



Judicial Vetting: The Forgotten Aspect of Argentina's Transition

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Argentina is a well-known case of transitional justice. From the pioneering [1984 truth commission](#) and [the prosecutions that had to be rolled back due to military backlash](#), to [the expansive trials of crimes against humanity since 2005](#), Argentina's responses to the human rights violations of the 1976-83 dictatorship have been widely reported. However, there is one facet of the human rights policy adopted immediately after the return of democracy that is little known and has implications for international law: the process by which hundreds of judges that had served during the dictatorship were vetted.

The judiciary is a critical actor in post-authoritarian and post-conflict states. Not only will judges be responsible for trying any crimes of the previous regime, but they will also be called upon to protect fundamental rights, review governmental policies and solve disputes. [However, a judicial system inherited from an authoritarian regime or from a period of armed conflict might not be up to these tasks.](#) Reforming the courts might be necessary but if the judges staffing them are unwilling or unable to do their job as required in the new dispensation or have been implicated in the human rights abuses it is unlikely that the courts will function properly or that the people will trust them.

[Different processes have been adopted around the world for dealing with the issue of inherited judges.](#) These range from the retention of all existing judges to the dissolution of the entire court system. In between these extremes, there are three types of processes that look into the conduct of judges to determine whether they are fit to serve in the new regime. First, selective investigations and removals target certain judges, for instance those in positions of constitutional significance, requiring them to undergo a screening process. Second, vetting processes screen the entire judiciary, deciding whether to retain or dismiss each individual judge. Third, reappointment processes remove the tenure of all judges requiring them to reapply to their roles in competition with other candidates.

Argentina's vetting of judges

Upon coming into office in 1983, the new Argentine democratic government faced the issue of what to do with the judges it inherited from the dictatorship. Between 1976 and 1983, the military juntas ruling the country carried out a brutal crackdown against perceived left-wing opponents involving illegal abductions, torture, enforced disappearance and extrajudicial killings that resulted in thousands of deaths. The judiciary was regarded as complicit for recognising the military government, affirming the validity of its legislation and failing to investigate its crimes.

The new government adopted the position that, despite the constitutional guarantee to the contrary, judges who had served under the dictatorship had no security of tenure. Its rationale was that since the appointment of judges during the dictatorship had not followed the constitutional process requiring Senate confirmation these judges did not enjoy security of tenure. Even those judges who were appointed before the coup, in accordance with the constitution, were regarded as having lost their security of

tenure when they swore allegiance to the dictatorship.

Based on this position, the incoming government planned to remove the judges of the Supreme Court. However, they resigned just before the new constitutional authorities took office. The government then appointed new Supreme Court judges representing a range of political persuasions.

As for those judges in other courts, the government required them all to be reconfirmed by the Senate. This was a laborious vetting process undertaken behind closed doors in 1984. Those judges who were confirmed received security of tenure and those who were not were immediately replaced. From the available evidence, it would appear that there were no general criteria for confirming or removing judges and the process resulted in hard political bargaining between the government and the opposition controlling the Senate. More than 500 judges went through this process; 70 percent were confirmed.

The criminal jurisdiction of Buenos Aires was regarded as particularly sensitive because it would be responsible for trying the junta leaders. Therefore, most judges of this jurisdiction were removed and an entirely new court of appeals was appointed. It was this court that on 9 December 1985 convicted five members of the military juntas of crimes under the Argentine Penal Code, including murder, torture and illegal detention.

Some removed judges sought judicial review of their dismissal. But the new Supreme Court upheld the view of the government that judges who had served during the dictatorship, even if originally appointed in accordance with the constitution, did not have security of tenure and the government had discretion to replace them. The Supreme Court also rejected claims of judges removed by the dictatorship that wanted to be reinstated using the argument that by appointing new judges the constitutional government had ratified the removals carried out by the military authorities.

The reconfirmation of judges was therefore a political process that did not follow clear criteria and did not allow those dismissed to challenge the grounds for dismissal. It was based on the doctrine that the constitutional government was not bound by the acts of the dictatorship and could choose to affirm or disregard any of them. This pick and choose approach allowed the government and the Senate to ignore the tenure of judges appointed by the dictatorship while in the same breath ratifying the dictatorship's prior dismissals of constitutionally appointed judges. Thus they were able to vet the judiciary unfettered by security of tenure guarantees.

Despite the free rein, the vetting process did not weed out all judges implicated in the crimes of the dictatorship. Pressure to keep the courts functioning, competing priorities and political bargaining constrained the process. Many among the 70 percent of judges who were confirmed did not have unblemished human rights credentials. In fact, in July 2017, four former federal judges were convicted of crimes against humanity and sentenced to life imprisonment for their conduct during the dictatorship. They were convicted for failing to investigate complaints of abductions, torture and disappearances. Not only had the convicted judges been confirmed in 1984, but were later promoted and were only removed in 2011 after being charged.

Implications for transitional justice and international law

What implications does this aspect of Argentina's transition have for current transitional justice processes? First, it underscores the importance of ensuring that the judiciary has the capacity and inclination to carry out human rights trials. While the brand-new Buenos Aires court was up to the task of trying the military juntas, courts in other parts of the country whose judges were not replaced were not as keen to bring to justice those responsible for the crimes of the dictatorship. Second, it shows the need for vetting processes that have sufficient safeguards not to undermine judicial independence. The Argentine government certainly faced an extraordinary situation in 1983 but publicising the grounds for dismissal and allowing judges to challenge them would have been more conducive for the rule of law.

Two international law implications can be drawn from this 1984 experience, at the risk of courting anachronism, in relation to the 1998 Rome Statute and the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Impunity Principles). [According to the Rome Statute](#), a case is inadmissible before the International Criminal Court (ICC) if the case is being investigated or prosecuted by a state with jurisdiction over it, "unless that state is unwilling or unable genuinely to carry out the investigation or prosecution". Having an inherited judiciary which is reluctant to move forward with cases related to the previous regime could end up rendering them admissible before the ICC. This possibility should provide an incentive to states to ensure their judges have the required integrity to genuinely adjudicate cases within the jurisdiction of the ICC, through a vetting process if necessary.

The [Updated Impunity Principles](#) urge states to prevent abuse of judicial irremovability guarantees that fosters impunity. They distinguish between judges appointed in conformity with the rule of law - whose tenure must be respected - and those unlawfully appointed or deriving their power from an act of allegiance - who can be removed by law. The Principles seem to mirror the view of the Argentine government that judges appointed outside the constitutional procedures and those who swore allegiance to the dictatorship could be removed. However, the Principles require that removed judges be provided an opportunity to challenge their dismissal in independent and impartial proceedings. In the case of Argentina, no law was enacted to remove the judges and while some were able to judicially challenge their dismissal the merits of each dismissal were not necessarily examined. Therefore, this process would probably not have complied with the Principles. In any case, the Principles do not provide much guidance to a state with a pressing need to screen hundreds of judges. Clarification of the grounds on which it would be permissible to remove a judge in a transitional situation and what the due process requirements are for screening judges would be helpful.

When viewed in its full context, this obscure aspect of the Argentine transition in which over 150 judges were replaced turns out to have been instrumental to the prosecutorial strategy of the government. It also highlights the importance and challenges of dealing with judges appointed by a previous regime.

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