

## **Judicial independence in Central America: problems and proposals**

Even after several decades of judicial reforms and international assistance for judiciaries, judicial independence, transparency, and more in general, the quality of the administration of justice in Central America still leave much to be desired. A variety of initiatives have been undertaken, and a lot of money has been invested—without tangible results. This indicates that it is necessary to think out of the box as regards approaches to improve judicial independence in Central America. This document contains DPLF's reflections on problems regarding judicial independence in Central America, and proposals on how to improve this situation.

On the basis of DPLF's research, experience and contacts with judges, civil society organizations and other experts in this field, the **main problems** can be summarized as follows:

- ❖ Central American judiciaries are poorly evaluated by the general public, as well as by subject matter experts (as a forthcoming DPLF publication on judicial independence and transparency in Central America can attest to). The **bad reputation of the judiciary** is rooted in recent history: corruption scandals, the meddling of political and economic actors with judges and the overtly political appointments of judges—who moreover often lack the necessary expertise—have led to a serious decline of respect for the judiciary.
- ❖ A worrying side-effect of this phenomenon is that there is a **lack of capacity among Central American judges**. Because the institution is not held in high regard, typically only those not hired by law firms or enterprises, apply to the judiciary. This is even the case for Supreme Court judges. Since the quality of a judicial system depends greatly on its human resources (i.e. its judges), this is a significant problem.
- ❖ **Interference by external actors** remains a problem, but this is done in a more subtle or sophisticated way than in decades past. One way in which political actors continue to control the judiciary is by means of the **appointment of high-level justices**. The procedures allow for appointments based on political considerations rather than on the merits of the candidates. This has far-reaching consequences in the case of appointments to the Supreme Court; in many cases, the best jurists of a country decline to submit themselves to farcical processes that can damage a successful career. Since the SCJ tends to have important administrative powers (touched upon below), the lack of quality and independence in the Supreme Court has considerable impact on the entire judiciary. A similar situation applies to the **appointments of lower judges** (by the Supreme Court or the Judicial Council): a **lack of procedures and norms** allow for arbitrary appointment decisions, which results in that the better candidates decline to submit themselves to these types of processes.

- ❖ There are also fundamental flaws in the institutional design of Central American judiciaries. One of these is the **concentration of (administrative) powers** (such as promotions, salaries, and the disciplinary system) in the Supreme Court. Such far-reaching powers, combined with a lack of transparency and clear criteria in these processes (mentioned below), lend themselves to undue interferences with the autonomy of lower judges. If to this, the politically motivated appointment of Supreme Court justices, addressed above, is added, we can conclude that there is an undesirable political influence in the judiciary. As a result, these ‘political justices’ can effectively control the judiciary top-down and can thus vie for the protection of economic or political interests of their patrons.
- ❖ Another fundamental flaw is the **lack of transparency** and **the lack of an effective access to information** about the judiciary’s functioning and its output. As a result, accountability and public scrutiny are difficult. This allows for the continuation of mismanagement and subpar performance without any consequences – something that further reinforces the negative perception the citizenry has of the judiciary.
- ❖ This situation is exacerbated by the **absence of effective communication policies** in the judiciary: the institution does not provide reliable information about its functioning or about relevant decisions. The lack of a media office or spokespeople make that media outlets tend to aggressively pursue judges to ‘get a quote’ about a case, might spread (sensationalist) misinformation about these cases (and allow for ‘parallel judgments’ in the media), and thus increase (undue) pressure on the judges, which compromises judicial independence and feeds the distrust of the judiciary.
- ❖ Another overarching problem is the **large gap between norms and practice** in the region. This is due, in part, to ‘legislative negligence’ that leads to important **lacunas and ambiguous criteria in the laws**, which allow for arbitrary decisions. Concepts like ‘being of recognized standing’ to be selected for a judicial post, applying a criterion like ‘as required by judicial service’ for the transfer of judges and ‘inexcusable fault’ for the application of sanctions almost seem made to be abused. Their contents should be clearly clarified and specified.
- ❖ At the same time, many laws do **not establish mechanisms that allow for an effective enforcement** of the norms contained in them. Examples that impact on judicial independence are the lack of independent organs that receive (and investigate) judges’ allegations of undue interference with their work, a lack of entities that implement effective evaluations of judges and judicial personnel, the absence of bodies that receive and investigate periodic asset declarations of judicial personnel, and the lack of mechanisms for the impartial assignment of cases to judges.
- ❖ In a number of countries, another reason for the gap between norms and practice resides in the **political system** and the **absence of a culture of legality**. In some countries, there is a blatant

disregard for existing norms that limit those in power. These norms tend to be ignored (Panama, El Salvador, Guatemala), or are changed on a case by case basis (Honduras, Nicaragua) to accommodate the interests of political powers. If this issue is not addressed, it is doubtful whether normative reforms will have any practical impact.

## Recommendations

In order to change this situation and strengthen the Central American judiciaries, action is required on several fronts:

- **Selection and appointment processes for high-level judges.** These processes need to be **transparent** and based on a **fact-based evaluation of the merits** of the candidates. Given the nature of the main problems—the prevalence of political control—it seems advisable that these selections be conducted by autonomous organs. Furthermore, it is essential that prior to the selection process, a candidates' profile is drafted and that the entity in charge of the selection process publicizes how candidates will be evaluated. Transparency throughout this process is essential. Lifetime appointments of judges (or automatic renewal of their mandates, unless a qualified majority of Congress votes against it) should be considered.
- The **professionalization** of the judiciary by means of the existence of an effective judicial career is essential. Solid selection and evaluation processes are essential for the success of this system:
  - **Selection processes** of lower judges need to be merit-based. The profile needs to be made clear, as well as how these qualities need to be evaluated. The Dominican Republic has an interesting practice of such 'entry exams'.
  - It is essential that a good **evaluation process** of judges be designed so as to control the quality and efficiency of the judiciary. Currently, no such processes exist in Central America. These evaluations need to be administered by an autonomous body (instead of the judges' superior) and there need to be an instance of revision and appeal.
  - **Lifetime appointments** of judges should be considered.
  - **Disciplinary proceedings** need to be improved. Clearer norms (about punishable behavior) need to be drafted, and due process needs to be respected in these proceedings (for instance, the right to a defense, transparency and the right to appeal at a different, independent body).
- In order to combat internal interference in the judiciary, mechanisms need to be established that allow for judges to **denounce undue interferences** with their work.
- No country in Central America has a system that allows for the **random distribution of cases**. This means that cases can be 'assigned' to certain judges, which opens the doors to undue interferences. Such a distribution system needs to be installed in the entire judicial system of each country.

- There need to be clearer **norms regarding conflicts of interests** and what to do when such cases arise. Effective mechanisms to recuse judges need to be installed, as well as the possibility to appeal these decisions.
- An effective policy of periodically rendering information about the **assets of judicial officials** needs to be adopted. An autonomous office with the power (and budget) to investigate these declarations should be set up.
- **Communication policies** need to be designed. A press office needs to be established and made responsible for the administration of information about the judiciary. The existence of ‘press judges’ (who can respond to media inquiries, rather than the judge who is handling the case) is a practice whose adoption should be evaluated.
- Judges who are making an effort to improve judicial independence, transparency and accountability should be supported. The role of **associations of judges** in bringing about fundamental changes in the judiciary should be recognized and encouraged.
- **Knowledge-sharing** between judges (associations) is essential, and can provide important encouragement to those struggling to be heard in their country.
- A sustained, large-scale effort should be made in the **media** and by means of the **education system** to appropriately inform citizens about how the justice system works and what their rights are.

### ***Short-term recommendations***

#### **In all of Central America**

- ❖ Increase the role that the UN and the IACHR play in addressing these issues with member states, for example by means of the regional OHCHR office, or the Special Procedures of the Human Rights Council (such as the UN Rapporteur for the Independence of Judges and Lawyers). As regards the IACHR, the Commission itself and the Rapporteurship on human rights defenders and judicial operators.
- ❖ Support organizations, both those working locally and internationally, who are addressing judicial independence issues in the region.
- ❖ Promote the involvement of actors like universities in this debate, and improve the curriculum of law students to include courses on human rights, constitutional law, and access to justice.

- ❖ Support a training program for journalists on judicial independence issues, to stimulate better quality reporting on issues related to the justice system.

### ***Short-term country-specific recommendations***

#### **Guatemala**

- In the first months of 2014, a selection process for the Guatemalan Supreme Court will be held. The entire court will be renewed, so this process will have an important impact on the administration of justice in the country in the coming years. Although the mechanism of the Comisión de Postulación has led to somewhat better results than in other countries in the region, the politicization of these processes is a considerable problem. It is essential that this process be transparent, which will allow for candidates to be scrutinized. International monitoring and pressure is essential to achieve this.
- Support lifetime appointments of judges (by means of a legal reform).

#### **El Salvador**

- The past few years have seen a number of confrontations between the Supreme Court and the political establishment, most notably regarding the appointment of high-level officials (SCJ justices, magistrates of the *Corte de Cuentas* (Comptroller) and the Electoral Tribunal, as well as the Minister of Defense and the Director of the National Police). It is essential for the stability of the country that a better, more transparent and merit-based procedure for these appointment processes be adopted. Support for such normative changes is key.

#### **Costa Rica**

- Support the adoption of clearer criteria for the evaluation of judges.
- Establish a mechanism to denounce undue interferences with the independence of judges.

#### **Nicaragua**

- Support the appointment of new Supreme Court justices for those whose mandate has expired (currently the vast majority) by means of transparent, merit-based, participatory processes.
- Establish a mechanism to denounce undue interferences with the independence of judges.

#### **Honduras**

- Support the establishment a solid, transparent and merit-based mechanism for the selection of Supreme Court judges. The next selection will take place in 2015, but because of the highly alarming state of the Honduran judiciary and the discouraging precedent of the selection process for the attorney general in 2013, this issue should be addressed with sufficient anticipation to the selection process.
- Support the revision of the Law on the Judicial Council and the Judicial Career, so as to include clearer rules regarding disciplinary processes, transfers of judges and the appointment processes of lower judges, amongst other issues. Consider providing technical support for this.

## **Panama**

- Call for the implementation of the *Pacto de Estado por la Justicia*, an agreement between the branches of government and civil society to improve the administration of justice in the country.
- Support the creation of transparent, merit-based mechanisms for the selection of judges (such as established in the *Pacto de Estado por la Justicia*).
- Call for the discussion of the Law on the Judicial Career in Congress—approved in first debate but dormant for the 5+ years since. This law would provide important stability in tenure for judges and improve their autonomy from their superiors.