under one of the following items:

(i) Persons engaged in Business stipulated in item (vi) (excluding forestry) or item (vii) of Appended Table No. 1;

(vi) Businesses that cultivate or reclaim land, or plant, grow, harvest, or cut plants, and other agricultural or forestry Businesses

(vii) Businesses that breed animals, or harvest or cultivate aquatic animals or plants, and other livestock, sericultural, or fishery Businesses

(ii) Persons in positions of supervision or management or persons handling confidential affairs, regardless of the type of Business;

(iii) Persons engaged in monitoring or in intermittent labor, with respect to which the Employer has obtained permission from the relevant government agency.

c) Apart from these general derogations, has the legislator provided for any other special exemptions applicable to the duration of working hours?

The Labor Standards Act allows Employers may have Workers work overtime or on the days off in the event of an emergency (Article 33) or according to an agreement between labor and Employers at workplace on working hours or days off (Article 36).

In addition, Articles 32-2 through 32-5 of the Labor Standards Act allow Employers to adopt irregular working hour systems to manage their Wokers' working hours in a flexible manner, subject to the satisfaction of certain requirements.

○ Labor Standards Act

Article 32-2 In the event that an Employer has stipulated, pursuant to a written agreement with a labor union organized by a majority of the Workers at the workplace (in cases where such labor union exists), or with a person representing a majority of the Workers (in cases where such union does not exist), or pursuant to rules of employment or the equivalent thereof, that the average working hours per week over the course of a fixed period of no more than one month will not exceed the working hours set forth in paragraph (1) of the preceding Article, the Employer may, in accordance with

such stipulation and regardless of the provisions of the preceding Article, have a Worker work in excess of the working hours set forth in paragraph (1) of the preceding Article in a specified week or weeks and may have a Worker work in excess of the working hours set forth in paragraph (2) of the preceding Article on a specified day or days.

Paragraph (2) is omitted.

Article 32-3 In the event that the following items have been provided in a written agreement either with a labor union organized by a majority of the Workers at the workplace concerned (in cases where such labor union exists), or with a person representing a majority of the Workers (in cases where such union does not exist), the Employer may, with respect to a Worker for whom the starting and ending time for work is left up to the Worker, pursuant to rules of employment or the equivalent, and regardless of the provisions of Article 32, have such a Worker work in excess of the working hours set forth in paragraph (1) of Article 32 in a week and may have such a Worker work in excess of the working hours set forth in paragraph (2) of that Article in a day, as long as the average working hours per week during the period provided in the above-mentioned written agreement as the settlement period (of which conditions are defined in item (ii) below) does not exceed the working hours set forth in paragraph (1) of Article 32:

(i) The scope of Workers whom the Employer may have work under the working hour provisions of this Article;

(ii) A settlement period (which shall be period, not to exceed one month in length, during which average working hours per week will not exceed the working hours under Article 32, paragraph (1). The same shall apply in the following item.);

(iii) Total working hours in the settlement period;

(iv) Other matters as set forth by Ordinance of the Ministry of Health, Labour and Welfare.

Article 32-4 In the event that the Employer has stipulated the following items pursuant to a written agreement either with a labor union organized by a majority of the Workers at the workplace concerned (in cases where

such labor union exists), or with a person representing a majority of the Workers at a workplace (in cases where such union does not exist), regardless of the provisions of Article 32, the Employer may have a Worker work in excess of the working hours set forth in paragraph (1) of Article 32 in a specified week or weeks and may have a Worker work in excess of the working hours set forth in paragraph (2) of that Article on a specified day or days in accordance with said written agreement (including stipulations that have been set under the provisions of the following paragraph in cases where this is applicable), as long as the average working hours per week for the period set in that agreement as the applicable period defined at item (ii) below does not exceed 40 hours:

(i) The scope of Workers whom the Employer may have work under the working hours provisions of this Article;

(ii) Applicable period (a period longer than one month but not exceeding one year, during which the average working hours per week do not exceed 40 hours; hereinafter the same shall apply in this Article and the following Article);

(iii) Specified period (a period within the applicable period when work is particularly busy; the same shall apply to paragraph (3));

(iv) Working days in the applicable period and working hours for each of said working days (in cases where the applicable period is divided into sub-periods of one month or more, working days and working hours for each working day in the sub-period which includes the first day of the applicable period (hereinafter in this Article referred to as the "Initial Sub-Period") and the number of working days and total working hours of each sub-period excluding the Initial Sub-Period);

(v) Other matters as set forth by Ordinance of the Ministry of Health, Labour and Welfare.

From paragraph (2) to paragraph (4) are omitted.

Article 32-5 With respect to Workers employed in a Business which is specified by Ordinance of the Ministry of Health, Labour and Welfare as having an amount of daily business which is often subject to wide

fluctuations, and given this forecast it would be difficult to fix daily working hours by rules of employment or the equivalent thereto, and of which the number of regular employees is under the number specified by Ordinance of the Ministry of the Health, Labour and Welfare, the Employer may, regardless of the provisions of paragraph (2) of Article 32, have Workers work for up to ten hours per day, if there is a written agreement either with a labor union organized by a majority of the Workers at the workplace (in cases where such labor union exists) or with a person representing a majority of the Workers (in cases where such union does not exist).

Paragraph (2) and paragraph (3) are omitted.

(Overtime Work in Cases of Extraordinary Need Due to Disasters, etc.)

Article 33 If there is an extraordinary need due to disaster or other unavoidable events, Employers may extend the working hours stipulated in Articles 32 through 32-5 or Article 40, or may have Workers work on the days off stipulated in Article 35, with the permission of the relevant government agency to the extent that is needed; provided, however, that the Employer does not need to obtain such permission in cases that the necessity to extend working hours is so urgent that the Employer does not have time to obtain the permission of the relevant government agency, and shall notify the relevant government agency of such extending of working hours after said work has been carried out without delay,.

Paragraph (2) is omitted.

(3) Notwithstanding the provisions of paragraph (1), if there is an extraordinary need for the purposes of public service, in so far as national public officers and local public officers who engage in business of public agencies (excluding businesses stipulated in Appended Table No. 1) are concerned, the Employer may extend the working hours stipulated in Articles 32 through 32-5 or Article 40 or may have Workers work on the days off stipulated in Article 35.

(Overtime Work and Work on Days Off)

Article 36 If an Employer has entered into a written agreement either with a labor union organized by a majority of the Workers at the workplace

(in cases where such labor union exists) or with a person representing a majority of the Workers (in cases where such union does not exist) and has notified the relevant government agency of such agreement , the Employer may, notwithstanding the provisions with respect to working hours stipulated in Articles 32 through 32-5 or Article 40 (hereinafter in this Article referred to as "Working Hours")or the provisions with respect to days off stipulated in the preceding Article(hereinafter in this paragraph referred to as "Days Off"), extend the Working Hours or have Workers work on Days Off in accordance with the provisions of said agreement; provided, however, that the extension of Working Hours for belowground labor and other work particularly harmful to health as stipulated by Ordinance of the Ministry of Health, Labour and Welfare shall not exceed 2 hours per day.

From paragraph (2) to paragraph (4) are omitted.

[3] In any event (whether in the absence or presence of a regulation on the duration of working hours):

a) What forms of flexible working hours have been considered, whether by your legislator, the social partners (in collective agreements), or even by the company (intern regulations, employment contract)?

- **Could you explain how it works?**

Flexible working hour systems include, among others, the flextime system, deemed working hours system for Workers working outside the workplace, and discretionary work system.

○ Labor Standards Act

Article 38-2 In cases where Workers engage in work outside of the workplace during all or part of their working hours and it would be difficult to calculate working hours, the number of hours worked shall be deemed to be the prescribed working hours; provided, however, that if it would normally be necessary to work in excess of the prescribed working hours in order to carry out said work, the number of hours worked shall be deemed to be the number of hours normally required to carry out such work as stipulated by Ordinance of the Ministry of Health, Labour and Welfare.

Paragraph (2) and paragraph (3) are omitted.

Article 38-3 When an Employer has provided the following items in a written agreement either with a labor union organized by a majority of the

Workers at the workplace concerned (in cases where such labor union exists), or with a person representing a majority of the Workers (in cases where such union does not exist), if the Employer has assigned a Worker to the work listed in item (i), such Worker shall be regarded as having worked the hours listed in item (ii), as prescribed by Ordinance of the Ministry of Health, Labour and Welfare:

(i) that work which is assigned to a Worker (hereinafter in this Article "Covered Work") as prescribed by Ordinance of the Ministry of Health, Labour and Welfare as work for which it is difficult for the Employer to give concrete direction regarding determining the how said work is to be carried out and the allocation of time to said work, etc., because the determining how said work is carried out needs, owing to its nature, to be left largely to the discretion of the Workers engaged in such work;

(ii) the hours calculated as the working hours of a Worker engaged in the Covered Work;

(iii) that the Employer will not give concrete direction to the Worker engaged in the Covered Work in relation to the determining how said Covered Work is carried out and the allocation of time to said Covered Work;

(iv) that the Employer will take measures pursuant to the provisions of such agreement in order to secure the Worker's health and welfare, taking into consideration the working hours of the Worker engaged in the Covered Work;

(v) that the Employer will take measures pursuant to the provisions of said agreement in relation to the handling of complaints from the Worker engaged in the Covered Work;

(vi) matters prescribed by Ordinance of the Ministry of Health, Labour and Welfare other than those listed in the preceding items.

Paragraph (2) is omitted.

Article 38-4 If, at a workplace where a committee (limited to committees comprising of the Employer and representatives of Workers at the workplace) is established with the aim of examining and deliberating on Wages, working hours and other matters concerning working conditions at the workplace concerned, and of stating opinions regarding said matters to the proprietor of the Business, said committee adopts a resolution by a majority of four-fifths or more of its members regarding or on the following items, and the Employer notifies the relevant government agency of said resolution in accordance with

Ordinance of the Ministry of Health, Labour and Welfare, and if the Employer has a Worker, who comes under the type of Workers stipulated in item (ii), carry out work stipulated in item (i) at the workplace concerned, said Worker shall be deemed to have worked the hours stipulated in item (iii) as prescribed by Ordinance of the Ministry of Health, Labour and Welfare:

(i) planning, drafting, researching and analyzing matters regarding business operations for which the Employer does not give concrete direction regarding determining how said work is carried out and the allocation of time to said work, etc., as the nature of the work is such that the means of carrying out said work for its proper completion need to be left largely to the discretion of the Workers (hereinafter referred to as "Covered Work" in this Article);

(ii) the scope of Workers who possess the knowledge and experience, etc. required to carry out the Covered Work properly, and who are deemed to have worked the hours stipulated by said resolution when engaged in said Covered Work;

(iii) the hours calculated as the working hours of Workers who are engaged in Covered Work and who come under the scope of the Workers stipulated in the preceding item;

(iv) Employers shall adopt measures as prescribed in said resolution to secure the health and welfare of Workers, who are engaged in Covered Work and who come under the scope of Workers stipulated in item (ii), according to the working hours of said Workers;

(v) Employers shall adopt measures as prescribed in said resolution to deal with complaints from Workers who are engaged in Covered Work and who come under the scope of Workers stipulated in item (ii);

(vi) when having Workers who come under the scope of Workers stipulated in item (ii) perform Covered Work as prescribed in this paragraph, Employers must obtain the consent of said Workers with respect to the fact that they shall be deemed to have worked the hours stipulated in item (iii), and shall not dismiss or treat said Worker who does not give consent in any other manner which adversely affects them;

From paragraph (2) to paragraph (5) are omitted.

b) Moreover, does your country have one or more of the following forms of flexibility (or other forms of flexibility to be specified):

- **Successive fixed-term contract, interim, layoff, teleworking, part-time work, on-call work contract, occasional work, etc.**

The fixed-term labor contract, dispatched Worker, and part-time labor are regulated by statutory law. Teleworking may be adopted by agreement between Workers and employers.

○Labor Contracts Act

(Dismissal, etc. Before Contract Expires)

Article 17 With regard to a fixed-term labor contract, an Employer may not dismiss a Worker until the expiration of the term of such labor contract, unless there are unavoidable circumstances.

Paragraph (2) is omitted.

○ Act for Securing the Proper Operation of Worker Dispatching Undertakings and Protection for Dispatched Wokers

(Purpose)

Article 1 The purpose of this Act is to take measures for securing the proper operation of Worker Dispatching Undertakings for the proper adjustment of labor demand and supply, in conjunction with the Employment Security Act (Act No. 141 of 1947), as well as measures for securing protection for Dispatched Workers, and thereby to contribute to the stability of employment and otherwise to the promotion of the welfare of Dispatched Workers.

○Act on Improvement, etc. of Employment Management for Part-Time Workers

(Definition)

Article 2 The term "Part-Time Worker" as used in this Act mean a worker whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same place of business (or said ordinary workers who are engaged in the same kind of work as said workers, unless otherwise specified by Ordinance of the Ministry of Health, Labour and Welfare, if the

worker is engaged in the same kind of work as said ordinary worker employed at the said place of business).

[4] **More specifically, in your country, is there a possibility to work outside of the workplace, for example at home?**

As stated in the answer to Question 3

[5] **If so:**

a) **What kind of control can the employer have over the employee working outside of the workplace?**

There are no systematic rules on means to provide supervision when Workers work outside of the workplace.

b) **Do the employers have to reimburse the employee for certain costs associated with this type of work?**

There are no systematic rules on the reimbursement of costs associated with work outside of the workplace.

* * *

サンティアゴ - ２０１7年

第４研究委員会

「柔軟な雇用及びその他の新たな労働関係」

序文

量的又は質的な柔軟性は，予期せぬ出来事，危機的な局面又はますます予測が困難となってきている経済的制約に可能な限り迅速に適応し対応しなければならない企業の競争力に関する重要な論点となっています。

そのような状況に対応するため，使用者は，外部的な柔軟性又は内部的な柔軟性のいずれを採るかを選択します。前者は，派遣労働，有期労働契約，下請契約又は特定の技能の外部委託（コンピューター，会計，ロジスティクス，コールセンター，ケータリング等）によるもの，後者は，①労働時間の調整やパートタイム労働の許容のように，「時間」に柔軟性を持たせること，②被用者に「地理的な」柔軟性を与えること（在宅就労（telework，working remotely），同一の被用者の就業場所の移動を伴う配置換え），③同一就業場所内において被用者の職務を変更することによりその所掌事務を拡大すること（労働者の技能を高めるための訓練による専門化），④同一企業内において，労働者に新しい仕事を得る可能性を与えるための訓練を行うことによるものです。

この柔軟性を，生活条件を低下させるような不安定さの原因として認識する労働者もいるかもしれませんが，他の労働者にとっては，例えばより柔軟な労働時間を（押し付けられるのではなく）交渉し又は選択するときに，労働時間の管理に係る自由度を高めることにもつながり得るのです。この，より自由な労働時間管理は，より単調ではなく，あるいは，より多様な働き方を作り出してくれるものです。

ＩＡＪの第５９回年次総会において第４研究委員会が選択した今年のテーマは，一方で，各国において実定法上導入されている「時間的及び地理的な」柔軟性の形態の異同を検証するとともに，他方で，被用者の労働時間や就業場所に関するより高い柔軟性を確保するために出現してきたその他の新しい柔軟性を同定することを志向しています。

質問

1　貴国には，労働時間についての法律又は規則がありますか。

（回答）

ある（労働基準法，労働基準法施行規則）。

2　ある場合には，

a)　労働時間について適用される一般的な規範はどのようなものですか。

（回答）

労働基準法により，休憩時間を除き，１週間について４０時間，１週間のうち各日については１日について８時間を超えて労働させてはならないことが定められている。

○労働基準法

（労働時間）

第三十二条　使用者は、労働者に、休憩時間を除き一週間について四十時間を超えて、労働させてはならない。

②　使用者は、一週間の各日については、労働者に、休憩時間を除き一日について八時間を超えて、労働させてはならない。

（休憩）

第三十四条　使用者は、労働時間が六時間を超える場合においては少くとも四十五分、八時間を超える場合においては少くとも一時間の休憩時間を労働時間の途中に与えなければならない。

②③　略

（休日）

第三十五条　使用者は、労働者に対して、毎週少くとも一回の休日を与えなければならない。

②　前項の規定は、四週間を通じ四日以上の休日を与える使用者については適用しない。

b)　これらの規範の一般的な適用除外事由はありますか。

（立法者は，これらの規範の一般的な適用除外事由を検討していますか。）

（回答）

労働基準法上，以下のとおり一定の事業や業務に従事する者等について，事業や業務の特殊性から，労働時間・休憩・休日の原則を適用しないこととされている。

○労働基準法

（労働時間等に関する規定の適用除外）

第四十一条　この章、第六章及び第六章の二で定める労働時間、休憩及び休日に関する規定は、次の各号の一に該当する労働者については適用しない。

一　別表第一第六号（林業を除く。）又は第七号に掲げる事業に従事する者

※ 第六号：土地の耕作若しくは開墾又は植物の栽植、栽培、採取若しくは伐採の事業その他農林の事業

第七号：動物の飼育又は水産動植物の採捕若しくは養殖の事業その他の畜産、養蚕又は水産の事業

二　事業の種類にかかわらず監督若しくは管理の地位にある者又は機密の事務を取り扱う者

三　監視又は断続的労働に従事する者で、使用者が行政官庁の許可を受けたもの

c)　これらの一般的な適用除外事由とは別に，立法者は，労働時間について特別な適用除外事由を規定しましたか。

（回答）

労働基準法により，非常事由によって時間外・休日労働をさせること（３３条）や，事業場における労使の時間外・休日労働協定等の定めに従い時間外・休日労働をさせること（３６条）が認められている。

また，労働基準法３２条の２から３２条の５までのとおり，一定の要件を満たした場合に，変形労働時間制をとり，労働時間について弾力的に運用することが認められている。

○労働基準法

第三十二条の二　使用者は、当該事業場に、労働者の過半数で組織する労働組合がある場合においてはその労働組合、労働者の過半数で組織する労働組合がない場合においては労働者の過半数を代表する

者との書面による協定により、又は就業規則その他これに準ずるものにより、一箇月以内の一定の期間を平均し一週間当たりの労働時間が前条第一項の労働時間を超えない定めをしたときは、同条の規定にかかわらず、その定めにより、特定された週において同項の労働時間又は特定された日において同条第二項の労働時間を超えて、労働させることができる。

② 略

第三十二条の三 使用者は、就業規則その他これに準ずるものにより、その労働者に係る始業及び終業の時刻をその労働者の決定にゆだねることとした労働者については、当該事業場の労働者の過半数で組織する労働組合がある場合においてはその労働組合、労働者の過半数で組織する労働組合がない場合においては労働者の過半数を代表する者との書面による協定により、次に掲げる事項を定めたときは、その協定で第二号の清算期間として定められた期間を平均し一週間当たりの労働時間が第三十二条第一項の労働時間を超えない範囲内において、同条の規定にかかわらず、一週間において同項の労働時間又は一日において同条第二項の労働時間を超えて、労働させることができる。

一 この条の規定による労働時間により労働させることができることとされる労働者の範囲

二 清算期間（その期間を平均し一週間当たりの労働時間が第三十二条第一項の労働時間を超えない範囲内において労働させる期間をいい、一箇月以内の期間に限るものとする。次号において同じ。）

三 清算期間における総労働時間

四 その他厚生労働省令で定める事項

第三十二条の四 使用者は、当該事業場に、労働者の過半数で組織する労働組合がある場合においてはその労働組合、労働者の過半数で組織する労働組合がない場合においては労働者の過半数を代表する者との書面による協定により、次に掲げる事項を定めたときは、第三十二条の規定にかかわらず、その協定で第二号の対象期間として定められた期間を平均し一週間当たりの労働時間が四十時間を超えない範囲内において、当該協定（次項の規定による定めをした場合においては、その定めを含む。）で定めるところにより、特定された週において同条第一項の労働時間又は特定された日において同条第二項の労働時間を超えて、労働させることができる。

一 この条の規定による労働時間により労働させることができること

とされる労働者の範囲

二　対象期間（その期間を平均し一週間当たりの労働時間が四十時間を超えない範囲内において労働させる期間をいい、一箇月を超え一年以内の期間に限るものとする。以下この条及び次条において同じ。）

三　特定期間（対象期間中の特に業務が繁忙な期間をいう。第三項において同じ。）

四　対象期間における労働日及び当該労働日ごとの労働時間（対象期間を一箇月以上の期間ごとに区分することとした場合においては、当該区分による各期間のうち当該対象期間の初日の属する期間（以下この条において「最初の期間」という。）における労働日及び当該労働日ごとの労働時間並びに当該最初の期間を除く各期間における労働日数及び総労働時間）

五　その他厚生労働省令で定める事項

②～④　略

第三十二条の五　使用者は、日ごとの業務に著しい繁閑の差が生ずることが多く、かつ、これを予測した上で就業規則その他これに準ずるものにより各日の労働時間を特定することが困難であると認められる厚生労働省令で定める事業であつて、常時使用する労働者の数が厚生労働省令で定める数未満のものに従事する労働者については、当該事業場に、労働者の過半数で組織する労働組合がある場合においてはその労働組合、労働者の過半数で組織する労働組合がない場合においては労働者の過半数を代表する者との書面による協定があるときは、第三十二条第二項の規定にかかわらず、一日について十時間まで労働させることができる。

②，③　略

（災害等による臨時の必要がある場合の時間外労働等）

第三十三条　災害その他避けることのできない事由によつて、臨時の必要がある場合においては、使用者は、行政官庁の許可を受けて、その必要の限度において第三十二条から前条まで若しくは第四十条の労働時間を延長し、又は第三十五条の休日に労働させることができる。ただし、事態急迫のために行政官庁の許可を受ける暇がない場合においては、事後に遅滞なく届け出なければならない。

②　略

③　公務のために臨時の必要がある場合においては、第一項の規定にかかわらず、官公署の事業（別表第一に掲げる事業を除く。）に従事

する国家公務員及び地方公務員については、第三十二条から前条まで若しくは第四十条の労働時間を延長し、又は第三十五条の休日に労働させることができる。

（時間外及び休日の労働）

第三十六条　使用者は、当該事業場に、労働者の過半数で組織する労働組合がある場合においてはその労働組合、労働者の過半数で組織する労働組合がない場合においては労働者の過半数を代表する者との書面による協定をし、これを行政官庁に届け出た場合においては、第三十二条から第三十二条の五まで若しくは第四十条の労働時間（以下この条において「労働時間」という。）又は前条の休日（以下この項において「休日」という。）に関する規定にかかわらず、その協定で定めるところによつて労働時間を延長し、又は休日に労働させることができる。ただし、坑内労働その他厚生労働省令で定める健康上特に有害な業務の労働時間の延長は、一日について二時間を超えてはならない。

②～④　略

3　労働時間に関する規制の有無にかかわらず，

a)　立法者，ソーシャル・パートナー（労働協約）又は企業（内規，労働契約）により，どのような形態の柔軟な働き方が考えられていますか。

・それはどのように機能していますか。

（回答）

フレックスタイム制（労働基準法３２条の３），事業場外労働者のみなし制（労働基準法３８条の２），裁量労働制（労働基準法３８条の４）等がある。

○労働基準法

第三十八条の二　労働者が労働時間の全部又は一部について事業場外で業務に従事した場合において、労働時間を算定し難いときは、所定労働時間労働したものとみなす。ただし、当該業務を遂行するためには通常所定労働時間を超えて労働することが必要となる場合においては、当該業務に関しては、厚生労働省令で定めるところにより、当該業務の遂行に通常必要とされる時間労働したものとみなす。

②，③　略

第三十八条の三　使用者が、当該事業場に、労働者の過半数で組織する労働組合があるときはその労働組合、労働者の過半数で組織する労働組合がないときは労働者の過半数を代表する者との書面による協定により、次に掲げる事項を定めた場合において、労働者を第一号に掲げる業務に就かせたときは、当該労働者は、厚生労働省令で定めるところにより、第二号に掲げる時間労働したものとみなす。

一　業務の性質上その遂行の方法を大幅に当該業務に従事する労働者の裁量にゆだねる必要があるため、当該業務の遂行の手段及び時間配分の決定等に関し使用者が具体的な指示をすることが困難なものとして厚生労働省令で定める業務のうち、労働者に就かせることとする業務（以下この条において「対象業務」という。）

二　対象業務に従事する労働者の労働時間として算定される時間

三　対象業務の遂行の手段及び時間配分の決定等に関し、当該対象業務に従事する労働者に対し使用者が具体的な指示をしないこと。

四　対象業務に従事する労働者の労働時間の状況に応じた当該労働者の健康及び福祉を確保するための措置を当該協定で定めるところにより使用者が講ずること。

五　対象業務に従事する労働者からの苦情の処理に関する措置を当該協定で定めるところにより使用者が講ずること。

六　前各号に掲げるもののほか、厚生労働省令で定める事項

②　略

第三十八条の四　賃金、労働時間その他の当該事業場における労働条件に関する事項を調査審議し、事業主に対し当該事項について意見を述べることを目的とする委員会（使用者及び当該事業場の労働者を代表する者を構成員とするものに限る。）が設置された事業場において、当該委員会がその委員の五分の四以上の多数による議決により次に掲げる事項に関する決議をし、かつ、使用者が、厚生労働省令で定めるところにより当該決議を行政官庁に届け出た場合において、第二号に掲げる労働者の範囲に属する労働者を当該事業場における第一号に掲げる業務に就かせたときは、当該労働者は、厚生労働省令で定めるところにより、第三号に掲げる時間労働したものとみなす。

一　事業の運営に関する事項についての企画、立案、調査及び分析の業務であつて、当該業務の性質上これを適切に遂行するにはその遂行の方法を大幅に労働者の裁量にゆだねる必要があるため、当該業務の遂行の手段及び時間配分の決定等に関し使用者が具体的な指示

をしないこととする業務（以下この条において「対象業務」という。）

二　対象業務を適切に遂行するための知識、経験等を有する労働者であつて、当該対象業務に就かせたときは当該決議で定める時間労働したものとみなされることとなるものの範囲

三　対象業務に従事する前号に掲げる労働者の範囲に属する労働者の労働時間として算定される時間

四　対象業務に従事する第二号に掲げる労働者の範囲に属する労働者の労働時間の状況に応じた当該労働者の健康及び福祉を確保するための措置を当該決議で定めるところにより使用者が講ずること。

五　対象業務に従事する第二号に掲げる労働者の範囲に属する労働者からの苦情の処理に関する措置を当該決議で定めるところにより使用者が講ずること。

六　使用者は、この項の規定により第二号に掲げる労働者の範囲に属する労働者を対象業務に就かせたときは第三号に掲げる時間労働したものとみなすことについて当該労働者の同意を得なければならないこと及び当該同意をしなかつた当該労働者に対して解雇その他不利益な取扱いをしてはならないこと。

七　前各号に掲げるもののほか、厚生労働省令で定める事項

②～⑤　略

b) さらに，貴国には，次に挙げる柔軟な働き方の形態（又はその他に規定された柔軟な働き方の形態）がありますか。

・継続的有期労働契約，派遣労働（interim[1]），一時解雇，在宅就労，パートタイム労働，呼び出し労働（on-call work[2]），臨時労働（occasional work[3]）など。

（回答）

有期労働契約，派遣労働，パートタイム労働については法定されている。在宅就労については使用者・労働者間の合意によりそのような形態がとられることもある。

○労働契約法

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1 「臨時労働」と訳されることがあるが，我が国の派遣労働に近い。

2 職務遂行まで待機を伴う労働

3 不定期に短期間行われる労働

（契約期間中の解雇等）

第十七条　使用者は、期間の定めのある労働契約（以下この章において「有期労働契約」という。）について、やむを得ない事由がある場合でなければ、その契約期間が満了するまでの間において、労働者を解雇することができない。

2　略

○労働者派遣事業の適正な運営の確保及び派遣労働者の保護等に関する法律

（目的）

第一条　この法律は、職業安定法（昭和二十二年法律第百四十一号）と相まつて労働力の需給の適正な調整を図るため労働者派遣事業の適正な運営の確保に関する措置を講ずるとともに、派遣労働者の保護等を図り、もつて派遣労働者の雇用の安定その他福祉の増進に資することを目的とする。

○短時間労働者の雇用管理の改善等に関する法律

（定義）

第二条　この法律において「短時間労働者」とは、一週間の所定労働時間が同一の事業所に雇用される通常の労働者（当該事業所に雇用される通常の労働者と同種の業務に従事する当該事業所に雇用される労働者にあっては、厚生労働省令で定める場合を除き、当該労働者と同種の業務に従事する当該通常の労働者）の一週間の所定労働時間に比し短い労働者をいう。

4　より具体的に，貴国では，例えば自宅のように就業場所の外において勤務することが可能ですか。

（回答）

3において回答のとおり。

5　可能である場合，

a)　使用者は，就業場所外において労働する被用者をどのように監督することができますか。

（回答）

就業場所の外において勤務する場合の監督の方策について，制度化

された規律はない。

b)　使用者は，この種の労働に関連する一定の費用について，被用者に対し償還する必要がありますか。

（回答）

就業場所の外において勤務する場合に関連する費用の償還について，制度化された規律はない。