

High-Level Meeting of the Global Judicial Integrity Network

(25-27 February 2020, Doha, Qatar)

## REASSESSMENT AND REMOVAL OF JUDGES IN CONSTITUTIONAL TRANSITIONS

Bingham Centre for the Rule of Law

### I. SESSION ORGANIZER

Session Organizer:	Dr Jan van Zyl Smit
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### II. RAPPORTEUR<sup>1</sup>

Rapporteur:	Dr Jan van Zyl Smit
Position:	Senior Research Fellow
Organization:	Bingham Centre for the Rule of Law

### III. MODERATOR AND PANELLISTS:

Moderator:	Dr Grzegorz Borkowski
Position:	International Legal Expert
Organization:	Independent

### PANELLISTS

Name:	Mr. Diego García-Sayán
Position:	UN Special Rapporteur on the Independence of Judges and Lawyers
Organization:	Independent
Topic of presentation:	Judicial reforms during a democratic transition: what is at stake?
Summary of presentation:	<p><b>Transitions</b> The relevant transitions are transitions <u>to</u> democracy, from situations such as internal war, authoritarian regime collapse or mass corruption. Often the judiciary is not functioning independently or effectively.</p> <p><b>Guiding principles for judicial personnel reform</b></p>

<sup>1</sup> Responsible for drafting the session report.

	<ol style="list-style-type: none"> <li>1. Core values of judicial independence, impartiality and integrity must be strengthened and maintained (see the United Nations Basic Principles on the Independence of the Judiciary).</li> <li>2. Justice for past human rights violations requires investigation, prosecution and sanctioning of violators (including judges). Domestic politics may obstruct this, but regional courts (e.g. Inter-American Court of Human Rights) have affirmed these obligations.</li> <li>3. When dealing with gross and systemic corruption, due process is essential (and shortcomings will be exposed if a dismissed judge has recourse to international bodies).</li> <li>4. Truth commissions offer a route to addressing human rights violations and corruption that emphasises national healing.</li> <li>5. Processes must be based on facts ascertained from evidence, to avoid a vicious cycle of revenge.</li> <li>6. Temporary, once-off mechanisms may be needed for special problems of transition (like Colombia’s mechanism balancing prosecution and re-integration of rebels).</li> </ol> <p><b>Minimum requirements</b></p> <p>Processes for reassessment of judges must be:</p> <ol style="list-style-type: none"> <li>(a) transparent, enabling verification of whether judges have been able to defend themselves;</li> <li>(b) participatory, allowing the public to provide information and opinions, observe adherence to international standards and thereby generating legitimacy; and</li> <li>(c) effective in bringing even high-ranking judges to justice.</li> </ol>
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Name:	Ms. Andrea Huber
Position:	Deputy Chief, Rule of Law Unit
Organization:	OSCE Office for Democratic Institutions and Human Rights (ODIHR)
Topic of presentation:	Experiences in recently used re-evaluation and vetting mechanisms
Summary of presentation:	<p>A growing appetite for lustration (vetting or reassessment) of judges has been evident lately, which prompted ODIHR to assess recent processes in the OSCE region (Serbia, Albania, Ukraine). These experiences indicate:</p> <ol style="list-style-type: none"> <li>1. Any decision on lustration needs to be preceded by an overall needs assessment to identify systemic problems and possible solutions.</li> <li>2. Lustration, if necessary and appropriate, needs to be part of a long-term strategy towards depoliticised judicial selection, independent governance bodies, asset declarations, discipline and training. Measures should include shifting institutional culture.</li> <li>3. Lustration objectives are often too vague to justify infringing irremovability, or inconsistent with the process chosen.</li> <li>4. Sustained political will is required throughout the process.</li> <li>5. Hastily drafted lustration laws produce major complications.</li> </ol>

	<ol style="list-style-type: none"> <li>6. The length and complexity of processes tend to be considerably underestimated. Proper sequencing is needed to ensure courts continue working.</li> <li>7. Pre-emptive mass resignations have exacerbated case backlogs and undermined public trust.</li> <li>8. Due process rights of judges undergoing lustration are often inadequate or ineffective.</li> <li>9. Innovations include international observers (Albania) or a civil society council supporting pre-screening judges (Ukraine).</li> </ol> <p>Security of tenure is critical to judicial independence, so lustration must be a last resort. Overall, risks of politicised lustration are high.</p>
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Name:	Dr. Jan van Zyl Smit
Position:	Senior Research Fellow
Organization:	Bingham Centre for the Rule of Law
Topic of presentation:	Process types, international standards and design of vetting processes
Summary of presentation:	<p>Interim findings were presented from Bingham Centre research that incorporates 10 case studies from Europe, Latin America, Africa and Asia.</p> <p><b>Types of reassessment or removal processes</b></p> <ol style="list-style-type: none"> <li>1. Ordinary mechanisms (disciplinary processes and criminal trials) are suitable for dealing with misconduct or criminal offences by small numbers of judges.</li> <li>2. Moderate transitional mechanisms (vetting and truth commissions) apply to entire categories of judges but still recognise their status as judges, in principle.</li> <li>3. Radical transitional mechanisms (including reappointment) start with the formal removal of judicial status and claim to make fresh appointments.</li> </ol> <p><b>Current international standards</b></p> <p>The United Nations Basic Principles on the Independence of the Judiciary and other judiciary standards do not explicitly deal with transitions. In the transitional justice field, the UN (Orentlicher) Impunity Principles consider only the radical measure of invalidating judicial appointments.</p> <p><b>Design of vetting processes</b></p> <ol style="list-style-type: none"> <li>a. Vetting bodies should include judges (possibly international) to enhance respect for judicial independence.</li> <li>b. Where corruption is being targeted, vetting criteria and procedures may utilise asset declarations and assess conflicts of interest, as direct proof of corruption is difficult.</li> <li>c. Due process requires an independent review or appeal body, with transparency in the form of reasons given for removal and a public hearing if the judge so requests.</li> </ol>

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#### **IV. SUMMARY OF THE SESSION:**

The presentations and Q&A focused on the following issues:

1. Constitutional transitions – what kinds of transitions may justify special processes for reassessment of judges? It was clarified that such processes must be confined to transitions from non-democracy (e.g. conflict, authoritarian government, totalitarian state) to constitutional democracy, and should be considered only as a last resort.
2. Types of reassessment – distinguishing truth commissions, vetting, lustration and reassessment as part of a reappointment process.
3. Objectives of reassessment processes – ensuring justice for past human rights violations; reaching a fact-based understanding of the judicial role in past human rights violations to enable national healing (e.g. through truth commissions); combating gross and systemic corruption; building independent and impartial judicial institutions.
4. The difficult challenge of ensuring reassessment processes are fair and legitimate – the precarious position of existing judges in cases where a large proportion hold provisional rather than permanent appointments; importance of transparent processes with public participation (e.g. civil society); possible role of international actors (including judges), with the danger that they could serve as a fig leaf for a flawed process; providing reasons for decisions to remove a judge; appeal routes and recourse to international courts.
5. Design and implementation issues that should be considered – the degree of political will and whether there is consensus among different parties and the wider population to support reassessment; importance of carrying out a needs assessment of the justice system; assessing risks of politicisation; sequencing; possible disruption.

#### **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:**

The session focused on developing a toolkit of practical guidance for countries in transition to constitutional democracy 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. 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.

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

The principal outcome that this session was designed to achieve was 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, which is funded by the UK Arts and Humanities Research Council,<sup>2</sup> undertook to 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 at <https://binghamcentre.biicl.org/projects/special-processes-for-the-reassessment-and-removal-of-judges-in-constitutional-transitions>.

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

### **Conclusions:**

1. The current popularity of reassessment of judges risks normalising this extraordinary process, and politicising the judiciary. Even if some of these interventions may be justified, this creates the danger that reassessment will be normalised for each change of government.
2. The composition of reassessment bodies is crucial. International members may sometimes bring objectivity but could also affect the legitimacy of the process. Alternatively, it may be a mere fig leaf for a politicised process. There is a need for participatory mechanisms throughout the process.
3. The reassessment criteria should be clearly related to the objectives of a reassessment process. For example, some anti-corruption processes use very broad criteria.
4. The risks that a reassessment process may disrupt the administration of justice should not be underestimated. Large numbers of judges may resign, and reassessment processes may take years to administer. Case backlogs may grow substantially, and courts may even become inoperative for lack of judges. Those designing reassessment processes should carefully consider issues of scope, sequencing and resources.
5. Reassessment processes should be a last resort, when ordinary disciplinary mechanisms and criminal prosecutions would not be sufficient to tackle deep and widespread problems in the judiciary. Institutional reforms should always be pursued in parallel to ensure that those processes become functional.

### **Recommendations:**

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<sup>2</sup> Special Processes for the Reassessment and Removal of Judges in the Context of Constitutional Transitions: Strengthening the Rule of Law? Grant AH/R005494/1.

- i. Good practices as well as analysis of dangers and risks should be shared through the Network's website, including written opinion pieces and online library. This is particularly important in an area as context-sensitive as this. The Bingham Centre should be encouraged to make the outputs of its 2018-2020 research project widely available (based on 10 case studies from a wide range of countries).
- ii. There should be an exploration of the case for establishing an independent body with expertise in transitional problems to advise countries considering reassessment. Advice should be available on how to carry out a justice sector needs assessment and weigh up the full range of institutional reform strategies other than reassessment that could be pursued, as well as how to address rule of law risks in the event that a process is determined to be necessary. This suggestion was made informally in conversation after the event. The immediate context was Europe, where the European Union has had to consider judicial reassessment initiatives in the context both of member state rule of law backsliding and non-member states pursuing accession. Such a body would be independent and have a purely advisory function. It might be more widely applicable.