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ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

ENFORCEMENT OF JUDICIAL CODES OF CONDUCT

QUERY

Please provide an overview of the principles governing the effective enforcement of codes of conduct for judges. Are there examples where codes also include mandatory asset declarations for judges? What are the model standards for enforcement bodies?

CONTENT

Author(s)

Thomas Shipley, tihelpdesk@transparency.org

Reviewer(s)

Marie Chêne, Transparency International, mchene@transparency.org

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SUMMARY

Judicial codes of conduct are an important part of integrity measures in the justice sector. There is substantial publicly available guidance on the recommended content of codes, which is commonly based around the internationally accepted Bangalore Principles of Judicial Conduct, which emphasise independence, impartiality, integrity, propriety, equality, competence and diligence. World Bank data indicates that asset declarations for judges are also a feature of over 50 per cent of judicial conduct regimes globally.

The question of how best to enforce codes of conduct raises constitutional questions regarding whether the judiciary should "self-regulate" or be subject to some external supervision. While this has led to variation in country approaches, there are international standards which reflect a gradually emerging consensus on enforcement. The key point is to strike a balance between protecting the independence of the judiciary and allowing some external input in oversight.

Although ad hoc tribunals appear to be the most common tools employed for judicial disciplinary matters, international bodies such as the Judicial Integrity Group generally recommend establishing a permanent disciplinary body. The recommendation is for this to be composed primarily of sitting or retired judges along with some minority representation from other legal professionals or lay members. It is imperative that the process has procedural safeguards which support judges' rights to a fair hearing and that it is as transparent as possible to maintain public confidence.

This review provides an overview of the recommended international guidance in the area of enforcement. It concludes with country examples in South Africa, Somaliland and Kenya which demonstrate the application of some of the principles around enforcement in practice.

1. CORRUPTION AND THE JUDICIARY

Overview

Enacting measures to counter the problem of corruption in the judiciary is one of the foremost priorities for anti-corruption reform. Survey data suggests the judiciary is among the public institutions where perceptions of corruption levels are the highest. In Transparency International's 2017 Global Corruption Barometer, 30 per cent of respondents held the view that "most" or "all" judges and magistrates are corrupt. Although there is substantial regional variation in practice, with many judicial systems exhibiting strong integrity standards, experience-based surveys also indicate that corruption is a major feature in many national judiciaries. The 2015 Global Corruption Barometer for Africa, for example, ranked the courts as the public service where users most frequently had to pay bribes.

Both corruption and negative perceptions of integrity undermine the effective functioning of the judicial system as well as public confidence in the institution. These issues have far-reaching implications, as a 2012 special report prepared by the United Nations Special Rapporteur surmised:

> "Judicial corruption erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system" (United Nations 2012).

Corruption in the judiciary stands in opposition to its role in upholding the accountability of the executive and legislative arms of government. The negative effects of the problem are accentuated when it comes to national efforts to reduce corruption. The judicial system can not only be a source of corruption but – given it plays a critical part in imposing penalties on those implicated in the practice – the effectiveness of anti-corruption reform on the whole can be severely curtailed.

Forms of misconduct

It is for the reasons outlined that the question of how best to approach the problem of judicial corruption has received substantial attention in the anti-corruption literature (see Transparency International 2007; United Nations Office of Drugs and Crime 2011). The conduct of judges, prosecutors, lawyers and court personnel is at the heart of this question. The conduct of judges, which is the focus of this review, is particularly important because, in exercising judgement in the interpretation of law and determining case outcomes, judges are highly influential public figures. Their behaviour also sets the tone for integrity standards within the wider judicial system.

There are a range of forms of misconduct by judges which can be regarded as corruption. These extend beyond simply bribery. In 2016, the Basel Institute on Governance and International Bar Association published a typology of corrupt behaviours based on a global survey of judicial professionals. It divided the behaviours into the following main themes

- Bribery, for example, of a judge to influence his or her decision-making or to manipulate court proceedings.
- Undue influence and other forms of interference, brought to bear by political or economic interests, or informal networks. The impartiality of judges can be compromised by their personal relationships and conflicts of interest.
- Extortion and misuse of funds, such as links between the judiciary and organised crime, legal professionals implicated in money laundering, theft of public funds or nepotism in court appointments.

The same report highlights how corruption risks vary for the different legal professions. It considers that judges and prosecutors are most at risk from attempts at undue influence, whereas lawyers and court personnel can often act as intermediaries in disseminating bribes within the court system. The internal judicial hierarchy is an area open to abuse: judicial appointments and promotions, case assignments and the tenure of judges can all be manipulated in a system where corruption is embedded (Gloppen 2013). In addition, different types of cases and phases of proceedings have varying levels of susceptibility to corruption. The criminal justice chain is potentially the most vulnerable to corruption due to the sensitivity of the cases and the need to maintain confidentiality.

Possible indicators of corruption in the judicial system could include unpredictable court decisions; limited information published on the rationale for judgements; concerns around the selective assignment of judges to specific cases; and unusual administrative processes, such as the unnecessary prolongation or shortening of court proceedings (GIZ 2005). Signs of misconduct might also be apparent from the behaviour of individuals, such as unexplained wealth.

2. STANDARDS OF CONDUCT

Proliferation of codes of conduct

The development of rules governing the conduct of judges has consequently become a critical dimension to anti-corruption reforms focused on the judicial

sector[1]. A resource guide on judicial integrity published by the United Nations Office of Drugs and Crime (UNODC 2011) notes that there is nothing new about the emphasis on judicial discipline. However, it adds that the "the increasing political, social and economic relevance of the judicial function" has encouraged states to "articulate in detail the specific behavioural implications" of the values of judicial independence and integrity.

The contribution codes of conduct can have in upholding judicial independence is enshrined in article 11 (1) of the United Nations Convention against Corruption (UNCAC 2004). This makes an explicit reference to rules regarding judicial conduct:

> "Bearing in mind the independence of the judiciary and its crucial role in combatting corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary".

There are a number of potential benefits for states in issuing a code of conduct, namely it can:

- help judges resolve questions of professional ethics, giving them autonomy in decision-taking and guaranteeing their independence
- inform the public about standards of conduct that judges can be expected to uphold
- provide the judiciary with standards against which it can measure its performance
- provide protection to judges against charges of misconduct that are arbitrary and capricious
- signal the serious commitment of a concerned judiciary to meet its responsibilities in this regard (Cárdenas and Chayer 2007)

On the other hand, and as discussed in a previous Helpdesk Answer on this theme, while there is consensus on the importance of ethical standards in the judiciary, the drive toward codification was not necessarily an automatic outcome (U4 2012). Many jurisdictions already regulate standards through judicial oaths, statutes or other rules around public office. This is especially the case in countries with a civil law tradition, where oversight of judicial conduct often falls under existing codified rules for civil servants. Such an approach might be questioned as to whether it is sufficiently adapted to the specific integrity risks facing the judiciary. It is, arguably, for this reason that many civil law countries, such as France, Romania and Spain, have enacted separate judicial code documents (UNODC 2011).

In common law countries the uptake of codes of conduct has been greater and is a practical approach to take. In some cases, the codes constitute an enforceable set of rules, whereas in others, such as in England and Wales and Canada, the codes are regarded as guiding documents for judges. This is due to a view held that strictly binding rules might impede the exercise of judicial discretion and independence (UNODC 2011).

Regional and professional organisations, such as the Commonwealth (Mayne 2007) and International Commission of Jurists (2016) have recommended the adoption of a code of conduct as part of a combination of measures aimed at promoting judicial integrity. The result is that formalised codes are now widely regarded as a valuable tool in regulating judicial conduct.

The Bangalore Principles for Judicial Conduct

Judicial codes of conduct commonly have as their basis the Bangalore Principles of Judicial Conduct, the primary international reference document regarding standards of integrity in the judiciary. Drafted by a group of chief justices using 24 existing codes of conduct and adopted in 2002 under the auspices of the Judicial Integrity Group (JIG), the document put forward six core principles as a foundation for ethical standards in the judiciary. These are:

- Independence: a judge must be independent from the executive and legislative branches of government, as well as the parties to a dispute over which the judge presides. The principles further emphasise that the appearance of independence from such parties is as important as practice in maintaining public confidence.
- Impartiality: a judge must "perform her or his duties judicial duties without favour, bias or prejudice", and disqualify themselves from proceedings where they may not be able to act impartially or could be perceived as acting partially.
- Integrity: a judge must "ensure that her or his conduct is above reproach in the view of a reasonable observer".

[1] The content of codes of conduct was the subject of a previous Helpdesk Answer. U4 Anti-Corruption Helpdesk. 2012. Codes of conduct for judges.

- Propriety: to avoid impropriety or the appearance of impropriety, judges must "accept personal restrictions that might be considered burdensome to an ordinary citizen" as they are subject to constant public scrutiny. Examples provided include taking care regarding the expression of personal views which might compromise the perception of a judge's independence; not using their authority to promote the interests of family; and not knowingly permitting those working under their influence to accept gifts or payments to carry out their functions.
- Equality: a judge must ensure equality of treatment for all individuals who come before the court.
- Competence and diligence: a judge must exercise their duties with professionalism and take all reasonable steps to enhance their ability to discharge their functions effectively (United Nations Economic and Social Council 2006).

The Bangalore Principles were endorsed by the United Nations Commission on Human Rights in 2004, as well as by the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council in 2006. In 2010, the Judicial Integrity Group released an additional guidance document on measures for the effective implementation of the Bangalore Principles on Judicial Conduct (JIG 2010), the content of which will be discussed further in the following sections on enforcement.

It is common for codes to begin with an overview of general principles regarding judicial conduct, followed by more detailed rules on behaviour. Case studies of acceptable and unacceptable conduct are also often supplied to support the rules. Examples of how the principles have been translated into national codes are available on the website of the Judicial Integrity Group.

Asset and income declarations

Asset and income declarations increasingly form an important part of judicial conduct regimes. Citing data compiled by the World Bank, the UNODC found in 2015 that 56 per cent of countries had in place an asset declaration system, which rose to 58 per cent for supreme court members (UNODC 2015). In a study of practices in Eastern Europe and Latin America, the International Foundation for Electoral Systems (IFES 2004) found countries use three main forms of legal obligation to obtain financial disclosure from judges: a constitutional obligation for public officials, which in some cases name judges directly; an obligation under legislative statutes, such as freedom of information laws; or specific judicial requirements, which might include an article in a judicial code of conduct.

Neither the Bangalore Principles nor the 2010 follow-up guidance include an explicit recommendation for asset and income declaration by judges, even if the principles encourage judges to accept additional scrutiny and encompass provisions on financial probity[2]. This reflects the fact that mandatory declarations are contentious. The primary concerns relate to whether mandatory declarations violate the privacy of judges, the fear that the information could be misused by the executive or parties to a legal dispute to exert pressure on a judge's decision-making, and challenges regarding the collection, processing and evaluation of data (IFES 2004).

Proponents of asset and income declarations for judges argue that these challenges are overstated and that there is insufficient evidence to claim the requirements compromise the independence and security of judges (U4 2014; IFES 2004). By increasing the risks of detection, declarations are a form of deterrent of conflicts of interest and participation in corruption. The data collected can also provide key evidence in criminal investigations.

The guidance on best practice is that the declarations should be broad. In terms of outside interests, the declaration should encompass all business holdings and directorships, organisational memberships (paid and unpaid) and pre-tenure activities (UNODC 2015). On the financial aspects, good practice is to declare all income declarations and liabilities, alongside a disaggregated breakdown of the individual's asset holdings, such as property, loans and paid income. Some countries have also extended this requirement to cover declaration of expenditures above a certain threshold (U4 2014). The IFES (2004) further recommends that the declaration include the assets of a judge's spouses and minor children. A declaration should be made on assuming office and on an annual basis thereafter.

Although not specifically targeting at the judiciary, a previous Helpdesk Answer has focused on good practices for assets declaration regimes that are relevant to judges.

The incorporation of asset and income declarations into judicial conduct regimes raises the question of how compliance with the rules can be properly monitored. The Helpdesk Answer returns to this point in the enforcement section which follows.

[2] For example, section 4.7: 'a judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family'.

3. STANDARDS FOR ENFORCEMENT BODIES

It is self-evident that codes of conduct can only be a useful anti-corruption instrument if they are properly enforced. However, the disciplining of judges is an issue which must directly confront constitutional questions regarding the status of the judiciary in society, which has led to some variation in country approaches. On the one hand, the judiciary is ultimately accountable to society in general, which would support a case for some degree of external supervision rather than complete self-regulation. On the other hand, it is critical that disciplinary measures do not infringe on judicial independence, for example, by offering a means for the executive to interfere in the running of the judicial system. In designing a model for the enforcement of standards, the consensus is then that it must find a balance in protecting independence while providing accountability for a judge's actions. Transparency can underpin the process and help gain public confidence (Cárdenas and Chayer 2007).

Judicial service commissions

The establishment of a judicial service commission, or other permanent member-based disciplinary body, is the most common approach to enforcement recommended by international bodies. Implementation guidance on the Bangalore Principles published by the Judicial Integrity Group again serves as the most ready reference point for international standards. It recommends first that "a specific body or person should be established by law with responsibility for receiving complaints", and that the body or person be responsible for deciding whether to refer the matter to a disciplinary authority (15.3, JIG 2010). It continues by stating that the power to discipline a judge should be "vested in an authority or tribunal which is independent of the legislature and executive" (15.4). The International Commission of Jurists has also written that "while most international standards do not outright preclude the possibility of other accountability mechanisms, many assert that independent judicial councils or similarly constituted bodies should have the primary if not exclusive role in holding judges accountable" (ICJ 2016).

Composition

One of the key considerations regarding a disciplinary body is the composition of its members. The Judicial Integrity Group recommends that the authority be "composed of serving or retired judges" but adds that its membership may include "persons other than judges, provided that such other persons are not members of the legislature or the executive" (15.4, JIG 2010). The UN Special Rapporteur (2012) similarly recommended that the body should be established within the judiciary, stating that it is "preferable that such a body be composed entirely or judges, retired or sitting". It added, however, that "it would be consistent with the principle of judicial independence if there could also be some representation of the legal profession or legal academics", even if that representation should be in the minority, and "no political representation should be permitted". Commissions are often chaired by the chief justice.

Some commentary allows for a greater possibility of lay representation in disciplinary bodies. The UNODC (2015) notes that many states "have considered it not appropriate" for the body to be "uniquely controlled by the judiciary", and have included external persons, such as lawyers, academics and representatives of the community, to monitor ethical principles. This is while ensuring that "judges are not deprived of the power to determine their own professional ethics" (UNODC 2015). In addition, in a study of practices across Africa, Hatchard (2014) notes that some countries have opened the commission to lay members. He considers that this can be justified on the grounds that the public has a legitimate interest in the processes and therefore should be represented. External members can also bring additional expertise and more diverse experience.

Disciplinary process

All disciplinary proceedings involving members of the judiciary should respect due process and be conducted in full conformity with international standards related to the right to a fair and impartial trial (UN 2012). The Judicial Integrity Group (2010) recommends that confidentiality be maintained in the initial stages of an inquiry by the body mandated to receive complaints while determining whether the complaint merits referral to the disciplinary body. It is generally the recommendation that such enquiries should only be considered for cases of serious misconduct (JIG, 15.1 2010). Thereafter, the consensus is that the assessment of the conduct should be conducted in as transparent a manner as possible (UN 2012). The Judicial Integrity Group further recommends that judges should have the right to appeal from the disciplinary authority to the court system (15.6).

In its 2011 resource guide on strengthening judicial integrity, the UNODC comments that in many common law countries, the only sanction for misconduct consists of removal of the judge from office. The basis to this view is that any form of misconduct would undermine the capacity of the judge to fulfil her or his role. Another approach is to have a list of possible sanctions held by the disciplinary authority that is

scaled according to the severity of the offence (see the South Africa example in section four).

The Judicial Integrity Group (16.1, 2010) stipulates a limited number of circumstances where a judge might be removed from office, namely "for proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary". The group acknowledges that in some countries final authority for removal of a judge may lie with the legislature but recommends it should only act following a recommendation from the independent body (16.2). The view of the International Commission of Jurists is that such power held by the legislature should not exist in theory or practice. It states that judicial independence is better protected where the final decision does not rely on the discretion of a political body (ICJ 2016).

Ad hoc tribunals

An alternative to permanently constituted disciplinary committees is the use of ad hoc tribunals. In 2015, the Commonwealth published a study of practices across its 48 member states and found that ad hoc tribunals were the most common tools used by countries for the removal of judges. Twenty countries employ this mode of removal compared to ten which have a permanent disciplinary council, as described in the previous section. A further 16 countries manage the process through the legislative body, while the remaining two countries employ mixed methods. As noted above, it is generally not recommended that supervision of conduct should sit primarily with the legislature (JIG 2010; ICJ 2016).

The Commonwealth Secretariat's analysis discusses the advantages and disadvantages to ad hoc tribunals. The primary advantage of such a system is its flexibility. Members can be selected in such a manner that their collective expertise is suited to the circumstances of the case. The system is also lower cost than a permanent body and, because the mechanism is temporary, it theoretically might be difficult for governments to use the system for long-term interference in judicial affairs (The Commonwealth 2015).

However, the flexibility of the system is also a source of concern. The Commonwealth study finds that, as the measure is currently used, it is generally the executive which has the right to convene a tribunal and formally make dismissals, which carries a risk of abuse. As a temporary measure, disciplinary processes may not be as formally embedded, meaning that the benefits of continuity in decision-making are lost. This suggests that, at least as the mechanism is currently employed, the procedural safeguards are not as robust as the processes in permanent disciplinary authorities.

Advisory councils

The establishment of an advisory council is a common recommendation across the literature on judicial conduct. This is a complementary body to the two forms of disciplinary authority described above, which serves to provide guidance to members of the judiciary on ethical dilemmas. The Judicial Integrity Group (2.1, 2010) advocates the establishment of an ethics advisory committee composed of sitting and/or retired judges "to advise members on the propriety of their contemplated or proposed future conduct". The same source recommends that the advisory committee issue formal written opinions which, although they might not necessarily be binding, can provide evidence of good faith on the part of the judge if the opinion is followed. In its implementation guidance for Article 11 of the UNCAC, the UNODC (2015) also refers to the possibility that judges should be able to obtain advisory opinions on ethical questions from judicial committees.

Supervision of asset and income declarations

Due to the expertise required, monitoring of asset and income declarations presents a particular challenge in the enforcement of judicial conduct standards. Best practice is for members of the judiciary to submit declarations to an electronic system to facilitate ease of analysis (U4 2014; IFES 2004).

A previous Helpdesk Answer has focused on the use of technology to manage interests and asset declarations.

The data can be reviewed by a collecting agency to check for compliance across the judiciary with the disclosure requirements. The agency should undertake regular audits of declarations according to a risk-based approach; for example, judges working in higher risk areas, such as economic crime courts, should be subject to more frequent review. The agency should additionally have the authority to conduct detailed investigations where necessary (IFES 2004).

Although there is a lack of detailed evidence on this question, a previous U4 paper (2014) put forward the position that a judicial disciplinary authority might not be the most appropriate body to act as the collection agency for declarations. This is because judicial members would generally lack the expertise to conduct financial investigations. The paper argued

that "anecdotal evidence from publicised cases suggests that investigations are more successful when an external body with sufficient expertise, rather than a body within the judiciary, verifies judges' declarations" (U4 2014). The question of how the collection agency might interact with a judicial disciplinary authority does not appear to be fully resolved in the literature. However, it is also conceivable that findings from specialised collection and review agencies could also be provided to a disciplinary authority which can consider the full parameters of the case.

4. COUNTRY EXAMPLES

The final section contains three country examples of judicial conduct regimes. The countries chosen are all located in sub-Saharan Africa as this is most relevant to the agency requesting this review. None of the countries cited can claim to have an ideal regime nor to have fully tackled judicial corruption; however, there are some features of their approach which merit highlighting, which is the reason for their inclusion.

South Africa

In his review of legal approaches to judicial integrity across Africa, Hatchard (2014) points to several positive aspects of the South African judicial conduct regime. He describes the South African Code of Judicial Conduct, adopted in 2012, as an "excellent example of a code which seeks to translate the Bangalore Principles into a domestic setting". The code expands on the six Bangalore Principles to include articles concerning transparency, extra-judicial income and reporting inappropriate conduct, all of which have value in strengthening anti-corruption controls (South Africa Government Gazette 2012).

Judges and their immediate family members are required to disclose their registrable interests (South Africa Government Gazette 2008). A senior official in the Office of the Chief Justice maintains the register, but it is unclear the extent to which this has been employed as an anti-corruption tool.

As concerns enforcement of the code, the key body is the Judicial Conduct Committee, a sub-committee of the Judicial Services Commission. Its membership is more limited than the Judicial Services Commission: whereas the latter consists of 23 members, including members of the legislature, the Conduct Committee comprises the chief justice, deputy chief justice and four judges, at least two of whom must be women. Any member of the public can make a complaint to the Judicial Conduct Committee relating to issues of corruption or other misconduct. The committee has the authority to appoint a tribunal consisting of two judges and a layperson to investigate the issue. The Judicial Conduct Committee subsequently reviews the findings and makes a recommendation to the National Assembly, which exercises the final decision on whether to dismiss a judge (South Africa Government Gazette 2008). The Conduct Committee also has its disposal remedial measures and lesser sanctions for non-impeachable offences (Hatchard 2014).

Notwithstanding that the principle of judicial independence has been severely tested in South Africa under the presidency of Jacob Zuma (2009 – present), Siyo and Mubangizi (2015) argue that the disciplinary framework has helped to insulate judges from improper influence. They emphasise that the final involvement of the National Assembly in the disciplinary process is consistent with a system of checks and balances and helps to ensure that disciplinary powers do not lie entirely with the judiciary.

Somaliland

In 2016, the United Nations Development Programme (UNDP) published a case study of its work on judicial integrity in Somaliland, an autonomous region of Somalia. The region faces severe challenges of corruption in the judicial system as well as a general shortage of qualified legal professionals. The UNDP worked with the Somaliland High Judicial Commission to develop a code of conduct for the judiciary and other legal practitioners, also running training sessions and awareness campaigns on the new code.

The High Judicial Commission appointed a team of inspectors to monitor compliance with the code, which undertook regular monitoring missions to courts in the region. It further undertook independent reviews of court decisions. The same inspectorate team received complaints from the public regarding the conduct of judges, referring its findings to a selection of members of the High Judicial Commission for decisions on disciplinary measures (UNDP 2016).

The programme claims to have brought about tangible improvements in judicial integrity. For the period 2013 to April 2015, the High Judicial Commission received 234 complaints, which led to 21 judges being dismissed due to misconduct, including for acts of corruption. The UNDP case study shows how the authority of a disciplinary authority such as the High Judicial Commission can be strengthened through proactive enforcement and working alongside a specialist technical monitoring unit (UNDP 2016).

Kenya

Kenya has a mixed history in efforts to reduce judicial corruption. A campaign in the early 2000s under the

Kibaki government (2002–2013) was widely criticised. Branded as "radical surgery", the government dismissed large numbers of judges in a campaign perceived to be politicised and which did not follow international standards for due process (ICJ 2016; Hatchard 2014). The International Commission of Jurists (2016) considered that there were several points to commend in a more recent vetting process for judges conducted between 2011 and 2016, even if it also was not without flaws.

In this process, a diverse vetting board, which included three judges from outside of Kenya, oversaw a process of ad hoc tribunals. Members of the public were invited to make complaints against judges which were assessed by tribunals convened by the vetting board. The Commonwealth (2015) commended the legislative provisions for the ad hoc tribunal system. These contained detailed procedural requirements which ensured judges had the right to a fair hearing, such as the requirement to serve judges with a notice setting out the allegations at least 14 days before a hearing. The tribunal published reasons for the dismissal of a judge, which allowed for public scrutiny of the process. Hatchard (2014) also highlights that the board required each judge to submit a questionnaire detailing their assets. This enabled the board to identify cases of potential corruption. For example, the board found unexplained sums of money passing through the accounts of a former judge, Hon. Ezra Awino, and his wife, leading to a decision not to retain him in office (Hatchard 2014).

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