

REASSESSMENT AND REMOVAL OF JUDGES IN CONSTITUTIONAL TRANSITIONS

BINGHAM CENTRE FOR THE RULE OF LAW

Societies in transition to constitutional democracy can face a difficult choice when their courts are staffed with judges from a period of conflict or authoritarian rule. While security of tenure is rightly seen as a fundamental guarantee of judicial independence, there are often demands for a mechanism that will examine each judge's history and possibly lead to the removal of those judges who are considered unwilling or unable to serve with integrity and competence in the new era. The situation is particularly complex when the judiciary as a whole has systematically failed to act with independence, impartiality and integrity.

A wide variety of transitions have included different mechanisms in relation to the judiciary: from 'de-Nazification' and 'de-Communization' in Europe, to a range of processes in other parts of the world, such as the screening of judges when Argentina returned to civilian rule in the 1980s, the 'de-Baathification' of the Iraqi judiciary that began during the U.S. occupation and the vetting of judges in Kenya under its 2010 constitution. However, not every transition has seen judges replaced. For instance, South Africa and Chile transitioned to constitutional democracy while retaining their judges, albeit with truth commissions providing some scrutiny of the judiciary's track record. These have often been, and sometimes still are, intensely controversial decisions. An obvious area of controversy concerns the risk of legitimizing political interference in the courts, which has become a live issue again in contemporary Europe.

The session focuses on developing practical guidance for countries where a significant proportion of the pre-transition judiciary is perceived to be lacking in integrity, on grounds such as complicity in human rights violations or corruption. Judicial corruption, even in its narrowest sense of financial or other pecuniary benefit, is one of the primary areas of concern in many cases. For example, corruption was one of the main reasons for the vetting process in Kenya, as well as the current vetting process in Albania. In the larger sense of corruption as abuse of the judicial office for improper personal or political purposes, corruption is the central concern of most if not all transitions.



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Session Organizer:

Mr. Jan van Zyl Smit
Bingham Centre for the Rule of Law, United Kingdom
j.vanzylsmit@inghamcentre.biicl.org

Moderator:

Judge Grzegorz Borkowski
International Legal Expert

Rapporteur:

Mr. Jan van Zyl Smit
Bingham Centre for the Rule of Law, United Kingdom

Panellists:

Special Rapporteur Diego García-Sayán
UN Special Rapporteur on the Independence of Judges and Lawyers

Ms. Sara Razai
Bingham Centre for Rule of Law, United Kingdom
L'Institut d'Études sur le Droit et la Justice dans les Sociétés Arabes

Ms. Andrea Huber
OSCE Office for Democratic Institutions and Human Rights

Mr. Jan van Zyl Smit
Bingham Centre for Rule of Law, United Kingdom

THE BINGHAM CENTRE FOR THE RULE OF LAW

An independent research centre dedicated to the study, promotion and enhancement of the rule of law worldwide. It forms part of the British Institute of International and Comparative Law. The Centre has worked extensively on issues relating to the judiciary, contributing to the development of standards such as the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges*.



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Main Issues:

The session focuses on the lessons that can be learned from countries that have grappled with challenges relating to the integrity of the existing judiciary during a constitutional transition.

The overall objective of the session is to build practical knowledge and understanding of three main issues:

- An overview of strategies and mechanisms have been developed in response to perceived integrity problems in the existing judiciary, analyzing their effectiveness and outcomes. Examples include: retention of judges and the use of ordinary disciplinary proceedings, a truth commission inquiry into the judiciary, individualized vetting of judges, wholesale replacement of judges through competitive reappointment.
- How mechanisms of each of the main types have been designed and implemented in particular countries.
- The extent to which international standards provide useful guidance on possible responses in the context of a constitutional transition, or could be revised to reflect the risks and benefits to the Rule of Law of the various types of mechanisms in the context of a constitutional transition.

In support of the overall objective of increasing practical knowledge and understanding of these issues, the session will pursue a number of more specific objectives that can be grouped under two headings:

1) Sharing preliminary findings and recommendations from the Bingham Centre's research project on "Special Processes for the Reassessment and Removal of Judges in the Context of Constitutional Transitions: Strengthening the Rule of Law?"

- This project has brought together experts who have written case studies on jurisdictions in Africa (Kenya and South Africa), Asia (Pakistan), Europe (the Czech Republic, Estonia, Germany, Hungary and Serbia) and Latin America (Argentina, Chile, El Salvador and Guatemala). These case studies written by experts from their respective jurisdictions will be published in an edited volume which will also involve cross-cutting analysis by the Bingham Centre team that will consider the implications for international standards. The volume will be accompanied by a policy brief written for a wider audience.
- A working paper with preliminary findings and recommendations will be published by early February 2020, and copies will be available at this session. Bingham Centre members Dr van Zyl Smit and Dr Razai will highlight key points from the working paper. All other panellists will be invited to comment on the working paper.

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2) Discussing the approach taken in selected regions, based on the personal experience of panellists:

Mr García-Sayán will offer not only global reflections as UN Special Rapporteur on the Independence of Judges and Lawyers, but also a personal perspective on his experience in government during the Peruvian transition and on regional issues and regional Human Rights Court rulings encountered during his service as Justice and later President of the Inter-American Court of Human Rights.

Ms Huber will speak in her capacity as Deputy Chief of the Rule of Law Unit within the OSCE Office for Democratic Institutions and Human Rights, which has been closely involved in analysing and advising on judicial reforms in the OSCE region for several decades, including within the framework of the OSCE Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010).

Bingham Centre representatives Dr van Zyl Smit and Dr Razai will speak about their own research advisory experience in transitional countries of Africa and MENA respectively.

Specific Questions and Discussion Points:

The three main issues for discussion that were highlighted above give rise to a series of more specific questions and issues for countries undergoing a transition to constitutional democracy.

Strategies and mechanisms for responding to integrity challenges in the existing judiciary:

- What are the main types of response? Comment and discussion will be invited on the classification proposed in the Bingham Centre working paper, which will include the following: retention of judges and the use of ordinary disciplinary proceedings, a truth commission inquiry into the judiciary, individualized vetting of judges, wholesale replacement of judges through competitive reappointment.
 - What are the risks and benefits for the integrity and independence of the judiciary that are associated with each type of response, both at the time it is adopted and over the longer term?
 - Under what conditions do the various types of response become justifiable? The justification for responding to integrity concerns about the existing judiciary in a particular way could depend on matters such as the scale and seriousness of alleged judicial wrongdoing, the availability of qualified persons who could be appointed to replace judges who are removed, and the likelihood that a particular mechanism would be open to political manipulation.
 - Which institutions and groups should participate in the decision, or be consulted, when a country is considering how to respond to integrity challenges in the existing judiciary?
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REASSESSMENT AND REMOVAL OF JUDGES IN CONSTITUTIONAL TRANSITIONS

Design and implementation of transitional mechanisms

- If there is to be a transitional mechanism for the existing judiciary, which judges should be subject to it?
- What criteria should be used for the assessment and possible removal of judges?
- What bodies, temporary or permanent, are suitable to conduct each type of mechanism? Is there a role for international members in such bodies?
- How should evidence and information be gathered?
- How should the assessment of judges be conducted to ensure: fairness to judges, complainants, witnesses and others directly involved in the mechanism; and appropriate transparency and accountability to the general public?
- What review or appeal mechanisms, if any, should be available to judges in the case of adverse findings or decisions, particularly when it has been decided that a judge should be removed from office?

International standards

- Which international standards offer guidance on the extent to which members of the existing judiciary can be held accountable during a constitutional transition?
- How is the relationship between judicial security of tenure and judicial accountability in the specific context of constitutional transitions addressed by these standards?
- Is there a need for further international guidance focusing exclusively on transitional situations, and if so what would be the best process and form for such guidance?

Proposed Outcomes of the Session:

The principal outcome which this session aims to achieve is an increase in practical knowledge and understanding (on the part of panellists as well as the session audience) regarding ways of responding to integrity challenges in the existing judiciary during a constitutional transition.

The Bingham Centre research project team will take into account any feedback from session participants on the project working paper when finalising the volume of case studies and the accompanying policy brief for a wider audience, both of which will be completed by July 2020 (the end of the grant funding period). Outputs of the research project will be made available through the Bingham Centre website. It will be particularly useful to receive feedback from the session audience on any recommendations which the project may make for revising international standards that are relevant to the treatment of the existing judiciary during constitutional transitions.