

After Poland's Attempted Purge of 'Communist-era' Judges, Do We Need New International Standards?

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For most of last year, the government of Poland maintained that legislation which effectively dismissed 27 Supreme Court judges (a third of the Court) by lowering the age of retirement was necessary to deal with the continued influence of the '[Communist-era](#)' judiciary. A few judges who remained in office from before the 1989 transition were said to be responsible for allegedly widespread judicial corruption, nepotism and inefficiency. The government faced months of international criticism for its actions, and large-scale domestic protests, before it suddenly relented on 21 November 2018 and rushed through amendments to reinstate the ousted judges.

The reversal followed an interim order of the [EU Court of Justice](#), which required Poland to allow the judges to resume their duties temporarily while the Court determined a challenge brought by the European Commission. In fact the amendments went further by enabling the 27 judges, one of whom was the President of the Supreme Court, to serve out their original appointments in full.

Two perspectives on the purge and its reversal

What should one make of the Polish government seemingly giving up its effort to 'de-Communiste' the judiciary, after defending it so strenuously on the international stage? Two very different readings are possible.

A sympathetic explanation of the reversal would be that the government was determined to remove the oldest cohort of Supreme Court judges to improve the integrity and performance of the apex court, but then realised that it was about to hit a brick wall in the EU Court of Justice. The Court differs from other EU fora in which Poland has been able to shrug off proposals for Rule of Law sanctions by relying on its ally Hungary to veto them.

'Judges will protect judges,' would be the cynical version of this view. In truth, legal reasons made it very likely that the Court of Justice would find against Poland. Having recently decided that the independence of judges in national courts is an issue falling within the scope of EU law, the Court was [expected](#) to invoke international standards of judicial independence to assess the Polish situation. The principle of security of tenure was obviously implicated. Some international instruments refer to the '[irremovability](#)' of judges, though removal is permitted in exceptional cases either for reasons of incapacity or when a judge is found to have committed serious misconduct. Whatever the formulation, dismissing judges en masse by lowering the retirement age clashes with this principle. The Polish government may not have accepted the applicability of the principle in the context of 'de-Communistation', but it felt forced to concede when it saw that the EU court was likely to enforce it.

The other, more critical view of recent events is that the 'de-Communistation' claim was merely a pretext for interference in the courts or, if genuine, that it formed only a small part of the government's wider quarrels with the judiciary.

Plenty of evidence supports the second view. Compared with its statements aimed at foreign audiences, the government's [domestic arguments](#) for judicial reform have reportedly focused less on the Communist past. Rather, they have been characterised by a general hostility to the separation of powers underlying Poland's broadly liberal 1997 constitution, as well as more specific accusations that the current judiciary are in cahoots with a social and economic elite which the governing Law and Justice party (Prawo i Sprawiedliwość, PiS) has often railed against. The [reforms](#) themselves are notorious, involving extensive transfers of power to the legislature and the Executive with regard to the composition of the National Judicial Council and the selection and disciplining of judges. At the same time, changes to the membership and functioning of the Constitutional Tribunal have made it more difficult to bring constitutional challenges against legislation or government action.

A fundamental issue in post-authoritarian transitions

I agree with commentators who warn that, even after the restoration of the Supreme Court judges, judicial independence in Poland is [still gravely threatened](#) by the many other institutional and administrative changes that have been made to the court system. However, this blog will not discuss the complex impact of those changes, some of which are still being implemented.

Instead, I want to reflect on the attempted purge of 'Communist-era' judges in the Supreme Court because the episode raises a more general issue about authoritarian-era judges in transitions to constitutional democracy.

In some ways, it is puzzling just how deeply the PiS government and its critics disagreed about the mass retirement or removal of Supreme Court judges. After all, both sides presumably agree that the Rule of Law requires trustworthy judges who are not compromised by their involvement in abuses by the previous regime, or enmeshed in networks of political patronage or corruption. However, there is substantial disagreement about what methods may be used to pursue this goal.

In legal terms, the government and its critics take different views of the principle of judicial security of tenure. Should this principle be applied to authoritarian-era judges, either strictly or at all? In Poland, the time that has passed since 1989 and the government's evident hostility to an independent judiciary are complicating factors. But what about countries just emerging from authoritarian rule and struggling to build a constitutional democracy with judges inherited from the previous regime?

De-Nazification, lustration and vetting of judges

Many countries have had to grapple with this problem. In post-war (West) Germany, judges were screened and became subject to dismissal for active involvement in the Nazi party and the perpetration of its crimes, even if their conduct would have been lawful at the time. After 1989, post-Communist countries in Central and Eastern Europe debated the 'lustration' of public officials who had connections with the regime or the secret police. Different lustration policies were adopted in different countries. As far as the judiciary was concerned, these ranged from extensive dismissals in the Czech Republic to the automatic retention of judges in Romania and Bulgaria. It was not always a binary choice between dismissal and retention. In some countries, lustration involved the exposure of the past political activities of judges without necessarily leading to official sanctions. Other countries took the radical step of declaring all judicial posts vacant, and leaving former judges to compete for reappointment against newcomers (more on this below).

'Vetting' is increasingly used as an umbrella term for personnel reforms that aim to address the integrity, and sometimes also the competence, of public officials in the context of a post-conflict or post-authoritarian transition. It is recognized as a form of transitional justice that may be critical to preventing the recurrence of human rights abuses, particularly in the justice and security sectors.

Countries where judges have been vetted since 2010 include Kenya, Ukraine and Albania (where the process is still under way). In Kenya, the post-conflict constitution of 2010 became the vehicle for a vetting process that the legal profession and civil society had long demanded in order to address political patronage and systemic corruption in the courts. Kenya also demonstrates that judicial vetting is not an exclusively European phenomenon. Other examples exist, such as the screening of Argentinian judges in the 1980s after the end of the military dictatorship, or the 'de-Ba'athification' of the Iraqi judiciary from 2003 onwards as part of wider reforms of state personnel under the US-led occupation.

Iraq's experience of vetting, particularly in the security sector, became a byword for the destabilizing consequences of losing skilled personnel and antagonizing some to the point of joining the armed resistance. Yet even while the Iraqi processes were attracting criticism, both the [UNDP](#) and the [UNOHCHR](#) issued operational guidance on vetting in 2006 which endorsed its use in a range of state institutions, including the judiciary. And vetting continues to be popular in countries debating how to strengthen or rebuild their systems of government. For example, the vetting of judges was recently [mooted](#) in the context of the democratic spring in Ethiopia, with the experience of neighbouring Kenya cited as a model.

Do international standards offer helpful guidance?

Countries that have embarked on a transition to constitutional democracy do not have the benefit of any exception in the [UN Basic Principles on the Independence of the Judiciary](#) (1985), which declare that judges should have 'guaranteed tenure until a mandatory retirement age or the expiry of their term of office'.

As I have mentioned in Part I of this blog post, norms such as the Basic Principles do allow for the removal of judges. A relatively broad statement of the grounds of removal is found in the [Bangalore Principles of Judicial Conduct](#), which refer to 'proved incapacity, conviction of a serious crime, gross incompetence, or conduct that is manifestly contrary to the independence, impartiality and integrity of the judiciary'.

However, the UN Basic Principles and the [Bangalore Implementation Measures](#) seem to presuppose an essentially trustworthy judiciary in which there only are a few bad apples. This is evident in the type of removal process that is envisaged. Allegations of misconduct are filtered through an initial process of investigation in which the judge must be given an opportunity to respond. The next stage of the process is a disciplinary inquiry that should normally be carried out by an independent authority composed of serving or retired judges. The disciplinary body determines the specific allegations referred to it, and decides whether the judge should be removed (subject to appeal or review by a court).

The disciplinary inquiry model is not well suited to assessing a judge's overall integrity or competence, due to the narrow focus on specific allegations. Moreover, it may be inappropriate for a body made up of (usually senior) judges to be in charge of judicial discipline in a post-authoritarian situation. Senior judges may be part of networks of corruption and political influence and could easily manipulate the disciplinary process to protect their accomplices while targeting more independent-minded judges for removal. For example, Kenya's judicial vetting process was in part a response to the perceived failure of an earlier attempt in 2003 to tackle systemic corruption through mass disciplinary action. The disciplinary investigations were overseen by a Chief Justice handpicked by the President to carry out '[radical surgery](#)' on judicial corruption, and despite the departure of scores of judges the process did not restore public confidence in the judiciary.

One might imagine that international standards on transitional justice would be more sensitive to the problem of a compromised judiciary than general standards on judicial independence. The leading UN instrument in this area is the [Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity](#) (Orentlicher Principles, 2005). The

Principles call for the removal of judges who are 'personally responsible for gross violations of human rights'. At the same time, they stipulate that 'the irremovability of judges' (i.e. security of tenure) is to be respected as a guarantee of judicial independence. A limited exception is made for judges 'unlawfully appointed or who derive their judicial power from an act of allegiance'.

The exception seems most readily applicable in situations where an authoritarian regime ruled for a relatively brief period, perhaps by suspending the existing constitutional framework rather than reshaping the entire legal order around its ideology and right to govern. For example, it provides some support for the decision of the [Supreme Court of Pakistan](#) in 2009 to dismiss judges appointed by the military regime during the enforced absence of Chief Justice Chaudhry. The Supreme Court in that case also ordered disciplinary investigations into judges who had sworn an oath of allegiance to the military ruler. However, in countries where the authoritarian regime and its ideology were more deeply embedded in the legal system, and endured for longer, it may not be possible to distinguish between judges in these ways. The Orentlicher Principles are less helpful in these situations.

Are Council of Europe standards on lustration more helpful?

Many states that suffered long periods of authoritarian rule, most of them under Soviet rule or influence, went on to ratify the European Convention on Human Rights and become members of the Council of Europe. Since the 1990s, Council of Europe organs such as the Strasbourg Court and the Venice Commission have repeatedly grappled with the lustration policies of new member states. The Parliamentary Assembly of the Council of Europe (PACE) laid the groundwork for current approaches in its 1996 resolution on '[Measures to dismantle the heritage of former communist totalitarian systems](#)'. Lustration was specifically recognized as a measure that could be adopted in institutions such as the judiciary that are critical to the Rule of Law, and no mention was made of security of tenure, possibly because judges did not generally enjoy guaranteed tenure under Communist rule.

The PACE resolution set out broad guidelines to ensure that lustration measures would be consistent with the Rule of Law. Lustration should not be based on 'collective guilt', or motivated by revenge. To ensure an individual assessment of each judge's fitness for office, procedural safeguards would be required, including the presumption of innocence, the right to be heard and the right to challenge lustration decisions before a court.

These procedural guidelines were clearly violated in the attempted purge of the Polish Supreme Court that was described in Part I of this blog post. The legislation lowering the retirement age of current judges to 65 amounted to collective punishment insofar as the loss of a Supreme Court seat was not based on a judge's career history or even whether he or she was appointed before or after the end of Communist rule. (The legislation allowed these judges to apply to the President of Poland for a post-retirement extension of service, but for the Executive to exercise such a discretion contravenes the separation of powers in a manner that further [undermines](#) the Rule of Law.)

However, the PACE resolution on lustration is uncertain or even problematic in several respects. Let me highlight two areas of difficulty.

First, the resolution was intended to apply only in the extraordinary situation of societies just emerging from Soviet-era totalitarian rule. The resolution recommended that lustration programmes should cease by 1999. That deadline was perhaps unrealistic and the Venice Commission has been willing to consider initiatives in our current decade to vet all serving judges in [Ukraine](#) and [Albania](#) (both countries argued that they were addressing persistent problems of judicial corruption). By contrast, the [Consultative Council of European Judges](#), another Council of Europe body, has been broadly critical of contemporary attempts at judicial lustration in Ukraine and other countries including Serbia and Slovakia.

So the question remains: under what conditions may a post-authoritarian country adopt measures that impinge on judicial security of tenure? In the case of Poland, it is also relevant that during the 1990s [judicial councils](#) reviewed the track record of Communist-era judges, who were also subject to lustration if they provided an incomplete disclosure of their involvement with the regime. The recent attempt to purge the Supreme Court must be understood [against this background](#).

A second problem is that the more one examines the sheer diversity of attempts to reform post-authoritarian judiciaries, the more the procedural safeguards in the PACE resolution seem to suffer from a one-size-fits-all approach. The safeguards may be unduly restrictive insofar as they exclude mechanisms for reforming judicial personnel that may have been justified in their particular contexts.

Several examples could be given. Notably, competitive reappointment processes are a collective measure and former judges do not benefit from the presumption of innocence and related procedural safeguards if they can simply be out-competed by new applicants. Such processes have been used with some degree of success in the former East Germany, Bosnia and Herzegovina, and Estonia - where they contributed to building a legal system now ranked 12th in the World Justice Project Rule of Law Index.

Further examples can be found beyond Europe. Truth commissions, a feature of many transitions in Latin America and Africa, have sometimes been given a mandate to investigate the judiciary. Truth commission inquiries often seek to establish an overall account of past abuses and, when a truth commission investigates alleged judicial wrongdoing, it may not accord individual judges the procedural safeguards that the PACE approach would require. Yet the UN Special Rapporteur on transitional justice has [argued](#) that Latin American truth commissions, in particular, have played an important role in strengthening the Rule of Law by identifying patterns of judicial wrongdoing and recommending institutional reforms. In Tunisia, the Truth and Dignity Commission that sat between 2014-2018 was given a [mandate](#) not only to recommend institutional reforms but also to identify individual judges to be referred for judicial discipline proceedings. The Tunisian commission has yet to publish its final report.

Thus, the second area of uncertainty that arises under the PACE approach is whether it is too restrictive to capture the variety of judicial personnel reform processes that may be appropriate or even necessary to strengthen the Rule of Law in some post-authoritarian transitions.

A comparative research project

I have argued in this blog that the attempted purge of the Polish Supreme Court exposes a worrying lack of international standards concerning judicial personnel reforms in post-authoritarian countries. Can such processes be designed to function in a manner that strengthens the Rule of Law rather than undermining it? In Poland it is fairly clear that the forced retirement of Supreme Court judges would have been damaging to the Rule of Law as it formed part of a wider pattern of government hostility to judicial independence and the separation of powers.

Other situations are harder to assess. There is a real, practical need for guidance as post-authoritarian countries continue to confront the problem of how to deal with judges they have inherited. I have mentioned recent or on-going judicial vetting processes in Albania, Kenya and Ukraine as well as truth commission investigations in Tunisia. Demand for such processes may well arise in countries such as Myanmar, Venezuela or Zimbabwe in the future.

More research is urgently needed to improve our understanding of how transitional countries come to adopt personnel reforms that focus on judges from an authoritarian era, and to examine the implications for the Rule of Law. If international norms are to be reviewed and revised, a comparative research base that reflects the widespread nature of the problem and the diversity of

ways in which transitional countries have reacted to it is essential.

In the hope of contributing to this research effort, I am currently working with colleagues on the AHRC-funded research project Special Processes for the Reassessment and Removal of Judges in the Context of a Constitutional Transition: Strengthening the Rule of Law? Our group includes experts from Europe, Latin America and Africa and the work will include in-depth case studies of past transitions as well as an analysis of what may constitute good practice from a Rule of Law perspective. We plan to publish interim findings and working papers as the research progresses, which will be posted on the [project page](#) at the Bingham Centre for the Rule of Law.

URL: <https://binghamcentre.biicl.org/comments/16/after-polands-attempted-purge-of-communist-era-judges-do-we-need-new-international-standards>