



POLICY BRIEF

Judicial Independence Hanging by a Thread in Guatemala

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Guatemalan justice sector actors known for being independent and impartial are facing a new slew of threats to their careers and professional integrity. Increasing efforts to rid the justice sector of the dwindling number of rule of law defenders that remain is part of what appears to be a larger, systematic plan to return Guatemala to a state of impunity. These attempts are spurring on the rule of law backsliding which began with the attack against the International Commission against Impunity in Guatemala (CICIG) and have created an exigent situation. Corruption and impunity will prevail again if something is not done soon to protect Guatemala's independent and impartial justice sector actors.



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The closing of CICIG was only the beginning

Since the closing of CICIG, it has only become more and more difficult to keep track of each week's occurrences in Guatemala that undermine the rule of law. This includes everything from multiple constitutional crises to the murder of human rights defenders working with Mayan communities. It also includes what seems like a never ending, problematic judicial nominations process. The nominations process began in the summer of last year and the new judges should have taken the bench in October 2019. The process, however, is still ongoing due to technical failures, allegations of corruption at the highest level and a standoff between Guatemala's Constitutional and Supreme Courts.

The judicial nominations process also coincides with a multitude of new attempts to rid Guatemala's justice sector of independent and impartial justice sector actors known for fighting corruption and defending the rule of law. The tactic to do so includes requests to lift judicial immunity and the filing of complaints to "criminalise" judges, prosecutors and other justice sector actors. Looking back, the closing of CICIG was only the starting point for what increasingly appears to be a concerted attempt to secure impunity again in Guatemala.

Key Points

- ❑ The closing of CICIG was only the beginning of what appears to be a broader attack on the justice sector to secure impunity again in Guatemala.
- ❑ Attempts to impeach and "criminalise" judges for carrying out their official duties directly violates the international principle that judges should have the discretion to decide matters before them without being pressured, threatened or penalised.
- ❑ Protecting the independence of the judiciary is pivotal to ensuring Guatemala continues to combat corruption after CICIG's closure.
- ❑ International rule of law actors should lend further support to protecting an independent judiciary in Guatemala by supporting the individual judges and justice actors under attack.

Impeaching judges for doing their job

Guatemala's Congress is currently considering whether to lift the immunity of four Constitutional Court judges – Boanerge Mejía, Gloria Porras, Neftaly Aldana and José Francisco de Mata Vela (Judge De Mata Vela sadly passed away from Covid-19 on 5 September). This has been made possible by the Supreme Court's ruling on 26 July, which allowed a request to impeach the four Constitutional Court judges to proceed to Congress – causing yet another constitutional crisis and deepening the rift between the Constitutional and Supreme Courts. The initial impeachment request stems from the Constitutional Court's 4-1 ruling in early May regarding the judicial nominations process. In that ruling, the Constitutional Court ordered the Attorney General to submit a report to Congress on the over 20 judicial nominees implicated in the "Parallel Commissions 2020" case,¹ along with over 100 additional nominees implicated in other investigations.

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The report is meant to inform Congress as to which nominees should be eliminated for failure to satisfy the constitutional requirements for a judge of "capacity, suitability and honesty". The motion to impeach the four named Constitutional Court judges claimed that they overreached because only judicial nominees convicted of corruption can be deemed ineligible in accordance with the presumption of innocence.

Similarly, on 3 July, the Supreme Court accepted a complaint to lift the judicial immunity of Judge Erika Aifán. The complaint alleged that Judge Aifán had abused her authority by authorising illegal warrants for telephone records in the "Parallel Commissions 2020" case, allowing the Special Prosecutor Against Impunity (FECI) to continue investigating the case. The complaint was not supported by any evidentiary proof. To date, the Constitutional Court has suspended the Supreme Court proceedings. If the matter proceeds in the Supreme Court, a judge who overruled the sentencing of former President Morales's son for fraud will preside over Judge Aifán's impeachment proceeding.

In both of these instances, the Supreme Court is punishing members of its own branch of government for simply fulfilling their official functions and duties. The Constitutional Court has jurisdiction to decide whether judges meet the constitutional requirements and there is no proof that Judge Aifán illegally issued warrants. The Supreme Court has directly violated both international principles and Guatemalan law that judges should have the discretion to decide matters before them without being pressured, threatened or penalised. In response and as a sign of the severity of the situation, the Special Rapporteur for Independence of Judges and Lawyers, Mr Diego García-Sayán, has asked that Guatemala's Congress respect the independence

of the judiciary. The Special Rapporteur also stated via Twitter, “I condemn the harassment of Erika Aifán, an independent judge who has contributed to the fight against impunity and corruption in Guatemala”.

After the Supreme Court’s ruling regarding Judges Mejía, Porras, Aldana and De Mata Vela, the Ombudsman for Human Rights filed an appeal and the Constitutional Court issued an order to suspend Congress from proceeding – creating a new constitutional crisis and again furthering the intra-branch divide within the Guatemalan judiciary. Then, in what was a flagrant failure to respect the separation of powers, Congress created a commission to recommend whether to lift the immunity of the four judges within hours of the Constitutional Court suspending the impeachment proceedings. Congress’s failure to respect the separation of powers is just one instance which is preceded by several others where the executive and legislative branches have side-stepped and ignored orders by the Constitutional Court since the attacks against CICIG began.²

Adding to the list of wrongs with the current impeachment processes, conflicts of interest, which have run rampant in nearly every step of the judicial nominations process, are also present here. Guatemala’s “Law of Probity”, which was passed in 2002 to ensure that public officials abide by the Constitution and the law in the exercise of their public functions, forbids the use of a public position to seek any individual or family benefit. Yet, five of the Supreme Court judges who granted the request to impeach the Constitutional Court judges are also judicial nominees themselves in the ongoing process. Even more problematic is the fact that four of the Supreme Court judges who ruled on the matter were directly implicated in the “Parallel Commissions 2020” case. Similarly, there are conflicts of interest within the Congressional commission created to approve or deny the impeachment request of the Constitutional Court judges. That commission is comprised of at least seven congressional members, including the President of Congress, that have been implicated in or connected to corruption investigations.³

The recommendation by the Congressional commission on whether or not to impeach Judges Mejía, Porras, Aldana and De Mata Vela is expected in the coming weeks. It is important to note that there have been at least four attempts to expel these same four judges from the bench since former President Jimmy Morales initiated his mission to prematurely shut down CICIG.⁴ However, prior attempts to lift judicial immunity have never proceeded this far and some fear it could actually happen in this instance.

These recent rulings by the Supreme Court only further reveal how vital it is that the judicial nominations process be meaningfully reformed in the near future.⁵ This is particularly critical with the upcoming election of the Constitutional Court in 2021, where the Supreme Court will elect one of the five Constitutional Court judges and one alternate. Now, however, is not the time to reform the process because meaningful reform is not possible in the midst of a pandemic.⁶ In the meantime, Guatemala’s independent and impartial judges need to be protected from threats to their careers and professional integrity.

The criminalisation of justice sector actors fighting corruption

Another tactic used to undermine justice sector actors fighting corruption is the “criminalisation” of those actors. This is done by the filing of numerous, unfounded criminal complaints against those actors to undermine their credibility and threaten their professional careers (threats to their personal safety are also a grave concern⁷). A poignant example of this tactic is the recent criminal complaint filed against Judge Yassmin Barrios, a judge from the Courts for High Risk Crimes who convicted Guatemala’s former president Efraín Ríos Montt of genocide in 2013.⁸

On 12 August, the Foundation Against Terrorism (FCT)⁹, a far right organisation, filed a criminal complaint against Judge Barrios. The criminal complaint alleged that Judge Barrios had committed abuse of authority, failure to fulfill her duties, passive bribery, passive international bribery, receiving illicit gifts and money laundering for accepting the “Civil Courage Prize”, which also included a 50,000 USD award, in New York City in 2015. The complaint was filed five years after Judge Barrios received the prize, indicating that this is likely part of a larger plan to undermine her credibility.

This is not the first time that the judges from the Courts for High Risk Crimes who are known for acting independently have been subject to such complaints. Judge Aifán has accumulated more than 40 complaints filed against her before the judiciary’s disciplinary body, the Public Prosecutor’s Office and the Ombudsman for Human Rights. Other justice sector actors, like Juan Francisco Sandoval, the head prosecutor of FECCI, and Jordan Rodas, the Ombudsman for Human Rights, have also been similarly “criminalised” for carrying out their public functions and duties. FCT alone has filed ten criminal complaints against Prosecutor Sandoval, and he is the subject of more than 30 such complaints in total. FCT has also filed actions against Constitutional Court judges, former Attorney General Thelma Aldana and civil society leaders.

In an extreme example of the “criminalisation” of judges and lawyers fighting corruption, the prior Congress (whose term ended in January) created a so-called “truth” commission. The purpose of the commission was to allow those accused or convicted of corruption to air their grievances and supposed illegalities and abuses suffered during the investigatory and judicial proceedings. Just before the term of the previous Congress ended, the commission published a series of recommendations which included the arrest of judges and prosecutors who allegedly committed abuses while working with CICIG. The recommendations were sent to the Attorney General, but no further action has been taken to date.

Several judges from the Courts for High Risk Crimes noted during an interview with ILAC in December 2019, that the tactics discussed here have had an intimidating effect and that they are to a certain extent experiencing anxiety and lower morale. They even expressed concern that if these criminal complaints are prosecuted or if the commission’s recommendations are carried out that they could end up in the same prison cells controlled by the criminal networks the judges have previously convicted. Yet, they continue to rule from the bench impartially and with judicial

integrity even though they are among the shrinking number of rule of law defenders remaining in the justice sector. Judge Barrios was recently asked in an interview if she believes the Supreme Court would properly deal with the new criminal complaint filed against her if the Attorney General decides to prosecute. Her response was that “she trusts in justice because each day she is expected to be fair and impartial to others”.¹⁰

Conclusion

Guatemala has dropped three spots on the World Justice Project’s Rule of Law Index in just one year alone, and that is in large part due to the fact that corruption and impunity have been on the rise since the attacks against CICIG began. This has in turn contributed to a loss of momentum for another people’s anti-corruption movement like that of the Guatemalan Spring in 2014. The Covid-19 pandemic has also made it much harder for Guatemalans to mobilise against the rule of law backsliding. Further, the President and Attorney General have silently stood by during the current constitutional crisis. While the Organization of American States (OAS) and the United Nations have recently expressed concern over the Guatemalan government’s failure to protect the independence of the judiciary, more can be done by international rule of law actors.

There are concrete measures that international actors can take to counteract the recent attempts to impeach independent judges and “criminalise” justice sector actors. One measure consistently mentioned by Guatemala’s justice sector actors themselves is to lift the international profile of independent and impartial justice sector actors and for the international community to respond when threats are made. Those deploying the tactics discussed here will be less likely to do so if they know that the international community is watching and ready to react. Another measure is to provide legal assistance to justice sector actors in defending against the complaints filed against them. The justice sector actors who are subject to such complaints often do not have the resources or time to properly defend themselves against numerous accusations in addition to carrying out their public functions.

The levels of corruption and impunity that existed before CICIG will return if the attempts to rid Guatemala’s justice sector of its independent actors is successful. International support is needed now to protect the remaining independent justice sector actors who continue to combat corruption.

Policy Recommendations for international rule of law actors

- ¶ Monitor the ongoing threats against Guatemala’s independent justice sector actors and ensure that they are included in the rule of law policy dialogue at the highest international level.
- ¶ Respond when there are attacks on independent justice sector actors by raising their international profiles through statements of support, social media campaigns, webinars, blogs and other similar platforms.
- ¶ Provide support to justice sector actors in defending against complaints by providing financial and practical support to hire attorneys, filing amicus curiae or other filings based on international human rights law both at the national and regional level.
- ¶ Ensure that international efforts are coordinated and prompt to show that the international community is ready to respond to attacks on independent justice sector actors.

References

- 1 . In mid-February, FECCI announced the arrest of Gustavo Alejos, a politician accused in several corruption cases. His implication in a new corruption case relates to the ongoing nomination of judges. While Mr Alejos was alleged to be hospitalised for a medical condition, he was seen receiving visits from several individuals involved in the judicial nominations process, including members of Congress, politicians, judges and lawyers. Several judges included in the nomination lists presented to Congress were observed meeting with Mr Alejos regarding the nominations process.
- 2 . For further examples where the executive and legislature have failed to respect the separation of powers, see ILAC, “A Window of Opportunity – Support to the Rule of Law in Guatemala”, (2020), pg. 26.
- 3 . Adriana Beltrán, WOLA, “Behind the Fight to Hijack Guatemala’s Justice System” (10 July 2020) [webpage, accessed 30 Aug. 2020].
4. Id.
5. For a further discussion on why the judicial nominations process is flawed and in need of reform, see “Judicial Nominations in Guatemala: Pockets of Resistance in a Closing Space”, ILAC’s Policy Brief (Oct. 2019).
6. For a discussion on why, see “A pandemic is not the time for reforming judicial nominations in Guatemala”, ILAC’s Policy Brief (June 2020).
7. For a discussion on the threats against the personal safety of independent justice sector actors,

see ILAC, “A Window of Opportunity – Support to the Rule of Law in Guatemala”, (2020), pg. 28-29.

8. The conviction was subsequently overturned after the Constitutional Court controversially declared a mistrial.

9. On 8 September, Judge Miguel Ángel Gálvez of the Courts for High Risk Crimes ordered the Public Prosecutor’s Office to open an investigation into the president of FCT for posting a confidential document on social media. The document detailed the prison visits received by Alejandro Sinibaldi, the Former Minister of Infrastructure, Housing and Communications, who is the subject of a high-level corruption case.

10. Nómada, “La sentencia (por genocidio) fue en 2013 y todavía sigo percibiendo sus efectos”, afirma jueza Barrios” (20 Aug. 2020) [webpage, accessed 30 Aug. 2020].

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