

High-Level Meeting of the Global Judicial Integrity Network

(25-27 February 2020, Doha, Qatar)

SELECTION AND APPOINTMENT OF JUDGES AND JUDICIAL INDEPENDENCE: NEW PERSPECTIVES ON FACING AN OLD PROBLEM

National Council of Justice, Brazil

Democratic Governance and Rights Unit, University of Cape Town

I. SESSION ORGANIZER

Session Organizer:	Carl Olav Smith, Judge
Contact information:	carl.smith@cnj.jus.br
Organization:	National Council of Justice of Brazil

II. RAPPORTEUR¹

Rapporteur:	Carl Olav Smith
Position:	Judge
Organization:	National Council of Justice of Brazil

III. MODERATOR AND PANELLISTS:

Moderator:	Herman Benjamin
Position:	Hon. Justice of Superior Court of Justice of Brazil
Organization:	Superior Court of Justice of Brazil

PANELLISTS

Name:	Chris Oxtoby
Position:	Senior Research Officer
Organization:	University of Cape Town
Topic of presentation:	The implementation of the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers: developments and challenges.
Summary of presentation:	The panellist started by explaining that the objective of the presentation was to share an African experience and provide an overview of the Lilongwe

¹ Responsible for drafting the session report.

	<p>Principles and Guidelines on the Selection and Appointment of Judicial Officers, as a set of regional principles on judicial appointments, and the experience with their implementation.</p> <p>The Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers comprise 15 core underlying principles which were adopted by the Southern African Chief Justices’ Forum in 2018 and supported by the Global Judicial Integrity Network during 2018-2019.</p> <p>The research conducted revealed a serious lack of transparency in judicial appointments in all of the countries surveyed. Therefore, the most important core principle is to increase transparency. Other principles include: fair process; clear criteria established in advance and that do not change during the process; candidates should be interviewed; and the appointment needs to be objective and tied to the criteria.</p> <p>With regard to the implementation of the Lilongwe Principles, the panelist shared some experiences from States in southern Africa. For example, in Mozambique, the Principles were used for developing regulations for judges and prosecutors. In Seychelles, some civil society initiatives have tried to promote their implementation, emphasizing that the engagement should go beyond the judiciaries and proposing an inclusive process and dialogue involving numerous national stakeholders, including law associations, bar associations, legal practitioners as well as the Constitutional Appointments Authority and the Judiciary.</p> <p>The drafting committee of the Lilongwe Principles tried to make the document specific, but not overly specific. The document offers broad overall guidelines, but it is necessary to consider the local differences of each jurisdiction. For example, challenges within very small jurisdictions may require a different approach in comparison to larger jurisdictions. It is important to be aware of the domestic context and also to have sensitivity for the proper timing (e.g. it may not be appropriate to advocate for reforms during the election season).</p> <p>People get excited by having their issues noticed and recognize the need of reforms, and the document stimulates the discussion about these issues.</p>
--	---

Name:	Hartmut Rank
Position:	Attorney
Organization:	Konrad Adenauer Foundation (KAS)
Topic of presentation:	Judicial recruitment and the impact of the recruitment process on judicial independence: A European perspective.
Summary of presentation:	Sharing the European experience, there are 6 programs in KAS focusing on the rule of law.

It is a difficult task to establish the European standards for selection and appointment of judges considering that there are around 40-50 systems currently in place. Each country has its system, and, sometimes, even two different systems are adopted within the same country. The systems differ according to the different legal traditions.

The presentation focused on four countries from the European Union, although it was recognized that there were representatives of many other judiciaries of European countries at the table, including Switzerland, Austria, Bulgaria and Croatia.

In Germany, federal judges are appointed by the Federal President after being elected for life. There is a Judges Election Committee composed of 16 ministers of 16 states in Germany.

In France, judges are recruited through a competitive recruitment process and then appointed by the president of the Republic. The Superior Magistracy Council can make proposals. The Commission is comprised of the President of Court of Cassation and 12 judicial members and 8 additional members.

In Belgium, following the judicial training program, judges are appointed directly by the Crown (King and ministers) for an indefinite period by request of the High Council of Justice based on multiple criteria. The Council has 44 members.

In the Netherlands, judges are appointed by the King after a selection process led by an independent Judicial Selection Committee, which has no decision-making power.

While the European Union as a whole has no single standard, generally speaking, most of the recruitment systems in the European Union have two standard appointment processes: selection process by assessment evaluation and sometimes additional criteria, such as examination of good conduct certificate. For example, in Austria, there is a health test and a psychological aptitude test.

The panelist referred to the Opinion 21 issued by the Consultative Council of European Judges, which says that the majority of Member States have entrusted a high judicial council or other self-governing bodies composed at least of the majority of judicial members, with the most relevant decisions of selection, appointment and promotion processes. It is important to involve the Supreme Court in this process. It is also very important that the process is based on objective findings as regards both legal and extralegal skills of the candidates. Decisions should be made essentially by non-political bodies composed of at least the majority of members drawn from the judiciary, and the process should allow for an unsuccessful candidate to have the right to challenge the decision.

	<p>The presentation concluded with the question: “Who is to decide: the Executive, the Legislature or Judiciary itself?” Key arguments to be considered in favor and against are:</p> <ul style="list-style-type: none"> - (in favour) the higher the parliamentary influence, the bigger the chance is to avoid overriding the political decision of the responsible minister. - (against) having the legislature in charge might lead to party representation in appointments in the judiciary, proportionally speaking. - the judiciary being the key decision maker is also criticized for the lack of general democratic legitimacy. <p>The presenter concluded by saying that it seems to be wise to have elements of all of the three powers and install a system where the decision is taken based on a professional evaluation done by judges, and that also allows that every decision in such appointments is subject to judicial review.</p> <p>Based on the European experience, it is advisable to have guarantees in place that ensure an objective decision-making process consisting of three elements:</p> <ul style="list-style-type: none"> i) existence of a peer procedure in judicial appointments; ii) functioning checks and balances in the composition of the decision-making bodies, secured by a well-designed composition of these bodies; and iii) a legal tradition and culture which ensure that the independence of judges is not infringed. <p>In summary: an objective and fair appointment process.</p>
--	--

Name:	Justice Ibrahim Alnisf
Position:	President
Organization:	Court of Appeal, Qatar
Topic of presentation:	The selection and appointment of judges in Qatar
Summary of presentation:	The panellist provided an overview of the judicial selection and appointment process in the State of Qatar. He explained that criminal and civil judges’ selection is unified under the Supreme Judiciary Council, which is responsible for maintaining judicial independence. Selection is based on competence, and judges are appointed after a long period of training. Also, legal personalities can be appointed judges.

Name:	Richard Pae Kim
Position:	Judge
Organization:	National Council of Justice of Brazil
Topic of presentation:	The selection and appointment of judges in Latin America: the experience of Brazil and the Brazilian National Council of Justice.

<p>Summary presentation:</p>	<p>of In Brazil, which is a federal state, the jurisdictions are divided into state and federal levels. There are also three special courts: the Labour Court; the Electoral Court; and the Military Court.</p> <p>The 1988 Constitution redesigned the Judiciary in Brazil, making it stronger, independent and active, with the function of guaranteeing the authority of the law and the Constitution. The workforce of the Judiciary comprises more than 17,000 magistrates, 278,000 civil servants and 155,000 auxiliary workers, distributed in three judicial instances. This is a big structure, but it is still insufficient to deal with the 80 million cases being processed by the judicial power, 94% of them concentrated in the first instance.</p> <p>The presentation focused on the federal jurisdiction, summarizing the key principles of selection and appointment for its various levels.</p> <p><u>First degree of federal jurisdiction:</u></p> <ul style="list-style-type: none"> - Selection by competitive public examinations conducted by the Regional Federal High Court; - Initial position: substitute federal judge; - Appointment by the President of the Regional Federal High Court; - Promotion from substitute to senior federal judge conducted by the Regional Federal High Court; - Promotions alternately by seniority and merit; and - Rules of promotions by merit established by the National Council of Justice. <p><u>Second degree of federal jurisdiction:</u></p> <ul style="list-style-type: none"> - Promotions of senior judges to Regional Federal High Court Judge conducted by the Court itself; - Promotions alternately by seniority and merit; - Rules of promotions by merit established by the National Council of Justice; - 1/5 of the High Court members are originally prosecutors or lawyers; and - Appointment by the President of the Republic from a list of nominees made by the Federal High Court. <p><u>Superior Court of Justice:</u></p> <ul style="list-style-type: none"> - 1/3 of the members are originally from State High Courts; - 1/3 of the members are originally from Regional Federal High Courts; - 1/3 of the members are originally Prosecutors or Lawyers; - Superior Court of Justice elaborates a list of nominees with 3 judges, prosecutors or lawyers;
------------------------------	---

	<p>- Appointment by the President of the Republic from a list of nominees made by the Superior Court; and</p> <p>- Endorsement of the appointment by the Federal Senate.</p> <p><u>Supreme Court:</u></p> <p>- Appointment by the President of the Republic; and</p> <p>- Endorsement of the appointment by the Federal Senate.</p> <p>In Brazil, the autonomy of the courts prevails in the selection and promotion of judges of the first degree of jurisdiction. This level of autonomy decreases as we move to the top of the judiciary.</p> <p>Regarding the National Council of Justice, it does not directly participate in the appointment and promotion of judges, but it does exercise control over the procedures conducted by the High Courts, seeking to ensure the compliance with national principles, such as legality, equality and impersonality in recruitment and promotion of judges.</p> <p>In summary, in Brazil, the higher the degree of jurisdiction, the greater is the involvement of other powers in judicial selection. Therefore, the judiciary does not participate in the selection of justices of the Supreme Court.</p>
--	--

IV. SUMMARY OF THE SESSION:

- Selection and appointment of judges is a key point for maintaining judicial independence;
- Not two countries use the same methods - selection of judges is diverse around the world;
- Methods are not always capable of being imported, so any guidance in the form of general guidelines or principles must be broad in order to be developed locally and to navigate the domestic environment/context;
- Transparency is a core principle - selection must be publicly advertised and based on previously known public criteria, and selection itself must adhere to these criteria, especially in highly politicized areas;
- Process should be based on competence, measured by objective standards, and use technical and psychological criteria (competence criteria);
- Candidates should have the right to challenge the decisions of the selection body, whose decisions should be subject to judicial review;
- To ensure independence, it is important to have a high judicial council or independent body, with majority of judges, as a stakeholder on the selection and appointment of judges; and
- The standardized criteria need to be constantly updated.

V. HOW THE SESSION SUPPORTS THE OVERALL OBJECTIVE OF THE GLOBAL JUDICIAL INTEGRITY NETWORK OF STRENGTHENING JUDICIAL INTEGRITY AND PREVENTING CORRUPTION IN THE JUSTICE SYSTEM:

An adequate process of recruitment and appointment of judges, capable of fulfilling the UN Basic Principles on the Independence of the Judiciary and guaranteeing the implementation of the Bangalore Principles of Judicial Conduct, is essential to increase the public perception on independence and integrity of the judicial branch of government. Also, an independent judiciary plays a critical role in the fight against international corruption and corruption in other government branches. Therefore, a guided discussion on how to have a strong judicial recruitment and appointment system is crucial for the strengthening of the Global Judicial Integrity Network and the implementation of the Doha Declaration adopted at the Thirteenth UN Crime Congress.

VI. PROPOSED OUTCOME(S) OF THE SESSION AND THEIR ACHIEVEMENT:

The main proposed outcomes of the session were:

- Identify the desirability of best practice principles for Latin America.
- Identify lessons learned from the European, Asian and African experience to inform the modalities, content and practice of developing and implementing such principles.
- Identify ways in which the Bangalore Principles of Judicial Conduct can be effectively implemented through a strong judicial selection process.
- Identify potential difficulties that may be foreseeable or be experienced, and develop possible strategies for how these could be addressed.
- Identify effective methods of implementation in different contexts that may be adapted and applied to best practices on judicial recruitment and appointment.
- Develop networks for future collaborations and identify potential topics and issues for such collaborations to address.

All the outcomes above were reached during the session, as can be seen from the conclusions of the session listed below.

VII. CONCLUSIONS OF THE SESSION AND RECOMMENDATIONS TO THE GLOBAL JUDICIAL INTEGRITY NETWORK:

The main conclusions of the session were:

- Transparency is the core principle and should be present at all stages of the judicial selection and appointment process;
- The selection criteria must be publicly advertised and not be altered until the process is complete;
- In the same vein, criteria need to be regularly updated to reflect the changes in the society;
- Selection should be based on competence, measured by objective standards, and using technical and psychological criteria;

- Candidates should have the possibility to challenge the decisions of the selection body, whose decisions should be subject to judicial review; and
- Selection processes vary across the world, and exchanging experiences is therefore one of the ways to constantly improve the quality of the process as well as the quality of judges, with the aim to build independent judiciaries.

There were no specific recommendations made to the Global Judicial Integrity Network.