

Judicial Accountability in Developing Countries

Report of Consultation Meeting
Tunis, 8-9 October 2015

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International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

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On 8 and 9 October 2015, the International Commission of Jurists (ICJ) held a consultation meeting in Tunis on the topic of judicial accountability. The focus was on mechanisms and procedures for holding judges to account for involvement in violations of human rights, judicial corruption or similar judicial misconduct, in developing countries. The meeting was organised by the ICJ Centre for the Independence of Judges and Lawyers (CIJL) in the context of a broader project on accountability of judges.

The forms of accountability covered by the project include among other things, procedures that can impose professional, civil or criminal consequences for individual judges, mechanisms for truth-seeking, remedy and reparation for victims, and ensuring compliance of domestic law with international obligations. The ICJ will publish a Practitioners' Guide on Judicial Accountability in 2016. The Practitioners Guide will draw on the Tunis consultation, the 2015 Geneva Forum of Judges and Lawyers (to be convened 14-15 December), as well as research conducted by the ICJ. The Guide will document selected national practices and international standards and make recommendations for effective accountability mechanisms and procedures, capable of securing both judicial independence and judicial integrity.

While all countries have responsibilities to combat corruption and prevent and respond to human rights violations, it is widely recognised that the negative impacts of corruption on human rights are deepest and most widespread in developing countries. Similarly, many countries undergoing or which have recently undergone a transition from repressive to democratic regimes – a situation with particular relevance to judicial accountability – are developing countries.

The Tunis meeting offered the opportunity for judges, researchers and other professionals with expertise in justice systems in a wide range of developing countries from Africa, South America and the MENA region, to exchange views and experiences on the topic. Drawing from their professional experience, knowledge and personal opinion, the participants discussed types of accountability mechanisms, their efficiency, and the main challenges faced in pursuing judicial accountability and potential ways to overcome them in developing countries. The discussions took place on the understanding that the views expressed were personal and would not be attributed to particular participants; some country identification has also been excluded from this summary report where it would be likely to indirectly identify the speaker.

This report offers a thematic summary of the discussions held over the course of the two days meeting, and also includes annexes with the list of participants (annex I), and questions for reflection, provided to the participants in advance of the meeting (annex II).

A. Composition and character of accountability bodies

A first subset of discussions concerned accountability mechanisms for misconduct of particular judges, in contexts where as a general matter the judicial system functions properly.

All participants expressed the view that judges must be held accountable for involvement in human rights violations, corruption and other breaches of ethical standards. However, several participants pointed out that judicial accountability remains a sensitive topic in many developing countries. Governments and other actors may be unwilling to tackle the issue for a variety of reasons. Some take the view that the judiciary must be treated as sacrosanct, with its independence shielding the institution and its members against any form of criticism or intervention. Participants commented that criticism of the judiciary is sometimes suppressed on the premise of preventing the administration of justice from being brought into disrepute, while on the other hand a failure to acknowledge and address judicial misconduct could itself have the very effect of bringing the administration of justice into disrepute. Participants also noted that judicial corruption often goes unaddressed when it takes place against a backdrop of widespread corruption within the country that affects the separation of powers. It was also suggested that donors must make judicial accountability a priority for international assistance for judicial reform if they want to have the maximum impact towards the fair and efficient administration of justice and respect for human rights and the rule of law..

Participants distinguished between mechanisms to hold judges accountable for breaching disciplinary rules and mechanisms to hold judges accountable for crimes.

One type of mechanism highlighted by participants was the judicial council, which exist in both common law and civil law systems. In numerous developing countries that have civil law legal systems, judicial councils deal only with disciplinary proceedings against judges. In some common law countries, however, judicial councils are also responsible for dealing with allegations of certain types of criminal conduct, including corruption.

In several of the developing countries considered, judicial councils are either composed entirely of members of the judiciary, or of members of the judiciary together with members of civil society organizations. In other countries the Minister of Justice or a representative of the head of State are part of the council; some participants considered this to constitute undue interference by the Executive with the judiciary's independence.

In the context of disciplinary proceedings, participants highlighted the potential role of codes of conduct and codes of ethics. Some such codes contain precise and detailed definitions of prohibited conduct, constituting grounds for disciplinary proceedings. In other jurisdictions such codes are more general documents that provide ethical guidelines but do not necessarily clarify the particular circumstances in which disciplinary proceedings would be appropriate. Several participants expressed the view that professional associations of judges must be involved in the drafting of such codes, and that such codes must contain specific definitions of misconduct and have the power of law and be enforced accordingly. One participant pointed out that regardless of the legal status and type of code, its mere existence will have an impact on the assessment of judges' conduct.

A second institution identified by participants, particularly in civil law countries, is an inspectorate responsible for investigating cases of judicial misconduct. In some instances, this inspectorate is part of the Executive and reports to the Minister of Justice, raising concerns about interference with judicial independence; it was observed however that overall this model of Executive control is gradually disappearing. One participant expressed the view that the inspectorate should be part of the judicial council, in part because the inspectorate's investigative role means that it is in the best position to advise the council. In one developing country under consideration at the consultation, the head of the judicial council also leads the inspectorate. Several participants stressed that inspectorates should not operate in total secrecy when they investigate an allegation. A lack of transparency can lead to arbitrariness on the part of the inspectorate amounting to a breach of the investigated judge's rights and, on the other hand, can give rise to (the perception of) judicial corporatism among the broader public.

In the Commonwealth there are generally three different types of mechanisms for removing judges from office for misconduct. First, by impeachment through a procedure involving the Executive or Legislature. Second, by decisions issued by *ad hoc* tribunals. Third, by decisions taken by standing disciplinary bodies, including judicial councils. One participant who had compared Commonwealth jurisdictions commented that *ad hoc* tribunals were the most common, usually composed of serving or retired judges from the same jurisdiction or other Commonwealth countries. (Foreign judges are seen in some circumstances as helping to secure the impartiality of a tribunal in a context where it would be difficult to find members of

the domestic legal community who had not formed an opinion or would not be subject to political pressure on such matters.)

Such *ad hoc* tribunals are frequently established by the Head of State, who subsequently is bound, whether legally or by expectation, by the tribunal's recommendations. A participant commented that if the authority who appoints the members of an *ad hoc* tribunal may itself be biased, the authority can select appointees to the tribunal who he or she thinks are likely to decide the case in a particular way. As such, such *ad hoc* tribunals appointed by the legislature or executive may lack effective guarantees of independence and impartiality. As a corollary, while foreign judges could in some circumstances help to secure the independence and impartiality of a tribunal, if the foreign judges are themselves selected by a biased appointing authority because it knows or predicts they will decide the case in a particular way, their inclusion may in such circumstances create a false impression of impartiality.

Regarding criminal proceedings, participants from both civil law and common law developing countries pointed out judges are rarely prosecuted, although nothing in the law prevents it. For example, in Nigeria the Economic and Financial Crimes Commission is competent to prevent, investigate, prosecute and penalize financial and economic crimes including corruption by judges, but so far it has not. One participant from the MENA region said that judges are only prosecuted when they are caught red-handed. Furthermore, several participants noted that often in developing countries, disciplinary proceedings that lead to removal from the bench and the impossibility of returning to legal practice are seen by society – presumably in particular by the legal fraternity – as ultimate and sufficient punishment, obviating the need for criminal prosecution. Several participants raised cases in which judges were informed of the allegation against them and then given a choice between submitting to an investigation or resigning; the judges in all instances opted to resign, because this allowed them to keep accrued pension and other benefits and left their reputation – at least formally – intact.

B. Composition and character of accountability bodies in situations of transition where the judiciary as a whole has been implicated

A second subset of discussions addressed situations where accountability mechanisms operate in a context where the judiciary, as a whole, has been implicated in violations and abuses of human rights, corruption or common breaches of the deontology.

All participants who spoke to the issue unanimously expressed the view that judges must be held accountable for their role in human rights violations during repressive regimes, citing two main reasons. The first is that repressive regimes often set up judicial systems that are misused by the government in an attempt to legitimize their policies and actions. The second is that a lack of scrutiny during transition will negatively affect public perception of the judiciary in the future. Participants found that judicial accountability in countries in transition requires taking into account both the role of the judiciary as a whole *and* the conduct of individual judges. As regards the latter, on the one hand there are instances in which a judge had a discretion under national law, and exercised the discretion in a way that violated human rights when such violations could have been avoided by exercising the discretion in another manner. Slightly more complicated could be a situation where national law appeared to leave no room for judicial discretion and the law's application would violate human rights, but in which the judge chose to apply the law without considering whether it was unjust, or inconsistent with fundamental human rights. Participants suggested there could still be grounds on which judges might be held responsible in the latter case. Some participants referred to the broader terms of oaths of office that judges take, or broader constitutional provisions, as a basis for subsequently holding individual judges and the judiciary as an institution accountable in such situations.

Several participants pointed out that that a "one size fits all" model to hold judges accountable does not exist nor should its development be attempted. Instead, one must consider each country's specific context before opting for one mechanism over another. In this regard, one participant noted that the process of constitutional reform in countries in transition offers the opportunity for in-depth debate, ideally driven by the national actors. At the same time, participants acknowledged that although one successful model should not be automatically adopted in another country, it is important to consider past experiences in order to identify best practices and lessons learned. One participant stressed in this regard that an example of past practice that should be avoided in the future is the automatic removal of all judges who served under a repressive regime, without examination of their individual conduct.

Participants identified truth commissions as a possible mechanism for considering the actions of the judiciary as a whole. The Tunisian Truth and Dignity Commission, which has a mandate to recommend

that disciplinary actions be initiated against individual judges, was cited as an example. It was suggested that other examples could be found in Latin America. It was observed that in South Africa, the judiciary replied negatively to a petition from the Truth and Reconciliation Commission (TRC) inviting members of the judiciary to account for their actions under the Apartheid regime; the judiciary formally took the position that to participate in the TRC process would violate the principle of judicial independence. Regarding truth commissions more generally, participants observed that many had failed to even consider the role of the judiciary and while they could be an effective mechanism, there is a need for commissions to pay greater attention to actors other than the Executive and the armed forces.

The participants also discussed the possible role of vetting of sitting judges. The experience of the Kenya Vetting Board was discussed. Participants noted that the primary stated purpose of vetting is usually prevention of future misconduct, rather than punishment or full accountability for past misconduct. However, like most judicial accountability processes, vetting has among its aims the restoration of public trust in the judiciary, and vetting can in practice be a means for identifying judges who failed to uphold the rule of law and referring them to other mechanisms or processes more specifically aimed at accountability for past wrongs. The participants noted that vetting of sitting judges tends to be resource-intensive from an investigative viewpoint, and therefore requires the commitment of considerable resources to be effective. The higher the number of judges in a country, the more resources will be needed to vet them, meaning that in practice vetting of all sitting judges is not always a viable option, particularly given resource restraints in developing countries. It was also stressed that the procedures used in the vetting exercise must provide due process guarantees for judges, including the right to legal representation and the right to appeal the decision of the vetting body.

It was also pointed out that accountability mechanisms that are capable of assessing the overall responsibility of the judiciary for human rights violations or mass corruption in situations of transition or crisis, should theoretically be well-positioned to contribute their fact-finding, analysis, and potentially recommendations, to forward-looking processes of judicial reform, particularly in establishing an accurate view of the baseline. At the same time, even if such bodies produce important findings, analysis and recommendations, their impact on judicial reform will be limited if the country does not adopt a coordinated and comprehensive reform strategy.

C. Powers, procedures and limits of accountability mechanisms

A discussion of appropriate powers, procedures and limits of accountability mechanisms revealed some differences between civil law and common law systems in a range of developing countries.

In some common law developing countries, the judicial council has investigative powers and can decide on the dismissal of judges. In a typical example, the judicial council had a mandate to choose which cases to investigate and then would appoint a committee composed of retired judges that has the power to request other authorities, including the police, to undertake specific investigative steps on its behalf. Judicial councils in such settings may be empowered to make a recommendation for another body formally to implement (the Legislature or President/Prime Minister for instance). Often there is a constitutional custom or expectation that the recommendation of the judicial council will automatically be endorsed; however, it was acknowledged that if the Legislature or President/Prime Minister retains even a theoretical possibility to fail to implement such a recommendation the a risk of political interference remains.

Several participants from civil law countries pointed out that judicial councils in their countries did not have similar investigative powers, this competence instead being assigned to the Ministry of Justice. Civil society organisations as well as the judiciary often criticize such a role for the Ministry of Justice as interfering with the independence of the judiciary, since the Executive can decide whether to proceed with its own investigation or whether to refer the case to the judicial council. Several civil law developing countries are in the process of reforming the role of their judicial councils and Ministry of Justice in this regard.

As noted earlier under "Composition and Character", some civil law countries also have inspectorates that are empowered to investigate judicial misconduct; these are usually part of the Ministry of Justice. Participants found this to affect the separation of powers between the judicial and the executive power. The fact that in some of the countries under consideration the forms of behaviour that could constitute misconduct is not specified in law effectively gives the inspectorates wide discretion, giving rise to a lack of legal certainty. Once again, participants observed that codes of conduct with the force of law and with detailed information on each type of misconduct could help resolve this problem.

The participants also raised concerns regarding the quality of investigations, the methods for collecting evidence, and the standard of proof, particularly in relation to inspectorates. In one example, the inspectorate reportedly made decisions without any concrete evidence. In order to overcome this, greater transparency of the process followed is required. (At the same time, article 17 of the UN Basic Principles for the Independence of the Judiciary which provides in part that, "The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge" was acknowledged.) In terms of evidence regarding corruption, participants identified bank records as a specific type of document that could be used to prove or disprove the allegations against the judge. Regarding the use of recorded conversations, reference was made to the on-going prosecution of seven judges in Ghana for corruption that reportedly relies (at least in part) on evidence directly collected by private individuals; participants raised questions about how an inspectorate or judicial council should approach such evidence.

In many civil law systems in the developing countries discussed, judicial councils are also responsible for deciding whether to lift the immunity of a judge. If the immunity is lifted, the judge will be prosecuted like any other citizen. Participants raised some concerns regarding the way this happens in practice. Some participants expressed concern that judges were not necessarily informed that a removal of their immunity was under consideration and given an opportunity to make submissions against removal of immunity, and that in other instances judges do not necessarily have the right to appeal against the decision.

It was noted that Tunisia, which has over one thousand judges and where the incoming government had considered a process of vetting of all sitting judges impracticable, opted to appoint a committee within the Truth and Dignity Commission with the mandate to make recommendations regarding the referral of specific individual judges to disciplinary proceedings (and possibly, for criminal investigation).

Participants stressed that regardless of the accountability mechanism or mechanisms adopted, the process needs to guarantee the judge appropriate safeguards. One such safeguard is a reasonable amount of time to reply to the allegations. Others include requiring that the complaint be sufficiently detailed and that the judges are informed and given copies of the evidence against them. Participants also discussed whether the initial hearing to assess the allegations should be public or private. Participants agreed that although many jurisdictions stipulate it must be private, the judge should be given the choice to have a public hearing if s/he thinks that a private hearing may be prejudicial.

The Tunis Consultation meeting on Judicial Accountability in Developing Countries, as well as participation of experts and practitioners from developing countries in the 2015 Geneva Forum of Judges & Lawyers on Judicial Accountability, was made possible with funding received under a core grant provided to the ICJ by the Ministry for Foreign Affairs of Finland.



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Annex I

Participants List

Dr. Ali Adoum Ahmat	Legal Adviser, Permanent Mission of the Republic of Chad to the United Nations, New York; Senior lecturer, Faculty of Law and Economics, University of Abeche, Chad
Ms. Linda Awuor	National Council for Law Reporting, Nairobi, Kenya
Judge Mondher Ben Sik Ali	Judge of the Court of Appeal, Sousse; Member, Executive Board of the Association of Tunisian Magistrates
Judge Abdellatif Chentouf	President, Club of Magistrates of Morocco; Professor, Faculty of law, Morocco
Judge Mohammed El Haini	Doctor in private law; Member, Executive Board of the association <i>Adala</i> for the right to a fair trial; Founding member of the Club of Magistrates of Morocco
Dr. Linn Hammergren	Independent Consultant, Washington D.C., USA
Judge Walid Melki	Judge; Member, provisional Instance for the supervision of the judiciary, Tunisia
Judge Marwan Tashani	President, Libyan Organisation of Judges
Dr. Hakeem Yusuf	Reader in Global Legal Studies, University of Birmingham, UK
Dr. Jan van Zyl Smit	Associate Senior Research Fellow, Bingham Centre for the Rule of Law, British Institute of Comparative and International Law
Dr. Matt Pollard	International Commission of Jurists, Senior Legal Adviser (Centre for the Independence of Judges & Lawyers), Geneva
Mr. Laurens Hueting	International Commission of Jurists, Legal Adviser (Centre for the Independence of Judges & Lawyers), Geneva
Ms. Lina Biscaia	International Commission of Jurists, Research Consultant
Ms. Leyla Slama Carimi	International Commission of Jurists, Logistics & Research Consultant
Mr. Brian Penduka	International Commission of Jurists, Legal Consultant (Africa Regional Programme), Zimbabwe
Mr. Saïd Benarbia	International Commission of Jurists, Director (Middle East & North Africa Regional Programme), Geneva
Ms. Doireann Ansbro	International Commission of Jurists, Associate Legal Adviser (Middle East & North Africa Regional Programme), Tunis
Ms. Arianna Rafiq	International Commission of Jurists, Legal Intern (Middle East & North Africa Regional Programme), Tunis

Annex II

Questions for Reflection

Composition and character of judicial accountability bodies

1. General purpose versus issue-specific mandate

Some countries have a general anti-corruption body, or other public ethics body, which has jurisdiction in respect of all types of public servants including judges; while others have a judicial council or similar body with jurisdiction over all aspects of judicial conduct including corruption and other ethical breaches.

- What kinds of bodies exist, have existed, or are under consideration in the developing countries that you are familiar with?
- If there is a general anti-corruption or other general ethics body, how does it address, if at all, the requirements of judicial independence of the judges over whom they have jurisdiction?
- If there is a judicial council or similar body with general jurisdiction over judges, does it have specific officials, procedures, or programmes for detecting and addressing judicial corruption or human rights violations?
- If both kinds of bodies exist with shared jurisdiction, how is this managed?
- Are there differences between civilian and military judges?
- Does the experience in the countries you are familiar with suggest any particular benefits or disadvantages of particular approaches?

For example, Afghanistan's High Office of Oversight and Anti-Corruption (HOOAC) is competent to receive complaints against government employees, Ministers, police officers and judges.¹ Bangladesh² and Bhutan³ also have Anti-Corruption Commissions which have investigative powers over any allegation of corruption, with Bhutan specifying this includes allegations against judges.

In parallel most countries have an one or more entities specifically responsible for dealing with misconduct by judges. These entities can be judicial councils or ad hoc tribunals set up to deal with allegations of misconduct by judges. The Constitutions of many countries provide for a judicial council which is responsible for disciplinary action against judges including deciding or making recommendations to the President on the removal of judges. This is the case of Burundi⁴, Cambodia⁵, Chad⁶, Democratic Republic of Congo⁷, Ethiopia⁸, Malawi⁹, Nepal¹⁰, Rwanda¹¹, South Sudan¹², Sudan¹³, Tajikistan¹⁴, and Yemen.¹⁵

¹ <http://anti-corruption.gov.af/en/page/3374>

² http://www.acc.org.bd/assets/2004_acc_act_eng_0.pdf

³ Art 45 Anti-Corruption Act of Bhutan

⁴ Art 112 Burundi Constitution

⁵ Art 21 Cambodia Constitution

⁶ Art 148 Chad Constitution

⁷ Art 82, 150 and 152 DRC Constitution

⁸ Art 79 Ethiopia Constitution

⁹ Art 111.3, 118 (c), 119.2 Malawi Constitution

¹⁰ Art 109 (10) (c) Interim Constitution of Nepal

¹¹ Art 157 Rwanda Constitution

¹² Art 7 (d) Judicial Service Council Act 2008

¹³ Art 102 (2) and 104 (4) Constitution of Sudan. The Council makes recommendations to the President.

¹⁴ Art 69 Tajikistan Constitution

¹⁵ Art 149 and 150 Yemen Constitution

2. The role of the Executive branch of government

In some countries, institutions addressing misconduct by judges are made up only of judges; in others, they include persons working in the executive. In other countries the relevant bodies are entirely controlled by the executive.

- What is the role of the executive in the judicial accountability bodies in the developing countries that you are familiar with?
- Does the presence of executive actors have any positive effect on judicial accountability?
- How is any executive role reconciled with the requirements of judicial independence?
- Are there differences between civilian and military judges?
- Does the experience in the countries you are familiar with suggest any particular benefits or disadvantages of particular approaches?

For example, the members of the Bhutan anti-corruption commission, which is responsible for investigating corruption of public servants¹⁶, including judges,¹⁷ are appointed by the King upon the recommendation of the Prime Minister, the Chief Justice and others.¹⁸ The Chairperson of the Commission is accountable to the King and the Parliament.¹⁹

In Burundi²⁰ and Chad²¹, the Superior Council of the Magistrature are presided by the President of the Republic with the assistance of the Minister of Justice. Similarly, in Burkina Faso²² and the Central African Republic²³, the President of the Republic is the President of the Superior Council of the Magistrature.

3. The role of the Legislative branch of government

In some countries, (members of) the legislature are involved in judicial accountability mechanisms:

- What is the role of the legislature in judicial accountability in the developing countries that you are familiar with? Does it involve the whole legislature or part thereof?
- At which stage of the procedure are members of the legislature involved?
- Is the legislature involved for all members of the judiciary, or only judges in the superior courts? What is the rationale?
- Does the involvement of the legislature have a positive effect on judicial accountability?
- How is the role of the legislature reconciled with judicial independence?
- Are there differences between civilian and military judges?
- Does the experience suggest any particular benefits or advantages?

Examples of countries that have processes for parliamentary impeachment include Afghanistan²⁴, Bangladesh²⁵, Bhutan²⁶, Kiribati²⁷, Liberia²⁸, Myanmar²⁹, and Nepal.³⁰

4. Persons who are neither judges nor part of the executive or legislature

Judicial councils, or other disciplinary bodies and accountability mechanisms, can include persons who are neither judges nor members of the executive or legislature:

¹⁶ Art 45 (b) Bhutan Anti-Corruption Act 2006

¹⁷ Art 138 (t) (3) Bhutan Anti-Corruption Act 2006

¹⁸ Art 12 Bhutan Anti-Corruption Act 2006

¹⁹ Art 14 Bhutan Anti-Corruption Act 2006

²⁰ Art 219 Burundi Constitution

²¹ Art 146 Chad Constitution

²² Art 53 Burkina Faso Constitution

²³ Art 22 CAR Constitution

²⁴ Art 127 Afghanistan Constitution (Applies to members of the Supreme Court)

²⁵ Article 96(2) and 92(3) Constitution of Bangladesh (as amended Bangladesh Act No XIII of 2014)

²⁶ Art 31 (3) Constitution of Bhutan

²⁷ Art 83 (3) Kiribati Constitution

²⁸ Art 71 Constitution of Liberia

²⁹ Art 302 (a) Constitution of Myanmar

³⁰ Art 105 Interim Constitution of Nepal

- Is this the case in the developing countries with which you are familiar?
- What are the required qualifications of these members?
- How are these members selected and appointed?
- Does their involvement have a positive effect on judicial accountability?
- How is their role reconciled with judicial independence?
- Are there advantages or disadvantages to including particular categories, such as representatives of the legal profession or legal academics?

5. Criminal and civil trials

Countries may have procedures to hold judges suspected of (certain types of) misconduct, including corruption, account in court through civil or criminal procedures.

- Are such proceedings permitted in the developing countries with which you are familiar (note that the related issue of judicial immunity is dealt with in more detail in a subsequent session)?
- What is the interaction between the proceedings before any disciplinary body and those in (criminal or civil) court?
- How do the outcomes in one set of proceedings influence the other? E.g., if disciplinary proceedings come first, can/must the disciplinary body refer to a criminal tribunal in case certain types of misconduct are found? Or, if criminal proceedings come first, are the factual or legal findings relevant for the disciplinary proceedings, and how?
- Do any special (substantive or procedural) safeguards apply in the tribunal?
- Is the court before which such proceedings take place constituted and selected in same manner as any other case, or do they take place before a specially constituted or selected court (and if so, how is this done)?
- Are there differences between civilian and military judges?
- What are the advantages and disadvantages with regard to court proceedings as a means of securing judicial accountability in developing countries?

Afghanistan has a special anti-corruption court under the Supreme Court.³¹ Similarly, Burundi's anti-corruption law, which criminalizes corruption by judges,³² sets up an anti-corruption court to deal with such cases.³³ But the majority of countries simply have provisions in their penal codes criminalising corruption by judges who face such charges before criminal courts. This is the case, amongst others, of Bangladesh³⁴, Burkina Faso³⁵, Cambodia³⁶, the Central African Republic³⁷, the Comoros³⁸ and Rwanda³⁹.

Some countries have set up special ad hoc tribunals to deal with allegations against judges and decide whether they should be removed. This is the case of Gambia (in the context of parliamentary impeachment)⁴⁰, Kenya⁴¹, Kiribati⁴², Lesotho⁴³, Sierra Leone⁴⁴, Solomon Islands⁴⁵, Tanzania⁴⁶, Tuvalu⁴⁷, Uganda⁴⁸ and Zambia⁴⁹. See also ongoing situation in Botswana.

³¹ Report on progress toward security and stability in Afghanistan, April 2010: https://books.google.be/books?id=5-BBKEPhm4QC&pg=PA77&lpg=PA77&dq=vetting+judges+afghanistan&source=bl&ots=J09FBYztq7&sig=utX7n5e72_t5hub_3ijwkPK-Zjs&hl=en&sa=X&ved=0CC4Q6AEwA2oVChMIy_Hd-P_cxwIVwb0UCh0R6Awe#v=onepage&q=vetting%20judges%20afghanistan&f=false, page 47

³² Art 44 loi portant répression de la corruption

³³ Art 15 loi portant répression de la corruption

³⁴ Art 21 and 161 Bangladesh Penal Code. See also art 5 of the Prevention of Corruption Act

³⁵ Art 156 Burkina Faso Penal Code

³⁶ Art 517 Cambodia Criminal Code

³⁷ Art 315 CAR Penal Code

³⁸ Art 158 (1) Comoros Penal Code

³⁹ Art 639 Rwanda Penal Code

⁴⁰ Art 141 (5) and 141 (7) Gambia Constitution

⁴¹ Art 62 (4) and 62 (5) Kenya Constitution

⁴² Art 83 (3), 83 (4), 93 (3) Kiribati Constitution

⁴³ Art 121 (4) Lesotho Constitution

⁴⁴ Art 137 (5) Sierra Leone Constitution

⁴⁵ Art 80 (5), 87 (5) Solomon Islands Constitution

⁴⁶ Art 110 (6) Tanzania Constitution

⁴⁷ Art 127 (3) Tuvalu Constitution

⁴⁸ Art 144 (4) Uganda Constitution

The number of members composing an ad hoc tribunal varies. For example, in the Gambia the tribunal is appointed by the National Assembly and consists of three persons, at least one of whom must hold or have held high judicial office and who is the chairman of the tribunal. In Kenya, the tribunal is appointed by the President and consists of the Chairman and four other persons who are either judges, qualified to be judges or persons upon whom the President conferred the rank of Senior Counsel under the Advocates Act.

6. Professional associations

Professional associations of judges may play a role in accountability mechanisms, either generally through engagement in determining the legal and regulatory framework, or in specific proceedings against individual judges:

- In the developing countries with which you are familiar, do professional associations of judges play a role in determining the legal and regulatory framework for judicial accountability?
- What have been the advantages and any disadvantages of their involvement? Have they effectively acted as a safeguard for judicial independence? Has their involvement improved accountability?

7. Situations of transition where the entire judiciary is implicated

A. *Vetting*

Some countries, particularly in situations of transition, in the aftermath of gross or widespread violations of human rights with institutional involvement of or lack of response by the judiciary, or other systemic breaches of judicial integrity, have established process for vetting of judges outside of other ordinary judicial accountability processes:

- Has vetting of judges been implemented in any of the developing countries with which you are familiar?
- Is it appropriate for judges to be vetted by the same body that is responsible for vetting other civil servants?
- How should the vetting body be composed, in order for judicial independence to be respected?
- How can the judiciary be engaged in these bodies, when the whole of the judiciary is implicated? How should the judicial member(s) of the vetting body be selected and appointed?
- How can the independent discharge of the vetting body's mandate be ensured?
- What are the advantages and disadvantages of vetting judges, in particular in developing countries?

An example is Rwanda, which vetted candidates for several positions in the justice system, including judges, after the 1994 genocide. Vetting took place when the judiciary was being rebuilt and was carried out by the intelligence services, which undertook investigations and, depending on the result, candidates for training were retained or told they were not eligible.⁵⁰ Participants will also bring extensive experience on the vetting process in Kenya.

B. *Re-application of all judges*

Linked to vetting in situations of transition, is the practice of requiring all judges to re-apply for their position:

- Which body should decide on these re-applications?
- How can judicial participation in these decisions be ensured, in a way that both ensures judicial independence as well as the body's functioning as an accountability mechanism, in situations where the whole of the judiciary was implicated?

⁴⁹ Art 98 (3) Zambia Constitution

⁵⁰ ICTJ Justice as Prevention, page 441, footnote 15

C. *Truth commissions and similar mechanisms*

- Can truth commissions be an appropriate body to hold judges accountable?
- How should these bodies be composed in order to ensure judicial independence?
- What are the advantages of using truth commissions to hold judges accountable, compared with other disciplinary or criminal proceedings, in particular in developing countries?

8. International accountability mechanisms

Broadly two sets of questions can be addressed under this heading, the first relating to the use of international mechanisms in order to improve judicial accountability of (members of) the domestic judiciary in developing countries:

- Is it appropriate to engage international mechanisms to ensure accountability of domestic judges? What would trigger this engagement?
- Which mechanisms can be envisaged? What would their mandate need to include in order to ensure accountability, while respecting both judicial independence and sovereignty?
- What is the interaction between international and domestic accountability mechanisms?

The second set of questions relates to accountability for international judges considering cases in relation to developing countries:

- Through what mechanisms should international judges be accountable?

Powers, procedures, and limits of accountability mechanisms

1. Powers of accountability mechanisms

Based on your experience with developing countries, which powers are available, which are missing, and which may not be appropriate, at each stage of the proceedings, in order to both guarantee proper functioning as an accountability mechanism and respect for judicial independence:

- As regards receiving complaints: is the accountability mechanism be able to receive complaints from anyone, or only certain people or institutions? Is the mechanism able to start an investigation or disciplinary or criminal proceedings *proprio motu*?
- Which powers are necessary appropriate in the investigation phase? Which safeguards must be in place to ensure judicial independence?
- Who frames the charges?
- Which powers and safeguards apply during the proceedings themselves?
- Who takes the decision on establishing that there was misconduct, and on the sanction tied to it?
- To what extent are these powers and safeguards the same or different, with regard to the different types of accountability mechanisms discussed in Session 2?

As seen above, anti-corruption commissions usually have the power to investigate and ultimately refer the case for prosecution. The Anti-Corruption Commission of Bangladesh even has the power to arrest suspects.⁵¹ Judicial councils and ad hoc tribunals have the power to either decide on the removal of a judge or at least make recommendations as to his/her removal.

2. Judicial immunity and waiver of immunity

Many countries grant judicial immunity to protect judges from liability for acts exercised in the performance of their duties.

⁵¹ Art 21 Anti-Corruption Commission Act

- Which types of immunity are provided in developing countries with which you are familiar? At which level (constitution, law, regulation, ...) are these guaranteed?
- Do these immunities help to protect judicial independence and how can this be reconciled with judicial accountability?
- Under which circumstances can/must immunity be waived? Which safeguards apply?

Some of the countries that allow exceptions to judicial immunity in their Constitutions are Angola⁵², Gambia⁵³, Guinea-Bissau⁵⁴, Liberia⁵⁵, Mozambique⁵⁶, Sao Tome and Principe⁵⁷, and Timor-Leste⁵⁸. Other countries provide for exceptions to immunity from criminal prosecution in their penal codes. This is the case of Lesotho⁵⁹, Malawi⁶⁰ and Tanzania⁶¹.

3. Procedural rights of the judge

With regard to disciplinary proceedings, the developing countries with which you are familiar:

- Which fair trial rights apply, as a minimum?
- Which safeguards must be in place in order to guarantee them?
- How do these procedural rights contribute to judicial independence?

With regard to criminal proceedings:

- Do these follow the normal rules of procedure, or do special procedures apply? What are the advantages and disadvantages of either, in particular in the context of developing countries?
- How are judicial independence and the need for judicial accountability best reconciled?
- If judges enjoy special procedures: which safeguards must be in place? How can in particular the public perception of accountability be ensured, when judges enjoy special legal regimes?

In addition to granting immunity from prosecution, the Constitutions of Benin⁶² and Togo⁶³ say that members of the Constitutional Court cannot be arrested except in cases of flagrante delicto. In such cases, the matter must be referred to the President of the Constitutional Court. The Constitution of the Central African Republic contains a similar provision saying that members of the Constitutional Court can only be arrested with the authorization of the Constitutional Court.⁶⁴

In other countries, there are provisions that apply to all judges (as opposed to only Constitutional Court judges). In Afghanistan, judges cannot be arrested without the approval of the President except when the evidence against him/her is compelling.⁶⁵ In Angola, judges may only be imprisoned after being charged when the infraction is punishable with a prison sentence of more than two years, except in the case of flagrante delicto involving a felony punishable with the same sentence.⁶⁶

4. Safeguards against abuse of accountability mechanisms for other purposes (political interference with judicial function in deciding cases or questions of law, etc)

- What safeguards exist in the developing countries with which you are familiar, to prevent accountability mechanisms being abused for improper purposes?

⁵² Art 179(3) Angola Constitution

⁵³ Art 123 Gambia Constitution

⁵⁴ Art 123 (3) Guinea-Bissau Constitution

⁵⁵ Art 73 Liberia Constitution

⁵⁶ Art 218 Mozambique Constitution

⁵⁷ Art 108 (2) Sao Tome and Principe Constitution

⁵⁸ Art 121 (4) Timor-Leste Constitution

⁵⁹ Art 21 Lesotho Penal Code

⁶⁰ Art 15 Malawi Penal Code

⁶¹ Art 16 Tanzania Penal Code

⁶² Art 115 Benin Constitution

⁶³ Art 102 Togo Constitution

⁶⁴ Art 74 CAR Constitution

⁶⁵ Art 67 Afghanistan Law on organisation and jurisdiction of courts

⁶⁶ Art 179 (4) Angola Constitution

- From your experience, are there any other safeguards necessary, in addition to those already discussed under the previous topics?
- Do different or particular considerations apply with regard to developing countries?

As seen above, judicial councils are often controlled by the executive, be it a Minister or the President. Likewise, anti-corruption agencies can sometimes be influenced by external parties. For example, Nepal's Commission for the Investigation of Abuse of Authority (CIAA) is the top constitutional body that investigates corruption involving public officials. CIAA has the right to access bank, financial and commercial records when investigating public sector corruption and it has used this right in some cases. The CIAA can also file cases in court against persons accused of corruption. However, it has been criticized for not prosecuting top officials, and allegations have been made that some of its cases have been politically motivated.⁶⁷

General principles and guidelines for effective accountability mechanisms and procedures

1. Process for adoption of mechanisms and procedures

- In the developing countries with which you are familiar, by what process were accountability mechanisms developed and adopted?
- What recommendations do you have for particular considerations on process of development and adoption of judicial accountability recommendations in developing countries?

2. Effective and fair mechanisms

- In your opinion, are the judicial accountability mechanisms in the developing countries with which you are familiar fair and, in terms of their results, effective? Why or why not?
- What recommendations do you have for particular considerations on composition, procedures, and practices of judicial accountability recommendations in developing countries, to ensure they are effective and fair?

⁶⁷ See "Anti-Corruption Authorities-Agencies" at <https://track.unodc.org/LegalLibrary/pages/LegalResources.aspx?country=Nepal>

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**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org