



POLICY BRIEF

Judges on the Frontline - Is the Rule of Law Losing its Guardian? Examples from the West Bank and Guatemala

Ylva L. Hartmann & Lauren McIntosh

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Judges are increasingly finding themselves on the frontline of defending the rule of law and coming under attack for doing so. The latest report by Dr Diego García-Sayán, the United Nations Special Rapporteur on the independence of judges and lawyers, sheds light on this reality.¹ ILAC has also observed this trend in the contexts where it works to support the justice sector, and this policy brief will discuss examples from the West Bank and Guatemala. If this current trend continues, the rule of law could lose one of its guardians.



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Patterns of abuse of judicial accountability

Judges are responsible for deciding over matters concerning lives of defendants and plaintiffs, sending people to prison and levying fines. They decide over sensitive family matters and employment and housing cases that affect peoples' lives and rights. Also, judges should uphold legal certainty, impartiality, independence and ultimately the rule of law. So, they must be held accountable when overstepping their mandates or threatening the independence of the judiciary.

Yet, the Special Rapporteur's latest report reveals worrying patterns of abuse of disciplinary, civil and criminal liability of judges – going far beyond what it means to fairly hold the judiciary in check. UNODC's Global Judicial Integrity Network and ILAC members, including the CEELI Institute and World Justice Project, have also raised this negative trend in their work. The Special Rapporteur's report documents 'disguised' sanctions against judges which can amount to harassment, intimidation and undue punishment for alleged misconduct in the exercise of their functions. Examples of these 'disguised' sanctions include a worsening of the work environment, lack of physical safety or collective dismissal/removal from office. These 'disguised' sanctions are harder to detect and are not regulated by international law, thus a dangerous tactic used to attack judicial independence.

For some time now ILAC has received reports of disturbing examples from across its global network of judges who have had their judicial accountability abused or been the subject of 'disguised' sanctions for simply fulfilling their professional mandate or exercising their freedom of expression. During a roundtable ILAC and Al Haq organised with Palestinian judges in July 2020, one judge used the following metaphor:

imagine the rule of law as a bank. We, the judges, are like bank guards. Before robbing the bank, you have to get rid of the guards. When having done away with the guards it is free forward to rob the bank, and the rule of law has lost its guardian.

Key Points

- ¶ The rule of law community must pay more attention to how the increasing vulnerability of judges undermine their vital role as guardians of the rule of law.
- ¶ Globally there are worrying patterns of abuse of disciplinary, civil and criminal liability of judges – ranging from outright attacks to more subtle 'disguised' sanctions
- ¶ Undue sanctions have a direct effect on judges, and chilling effect on the judiciary as a whole and its ability to freely practice its profession.

This policy brief discusses how judges from the West Bank and Guatemala, two contexts where ILAC and its members are engaged in justice sector support, are suffering from attacks and an undermining of judicial independence. The West Bank and Guatemala have their obvious differences, yet they are both examples of how the independence of the judiciary is being undermined through the abuse of disciplinary, civil and criminal liability of judges. In the West Bank, the executive is increasingly controlling the bench and, in Guatemala, the legal system itself is being used to ‘criminalise’ judges known for ruling independently and in defence of the rule of law.²

West Bank – the independence of the judiciary in decay

Increasing control by the executive over the judiciary and the weakening of judicial independence in the West Bank have previously been raised by ILAC in policy dialogue over a period of time.³ In 2019, two decree laws issued by the executive, substantially changed the face of the Palestinian bench in the West Bank. The first decree law lowered the retirement age for judges from 70 to 60. The second decree law, based on a recommendation from the Transitional High Judicial Council, gave power to the executive to decide over early retirements of individual judges.⁴ Since then, the President has issued two more decrees in June and August 2020, which yet again reshape the face of the Palestinian judiciary. Presidential decrees No. 26 and 33 transfer 20 judges from their role as adjudicating judges to civil servant posts at other state institutions against their will.

In the Special Rapporteur’s most recent report, it is stated that one of the most recurrent forms of disguised sanctions against judges are transfers or removals from office.⁵ According to international standards, a judge should only be transferred against their will when the transfer is a part of a system of regular rotation or promotion.⁶ Palestinian law establishes that the transfer of judges against their will is only possible temporarily and if it is required by a national interest.⁷ Also, the appointment upon transfer shall not be longer than three years unless there is a compelling national interest.⁸ Presidential decrees No. 26 and 33, however, do not set any time limits to the transfers.⁹ Nor do the decrees state any national interest justifying the decisions as established by the Judicial Authority Law. In fact, the head of the Transitional High Judicial Council, Chancellor Issa Abu Sharar, has on various occasions stated that there is a lack of judges in the Palestinian judiciary.¹⁰ Thus, the decision to do away with 20 of the 166 judges from the West Bank’s First Instance and Magistrates courts appears to be pretextual.¹¹

The Special Rapporteur affirms that disguised sanctions against judges can take the form of collective dismissal/removal from office.¹² The collective nature of a dismissal/removal can in fact reinforce its arbitrariness. Presidential decrees No. 26 and 33 are blanket decisions removing 20 judges from judicial office without any individual justification, accentuating their arbitrary nature. There is unfortunately also a gender dimension to all of this. Four of the 20 judges transferred were women. This disproportionately decreases the representation of women on the bench in the West Bank. According to Judge Anna Harsha (who was included in the list of judges in decree No. 33), the decision also influences the remaining women judges’ morale as well as the citizens’ trust in women judges.¹³

The two Presidential decrees also raise serious concerns regarding lack of procedural guarantees. The transfer of the 20 judges results in a de facto suspension from judicial office, a procedure that must afford adequate procedural guarantees and respect due process principles.¹⁴ The 20 judges have not had the right to appeal the decision. Moreover, the authority initiating any procedure pertaining to the security of tenure must be independent, since it affects the principle of irremovability of a judge and ultimately the independence of the judiciary.¹⁵ Needless to say the President cannot be perceived as independent in sanctioning or disciplining the judiciary.

According to Palestinian law, the Palestinian High Judicial Council is in charge of transferring or seconding judges.¹⁶ It should be taken into consideration that the members of the Transitional High Judicial Council are selected by the executive.¹⁷ This obstructs the mission of the High Judicial Council, which is to guarantee the independence of the judiciary from influence by the executive and external political pressure.¹⁸

Beyond affecting individual judges, Presidential decrees No. 26 and 33 show how decisive the executive is in systematically extending its power over the judiciary.

The Special Rapporteur has also stated that attacks on the prestige and authority of the judiciary and individual judges are examples of ‘disguised’ sanctions.¹⁹ A recent statement by the head of the Transitional High Judicial Council on certain judges’ lack of suitability to exercise their profession, in part due to some judges’ use of their freedom of expression, falls within this category of ‘disguised’ sanctions.²⁰ It is important to note that, even if the freedom of expression of judges is restricted to maintain public trust in the judiciary, their right to freely express themselves is broader when it comes to issues related to the independence of the judiciary.²¹

Beyond affecting individual judges, Presidential decrees No. 26 and 33 show how decisive the executive is in systematically extending its power over the judiciary. The primary responsibility to guarantee judicial independence and due separation of power lies with the Palestinian state. Since there is no functioning legislative body in the West Bank, the state’s possibilities for action are limited. When the formal checks and balances are weak, civil society, the community of legal professionals and the media play an even more central part to uphold the rule of law. International actors will also have to address the threats to judicial independence to stay true to principles of rule of law and human rights obligations.

Guatemala – ‘criminalising’ and impeaching judges

Guatemala is unfortunately a prime example of the abuse of judicial accountability and disguised sanctions highlighted in the Special Rapporteur’s most recent report. The country is even cited several times in the report to exemplify ‘judicial harassment’ and “attacks on individual judges in relation to the decisions they have adopted or the nature of the cases they are responsible for”. According to Guatemalan judges, the attacks on judges who defend the rule of law have only worsened since the closing of the International Commission against Impunity in Guatemala’s (CICIG) in September 2019.²² The below examples to exhibit the tactics used in Guatemala to attack judicial independence are just some of the too many other examples.

As stated by the Special Rapporteur, “In many countries, certain categories of judges, for instance those dealing with corruption, organized crime or gross human rights violations perpetrated by the armed forces, are subject to systematic criminalization” One example of such “criminalisation” is the recent case against Judge Yassmin Barrios, a judge from the Courts for High Risk Crimes who convicted Guatemala’s former president Efraín Ríos Montt of genocide. A criminal complaint filed against Judge Barrios in August of this year alleges that she committed abuse of authority, a failure to fulfill her duties, passive bribery, passive international bribery, receiving illicit gifts and money laundering. The allegation comes from the acceptance of a 2015 human rights award that included prize money. It should be noted that the criminal complaint was filed by the Foundation Against Terrorism (Fundación contra el Terrorismo in Spanish), a far right organisation,²³ and five years after Judge Barrios received the award. Further suggesting that FCT filed the complaint with malicious motives is the fact that it has filed similar complaints against Constitutional Court judges, former Attorney General Thelma Aldana and civil society leaders, and its president is currently under investigation for publishing confidential information.

An extreme example of the ‘criminalisation’ of judges overseeing high-level corruption cases, which were often investigated by CICIG, was the prior Congress’s (whose term ended in January) creation of a so-called “truth” commission. The commission gave a platform to those accused or convicted of corruption to air their grievances and supposed illegalities and abuses suffered during investigatory and judicial proceedings. The commission ultimately published a series of recommendations which included the arrest of judges who allegedly committed abuses while working with CICIG. To date, the recommendations have been sent to the Attorney General, but no further action has been taken.

Threatening the personal safety of judges is another tactic that is systematically used in Guatemala. Some judges have even reported the use of intimidation tactics reminiscent of those used in Guatemala during the 1980s. Many of the judges from the Courts for High Risk Crimes are accompanied by several armed security guards and often travel in bullet-proof vehicles but have also been left without safe transport for periods of time. The situation has become so precarious for certain judges that the Inter-American Commission for Human Rights has issued interim protection measures for those judges.²⁴

Excluding judges from the ongoing judicial nominations process has been another retaliation tactic. Guatemala's Congress should have elected a new Supreme Court bench and 270 seats on the Court of Appeals by October 2019, but the process has been beset by technical errors and corruption and is still ongoing to date.²⁵ During the process of selecting candidates, the judicial nominations commissions used minor technicalities to exclude Judges Miguel Angel Galvez and Erika Aifan. Both had been subjects of previous threats and intimidation resulting from presiding over high-level corruption cases. Judge Angel Galvez was excluded for failing to present a certified copy of his national identification because he submitted the copy and the certification in two separate documents. Judge Aifan had apparently failed to include the required phrase 'sindical' (trade union) in one of her affidavits relating to any possible impediments to sitting on the Supreme Court. Although she corrected the error and claimed it was not relevant to her candidacy, not a single commission member permitted her to remain eligible.

Even judges from Guatemala's Constitutional Court, the highest court for civil law in Guatemala, are not immune. Most recently, the attack on Constitutional Court judges began in the summer with an attempt to lift the immunity of four of the five judges sitting on that bench. The impeachment request stems from a 4-1 order issued by the Constitutional Court in early May to accelerate the judicial nominations process and ensure that the judicial candidates satisfy constitutional requirements regarding suitability. Guatemala's Supreme Court granted the impeachment request and then Congress created a commission to investigate the Constitutional Court's legitimacy. The commission has recently asked the Attorney General to investigate three of the five judges for malfeasance, obstruction of justice, violating the Constitution and adopting resolutions that contravene the Constitution, which are crimes punishable by up to ten years in prison.

The 4-1 order by the Constitutional Court has also been ignored to date, and this is not the first time that orders by the Constitutional Court have been disregarded.²⁶ Not only has the legislature fully failed to respect the separation of powers, but the impeachment requests unveil the intra-branch divide within the Guatemalan judiciary. The divide has resulted in an ongoing constitutional crisis, a further loss of trust in institutions and an erosion of judicial collegiality. Moreover, on 18 November, the Supreme Court deepened the rift within the judiciary by granting another request to lift the immunity of two Constitutional Court judges and referred the matter to Congress. Shortly thereafter, the Constitutional Court ruled in favor of an amparo²⁷ filed by the Ombudsman for Human Rights to adjourn the impeachment action. In response to such an overt lack of respect for judicial independence and separation of powers, including within the judiciary itself, the Special Rapporteur recently called on the Guatemalan state to end the attacks against the Constitutional Court and comply with its orders.²⁸

More subtle tactics, along the line of the "soft" tactics discussed in the Special Rapporteur's report, are also being used in Guatemala too. For example, many judges have reported on the political polarisation of judges in news and social media outlets. Judges who oversee corruption and human rights cases and rule independently are labelled as "leftists" and "communists", detracting from the several of these judges' hard-fought efforts to remain independent and impartial.

Judges from AGJI have reported that the continuous use of so many methods to threaten their personal safety and undermine professional integrity has an intimidating and chilling effect, so that they are to a certain extent experiencing anxiety and lower morale. They even expressed concern that if the criminal complaints against them 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, these judges have reported that they still believe in their professional mandate and strengthening the rule of law in Guatemala by judging independently.

Civil and criminal liability of judges is less regulated in international law, as highlighted by the Special Rapporteur's report. It is therefore all the more important that Guatemalan law is properly applied and reformed, where needed, to afford judges procedural guarantees in civil and criminal claims.

Conclusion

Despite differences in geography, legal traditions and status of development, the West Bank and Guatemala show the patterns of undue and often systematised sanctions against judges. Sowing discord on the bench can be a tactic to divide and rule, but it also erodes judicial collegiality and polarises judges – something that is happening both in the West Bank and Guatemala. Judicial collegiality is in fact a condition to sustain judicial integrity and independence, and ultimately uphold the rule of law.

Beyond directly affecting individual judges, undue sanctions have an overall chilling effect on the judiciary as a whole and its ability to freely practice its profession. The Special Rapporteur's report uncovers how the use of disguised sanctions is a means to test the waters of repressing the judiciary. In order to push back, the rule of law community must pay more attention to the increasing vulnerability of judges and their vital role as guardians of the rule of law.

Recommendations

¶ International and national rule of law communities:

- Ensure that all disciplinary, civil and criminal proceedings against judges should follow clear procedures and objective criteria established in national law.
- Better and continuous monitoring and tracking of attacks against judges, including 'disguised' sanctions, by the national and international law community to raise the profiles of judges under attack and ensure that they are included in the rule of law policy dialogue at the highest national and 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.

¶ West Bank:

- Decree laws 16 and 17 and Presidential decrees 26 and 33 should be withdrawn, and the affected judges reinstated in their adjudicating roles.

- The Transitional High Judicial Council should be dissolved, and a permanent High Judicial Council should be reinstated in accordance with Palestinian law (Article 37 of the Judicial Authority Law) and international standards, respecting its primary role as a guarantor of judicial independence.
- The Judicial Authority Law should be followed and respected at all times.

¶ Guatemala:

- Identify gaps and support reform of national legislation to prevent the filing of unfounded criminal and civil claims and to ensure the dismissal of malicious complaints within a reasonable time.
- Provide support to justice sector actors in defending against complaints by providing financial and practical support to hire attorneys, filing amicuscuriae 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

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- 6 UNODC, The United Nations Convention against Corruption: Implementation Guide and Evaluative Framework for Article 11 (2015), para. 59.
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- 8 Judicial Authority Law Article 26, para. 2.
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21. UN Special Rapporteur on the independence of judges and lawyers, Report on Freedom of expression, association and peaceful assembly for judges and prosecutors, A/HRC/41/48, 29 April 2019, Bangalore principle on judicial conduct No. 4.6 and UNODC commentary on the Bangalore principles, para. 138:
"A judge may speak out on matters that affect the judiciary, 138. There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge.
- 22 ILAC, "A Window of Opportunity – Support to the Rule of Law in Guatemala", (2020), pg. 28-29.
- 23 For more information on Foundation Against Terrorism see for instance Forbes Centroamérica, "OAS mission in Guatemala in dialogue with indigenous leaders and the extreme right", 1 December 2020, <https://forbescentroamerica.com/2020/12/01/mision-de-oea-en-guatemala-dialoga-con-dirigentes-indigenas-y-extrema-derecha/> and Nomada "Foundation Against Terrorism's favorite candidate says that she is after the CICIG", 14 March 2018, <https://nomada.gt/pais/entender-la-politica/la-candidata-favorita-de-la-fundacion-contra-el-terrorismo-dice-que-quiere-a-la-cicig/>
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26 For 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.

27 In general terms, an amparo is a constitutional lawsuit filed against the government for the immediate protection of human rights.

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About the Authors

Ylva L. Hartmann is a Legal Advisor at ILAC.

Lauren McIntosh is a Legal Advisor at ILAC.



ILAC Secretariat
Stockholmsvägen 21,
SE-122 62 Enskede, Stockholm, Sweden
Phone: +46 (0)8-545 714 20 info@ilac.se
www.ilacnet.org

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