ACTION PLAN FOR THE RE-ESTABLISHMENT OF THE RULE OF LAW IN VENEZUELA

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Introduction

This report is written as the final deliverable of a project, run by the European Lawyers Foundation and funded by the National Endowment for Democracy, to contribute to the re-establishment of the rule of law in Venezuela.

Much substantive work has been undertaken by a number of organisations on this subject. Of particular use in providing background for the present report have been:

- the fourth periodic report on Venezuela of the UN Human Rights Committee (2015);
- the Inter-American Commission on Human Rights chapter on Venezuela in its latest Annual Report (2015);
- the International Commission of Jurists Mission Report 'Sunset of the Rule of Law in Venezuela' (2015); and
- the World Justice Project Rule of Law Index (2015).

The aim of this report is not to duplicate the work of the four bodies mentioned above, and of others undertaking similar work (the list of all reports and standards used in this report is given in Annex 1).

Instead, the aim is to complement what is already known, and build an action plan which will assist Venezuela in the future. After a preliminary discussion with the Venezuelan experts appointed by our counterpart in Venezuela, the *Foro Penal Venezolano*, it was decided to focus on two aspects of the rule of law:

- on judicial reform and independence, as the key also to two other parts on which the project had originally intended to focus with equal effort (criminal law and human rights – see below); and
- on producing a plan which the government, or a future government, can use to implement a step-by-step process for a return to the rule of law.

The foresight of this approach has been confirmed since it was adopted, as a result of the leading role taken throughout this project by the Venezuelan Supreme Court in thwarting the outcome of the election of December 2015.

As a result, this report produces a practical and usable plan, based on the previous reports and principles cited in Annex 1. It does not deal with all aspects of the rule of law – for instance, the force used by the police and the army, the way that politicians intervene in matters before the courts, or the impunity for murder and other serious crimes – since it was felt that a report produced by lawyers should concentrate on the areas where they could bring most expertise.

The plan outlines a series of eight steps to be taken by any government which wants to return to the rule of law:

1) the constitutional framework (changes to the constitution)
2) judicial principles (the establishment of a series of principles to which judges should adhere)
3) judicial career (the establishment of a system for appointing, disciplining and appointing judges)
4) judicial training (the establishment of a system for training judges)
5) judicial oath (consideration of whether a judicial oath should be introduced)
6) judicial associations (the establishment of an association for judges in accordance with international norms)
7) transitional measures (to consider how to move most efficiently from the current state to the new state of the rule of law, for instance in relation to the many provisional judges)
8) rebuilding trust in the judicial system

After a preliminary introduction, describing the current state of the rule of law in Venezuela, the eight steps are laid out. Each is preceded by the international and regional principles governing standards related to that step, followed by concrete measures which can be taken.

The background

It is a commonplace, shared by many commentators, that the lack of independence of the judiciary from political power constitutes one of the weakest points in Venezuelan democracy. This has permitted the Venezuelan government to criminalise human rights defenders, penalise peaceful protest, prosecute political dissidents and block political opponents from public office. There is a number of leading causes of this breakdown:

- the appointment of a large number of provisional judges and prosecutors
- the appointment of government supporters to majority membership of the Supreme Court
- the denunciation by the Venezuelan government of the InterAmerican Convention of Human Rights

This background will look at all these factors in turn, followed by an overview of the use by the judiciary, on instructions from the government, of the criminal law as a force for persecution and oppression. The eight steps needed for a return to the rule of law will follow.

Provisional judges

The exact number of provisional judges is not known, and estimates vary, although it is clear that they constitute the great majority. The UN noted in July 2015 that only 34% of judges are titular and the remainder have temporary tenure, subject to discretionary removal.

According to the IACHR, civil society organizations estimate that almost 80% of judges in Venezuela are provisional. They fall into different categories: temporary, occasional, or incidental, and no-one in these categories is subject either to ethical control or to the disciplinary provisions of the Code of Ethics. They also do not enjoy job security, in accordance with a decision from the Constitutional Chamber of the Supreme Court. That means that every year such judges continue to be appointed and removed without due process proceedings and without open public examination. IACHR also states that these judges are removed by the Judicial Commission with a single, non-explanatory sentence: "Their appointment has been annulled".

The figures offered by the President of the Supreme Court at the beginning of the 2015 judicial year show that, since 2007, not a single qualification examination for judges has been held.

In a reply received by the IACHR in December 2015 from the Venezuelan government, the government stated:

'*At present, the roster of trial court judges (Jueces de Instancia) for all jurisdictions, including the new ones such as violence against women and the Municipal Courts for Criminal Control consists of 2,231 judges, of whom 34% are titular, as the result of public competitions held in 2002, 2005, and 2006.*'

It also indicated that:

'*the highest Court is waiting, to hold new public competitive processes, for the National Assembly to approve the draft Law on the Statute of the Judicial Function, which regulates entry by public competitive process and judicial promotion. It is part of the process of Judicial Restructuring that began with the Constituent Assembly in 1999 and that has continued to date with advances such as the creation of the Judicial Disciplinary Jurisdiction (Jurisdicción Disciplinaria Judicial) (2009) with appeal provided for two instances, which is a novelty on an international level, and which guarantees stability for judges.*'

It finally noted that:

'*The State also argued that "this is perhaps one of our greatest challenges: applying processes for selecting judicial officers through the respective competitive processes and enforcing a disciplinary regime that guarantees due process of law and the right to defense as provided for in Article 267 of the Constitution."*'

The lack of tenure has an obvious and direct link to the behaviour of judges. That is because the legal decisions of judges are reviewed by their superiors on a strictly political basis. It is common for judges to wait for instructions from their superiors before acting or ruling in situations where there could be political consequences or their decision could in some way affect government interests. Otherwise they will be subject to reprisals.

Politicisation of the judiciary

This takes place within a framework where the judiciary in any case shows signs of clear political bias. For example, between 2005 and 2013, 99% of the requests for precautionary measures made by public entities were accepted. In contrast, in the same time period, 98% of requests for precautionary measures made by individuals against the decisions of the authorities were denied.

The actions of the judiciary and, in particular, the Supreme Court are dictated by the government. The former President of the National Assembly, Representative Diosdado Cabello, uses his television programme "*Con el mazo dando*", to give instructions to members of the judiciary, including instructions to initiate judicial procedures, especially against political opposition or human rights defenders. He often uses the mechanism called "patriotic partners" (*patriotas cooperantes*) to access information about people's conduct, often by intruding on their privacy, on the basis that it allegedly affects the government. This conduct is then denounced on the television programme, which notifies the judicial authorities about how they should respond.

Since the elections of December 2015, the Supreme Court has acted on the instructions of the government to thwart as much as possible the outcome of that election, and to oppose decisions taken by the new majority in the National Assembly.

Obviously, the leading case over the last few years involving a member of the judiciary is that of Judge Afiuni. Judge María Lourdes Afiuni was arrested on December 10, 2009, after handing down a decision to replace the measure depriving citizen Eligio Cedeño of liberty, replacing it by a less onerous precautionary measure. The decision was based on the provisions of the Organic Code of Criminal Procedure, which establishes a maximum period of two years for pre-trial detention; and Opinion No. 10/2009 (Venezuela)

handed down by the Working Group on Arbitrary Detention of the Human Rights Council on September 1, 2009, which found that Cedeño's detention was arbitrary, based on its prolonged duration. The next day, on a national radio and television broadcast, then-President of the Republic Hugo Chávez called Judge Afiuni a "bandit" ("bandida"), demanded "harsh measures" ("dureza") against her, and asked that she be given the maximum prison sentence of 30 years. Afuini was arrested, and later reported that she had suffered torture, abuse and rape during her detention at the National Institute of Feminine Orientation (Instituto Nacional de Orientación Femenina NIFO), causing her serious injuries. Judge Afiuni was a tenured judge, and the example of what happened to her as a result of her taking a decision which displeased the government has had a noticeably chilling effect on the independence of the judiciary ever since.

A different aspect of politicisation comes about through legal education. In 2005, the government opened the Bolivarian University of Venezuela (BUV), authorized to teach a programme of Legal Studies. This programme is different from that taught in other national and international law schools, as it excludes certain essential topics for lawyers (i.e. civil law, civil and criminal procedural law). The graduates receive the title of "Bachelor of Laws" instead of "Lawyer". However, the BUV in practice bestows the title of Lawyer upon its graduate students. In 2010, President Chávez announced the creation of the "Mission of Socialist Justice", offering secure postgraduate studies for all BUV graduates in the School of Judges, and guaranteeing their practice and further exercise of their profession in the Office of the Attorney General. This practice of incorporating graduates from the BUV into the judicial system, either as judges or public prosecutors, has had a negative effect not only on the quality of justice but also on its independence. BUV graduates do not have all the necessary academic and professional qualifications to perform properly the functions of judges or public prosecutors, and this makes them vulnerable to, and able to manipulated by, the government.

Corruption

There are widespread reports about judicial decisions between individuals being sold on the basis of who pays more for the decision. Low pay has a bearing on this behaviour. Due to distortions in the exchange rates, caused by the fact that in Venezuela there are multiple exchange rates, judges receive very low pay, which obviously increases the danger of corruption. Venezuela's poor reputation in this field was confirmed by the findings of the most recent World Justice Project Rule of Law Index (2015) which put Venezuela at the bottom of the list of all countries in the world investigated in relation to the rule of law (102 out of 102)[1]. Corruption was one of the specific factors studied.

Removal of provisional judges

The Supreme Court ruled in August 2015 that provisional judges are not entitled to formal disciplinary proceedings on removal, and so have no minimal due process guarantees. This arose out of a nullity action filed in 2009 against the judicial Code of Ethics. In its 2013 Annual Report, the IACHR stated its concern over a subsequent Supreme Court decision of May 7, 2013, by which the Court declared the original nullity

[1] http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf; and http://data.worldjusticeproject.org/#/groups/VEN

action admissible, and also decreed a series of precautionary measures, including the suspension of what was provided for in that Code on its application to temporary, occasion, accidental, and provisional judges.

This new decision of August 2015 establishes that the judicial disciplinary jurisdiction has no power to prosecute provisional judges implicated in any irregularities, and reiterated that this power rests with the Court itself, through the Judicial Commission. It rejected the arguments filed against the 2013 decision by the President of the Court and the Judicial Disciplinary Tribunal.

The Inter-American Court has stated, however, that:

> '*provisional judges in Venezuela exercise exactly the same duties as titular judges, that is, to administer justice. Thus, the parties have the right, derived from the Venezuelan Constitution itself and the American Convention, to have judges who upon solving their controversies are and appear to be independent. For this, the State shall offer the guarantees that derive from the principle of judicial independence, of both titular and provisional judges..*'[2]

In that particular judgment, the Inter-American Court ordered that the Venezuelan Supreme Court and other state bodies should bring into line within a reasonable time the rules and practices of the free removal of non-titular judges. The Supreme Court decision of August 2015 is at odds with these recommendations.

In a recent ruling of the Constitutional Chamber of the Supreme Court[3], it was decided to suspend provisionally several articles of the Code of Ethics of Venezuelan Judges until the merits of the case was decided. The scope of the suspension covers Supreme Court judges and provisional judges, but not judges with permanent tenure. This violates an explicit rule in Article 267 of the 1999 Constitution on mandatory compliance with the Code of Ethics. There are fears that it will have a serious impact on the functioning of the judiciary, particularly with regard to the protection of the right to life and the effective punishment of all crimes, especially murder.

Prosecutors

The Public Prosecutor's Office was originally established as an institution independent of the state. However, it is currently an instrument used to repress dissidents, on the orders of the government. (The case of Franklin Nieves, prosecutor against opposition leader Leopoldo López is a case in point: after having escaped Venezuela, Franklin Nieves announced that he had been subject to pressure from the government to use false evidence in the trial against Leopoldo López.) The Public Prosecutor's Office should usually intervene against measures that have been adopted by other state organisms which contravene the law or logic - however, it does not do this. The Public Prosecutor's Office should also adopt an attitude that is

[2] I/A Court, *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 114.

[3] (File No. 09-1038, 4 February 2016: http://historico.tsj.gob.ve/decisiones/scon/febrero/184735- 06-4216-2016-09-1038.HTML)

pro-human rights, and in favour of the protection of fundamental liberties - but this is not possible as long as it is subordinate to the government.

One of the chief reasons for these failures is because its structure has the same grave weakness as that of the judiciary described above: the Public Prosecutor's Office has only five tenured prosecutors. Public prosecutors are also now appointed on a provisional basis, and the remedies proposed in this paper for judges should be reflected in a restructuring of the prosecutorial profession with proper tenure, grounds for dismissal etc.

Appointments to the Supreme Court

In 2004, the pro-government majority in the National Assembly increased the number of Supreme Court justices from 20 to 32, and packed the court with political allies of the government. Since then, the Venezuelan judiciary has ceased to function as an independent branch of government. Members of the Supreme Court have openly rejected the principle of separation of powers, and publicly pledged their commitment to advancing the government's "Bolivarian Revolution." As stated before, the Court has routinely ruled in favour of the government when its actions were challenged, validating its growing disregard for human rights.

At the end of December 2015, government supporters in the National Assembly again packed the Supreme Court with ruling party supporters on a vote taken by a simple majority, just days before opposition legislators (who had won the December 6, 2015 legislative elections) took office. They appointed 13 permanent justices and 21 substitute ones, including 13 who had requested their early retirement in October 2015, reportedly a year before their terms ended, apparently in order to ensure that they would be replaced by allies of the government. Justices serve 12 year terms, so it may be many years before there is another opportunity to restore the Court's political independence.

The impact of this move is already being felt. Since the new National Assembly legislators took office in January 2016, the Supreme Court has issued a series of rulings undermining the role of the opposition-led National Assembly, limiting its ability to act meaningfully as the country's legislative branch.

Renunciation of the IACHR

On September 10, 2012, the Secretary General of the Organization of American States (OAS) received the formal notice of denunciation, dated September 6, 2012, from the Ministry of the People's Power for Foreign Affairs, on behalf of the government of Venezuela. Based on the provisions of Article 78(1) of the American Convention, the denunciation took effect on September 10, 2013, one year after notice was given.

Any human rights violations that took place in Venezuela after September 10, 2013, could no longer be brought before the Inter-American Court of Human Rights. Human rights violations that took place in Venezuela during the time in which the country was a State Party to the American Convention continued to be subject to the Court's jurisdiction, in accordance with the obligations established in the treaty. Venezuela ratified the American Convention on June 23, 1977.

Venezuela's denunciation of the American Convention did not affect the jurisdiction of the Inter-American Commission on Human Rights to consider matters related to Venezuela.

As a Member State of the OAS, Venezuela continued to be subject to the jurisdiction of the Inter-American Commission on Human Rights and bound by the obligations established in the OAS Charter and the American Declaration of the Rights and Duties of Man, signed by the State of Venezuela in 1948. As long as Venezuela continues to be a State Party to the OAS, the Inter-American Commission continues to fulfil its mandate to promote and oversee the human rights situation in Venezuela and to handle petitions, cases, and precautionary measures.

The withdrawal from the Court eliminates a right of access to justice for Venezuelan citizens and, as a consequence, also judicial protection against breaches of fundamental rights. It permits impunity against abuses caused by the inadequate legal protection provided by Venezuelan legislation, and by the structural deficiencies and dysfunctions of the Venezuelan judicial system.

The Venezuelan legislation approving the IACHR has not been repealed, and so remains in force. Therefore, the renunciation of the Convention is illegal under Venezuelan law and, indeed, unconstitutional. The IACHR is specifically mentioned in Article 339 of the Constitution under the provision on states of emergency, saying that that the decree which declares such a state must be in compliance with the IACHR. It is further implied in several other articles of the Constitution.

Regardless, case law and practice in the inter-American human rights system has recognised that the American Declaration is a source of legal obligations for the OAS Member States, including in particular those that are not part of the American Convention.

Use of criminal law for repression

The IACHR has expressed its concern about the use of the state's punitive power to harass and stigmatize human rights defenders and journalists, and to criminally prosecute political dissidents. In 2014, as a result of public and student protests, the Public Prosecutor's Office indicated that more than 3,700 people had been detained and brought to court, accused of various crimes such as obstruction of roads, conspiracy, and inciting criminal activities. Additional detentions carried out by security bodies, which do not result in the presentation of the detainee in court, should be added to this.

The *Observatorio Venezolano de Conflictividad Social* (OVCS or Venezuelan Observatory on Social Conflicts) registered 9,286 protests in 2014, over twice as many as the 4,410 protests registered in 2013. These numbers show an increasing social restlessness, controlled by means of police repression. There are approximately 2,000 people who were subjected to criminal proceedings after demonstrations which took place in early 2014.

Especially since 2014, criminal prosecution has been more focused on the political opposition and control of social protest. Criminal prosecution is directed at political opposition, human rights defenders and social or trade union activists, as in the case of lawyer Tadeo Arrieche Franco and trade union leader Fray Roa,

or the situations which affect the political leaders Leopoldo López and Antonio José Ledezma, or Mayors Daniel Ceballos and Vicente Scarano Spisso, among others.

The selective detention of lawyers or social and trade union leaders has a clear political objective, which is to force people who dare to express different views to withdraw from the public arena.

Human rights

The UN Human Rights Commission's fourth periodic review of the state of human rights in Venezuela (2015) lays out comprehensively the state of human rights violations in Venezuela. As stated at the outset, this report has not undertaken its own original research. The Venezuelan experts at the project's kick-off meeting agreed that improvement in human rights could not in any case come about without the principal topic of judicial reform and independence being dealt with. If that can be put right, there would be an immediate improvement in the human rights situation. This report has accordingly proceeded on that basis.

Step one – constitutional framework

UN Basic Principles on the independence of the judiciary[4]

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Venezuela constitution

Article 254

The Judicial Power is autonomous, and the operating, financial and administrative autonomy of the Supreme Court of Justice is hereby established. To this end, in the national general budget a variable annual amount at least equivalent to 2% of the ordinary national budget shall be allocated to the justice system in order to enable it to function effectively; such amount shall not be reduced or modified without authorization in advance from the National Assembly. The Judicial Power is not authorized to establish any charges or tariffs, nor to demand any payment for its services.

Article 255

[4] http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

Appointment to a judicial position and the promotion of judges shall be carried out by means of public competitions to ensure the capability and excellence of the participants, with selection by the juries of the judicial circuits, in such manner and on such terms as may be established by law. The appointment and swearing in of judges shall be the responsibility of the Supreme Court of Justice. Citizen participation in the process of selecting and designating judges shall be guaranteed by law. Judges shall be removed or suspended from office only through the procedures expressly provided for by law.

Measures shall be taken by law to promote the professionalism of judges, and the universities shall cooperate to this end, organizing their corresponding law schools curricula to specialized studies in judicial practice.

Judges are personally liable, on such terms as may be determined by law, for unjustified omissions, delay or errors, for substantial failure to observe the rules of procedure, for denial of justice, for partiality and for the criminal offenses of bribery and prevarication in office.

Article 256

In order to guarantee impartiality and independence in the exercise of their official functions, magistrates, judges, prosecutors in the Office of Public Prosecutions and public defenders, from the date of their appointment until they leave office, shall not be permitted, otherwise than by exercising their right to vote, to engage in partisan political, professional association, trade union or similar activism; nor to engage in private activities for profit which are incompatible with their official functions, either directly or through any interposed person; nor to perform any other public functions, with the exception of educational activities.

Judges shall not be permitted to form associations among themselves.

Article 264

The justices of the Supreme Court of Justice shall be elected for a single term of twelve years. The election procedure shall be determined by law. In all cases, candidates may be proposed to the Judicial Nominations Committee either on their own initiative or by organizations involved in the field of law. The Committee, after hearing the community's views, will carry out a preliminary selection for presentation to the citizens' branch, which shall then carry out a second pre-selection for submission to the National Assembly, which shall then make the final selection. Citizens may file objections to any of the candidates, for cause, with the Judicial Nominations Committee or the National Assembly.

Article 267

The Supreme Court is charged with the direction, governance and administration of the Judicial Power and inspection and vigilance of the courts of the Republic and the public defenders' offices. The Supreme Court is also charged with preparing and implementing its own budget and that of the Judicial Power. Jurisdiction over judicial discipline shall be vested in such disciplinary courts as may be determined

by law. The discipline system for magistrates and judges shall be based in the Venezuelan Judge's Code of Ethics to be promulgated by the National Assembly. Disciplinary proceedings shall be public, oral and expeditious, in accordance with due process, subject to such terms and conditions as may be established by law. In order to exercise these powers, the Supreme Court in plenary session shall create an Executive Department of the Judiciary, with its various regional offices.

Background

There are two issues at stake here:

- the articles of the Constitution itself, and whether they need to be changed to assist a return to the rule of law; and

- Venezuela's renunciation from the InterAmerican Commission on Human Rights in 2012, which has been previously described.

Constitution

There is nothing in the Constitution which prevents the judiciary from fulfilling its functions, apart from one sentence concerned with the ability to form judicial associations - see a fuller discussion under the step devoted to 'Judicial associations' below. Indeed, they are model terms, subject to a point made later concerning the ability to change what is stated concerning judicial independence. But the current judicial authorities have in effect chosen not to carry out the substance of what the Constitution demands.

The 1999 Constitution establishes a division of powers, and expressly indicates that a social and democratic state seeking to promote rights and justice:

"*requires the existence of bodies which, characterized institutionally by their independence, have the constitutional authority allowing them to execute and impartially apply the regulations which express the people's will, the submission of all public authorities to the fulfillment of the Constitution and laws, control the legality of administrative actions and offer all people an effective writ of protection in carrying out their legitimate rights and interests*."

The 1999 Constitution also expressly indicates that (Article 255):

'*Appointment to a judicial position and the promotion of judges shall be carried out by means of public competitions to ensure the capability and excellence of the participants, with selection by the juries of the judicial circuits, in such manner and on such terms as may be established by law. The appointment and swearing in of judges shall be the responsibility of the Supreme Court of Justice. Citizen participation in the process of selecting and designating judges shall be guaranteed by law. Judges shall be removed or suspended from office only through the procedures expressly provided for by law.'*

These clear constitutional provisions are not being fulfilled by the authorities, as there has not been an open competitive bid for judicial positions since at least 2003. This has led to an irregular situation,

whereby the Supreme Court has established that provisional judges (as well as interim, temporary and alternate judges) are appointed and removed at the discretion of the Judicial Commission made up of Supreme Court judges, without due process being respected.

Changes to a constitution are elaborate and lengthy processes, which is why this report recommends them only where necessary. Although it is true that the current Constitution has clear safeguards, it might be better, given the failures in the rule of law which have occurred under it, that there is a new and separate provision focusing only on the independence of the judiciary. This is for consideration only, and one element of such a new constitutional article is suggested separately below under the step concerning judicial ethics, as follows:

'*Although the Constitution recognises judicial independence, there should be provision ensuring that any change to the Constitution concerning such independence cannot be affected without full democratic consideration and more than a simple majority of the legislature.*'

The new Article could clearly confirm that the state guarantees the independence of judges and prosecutors.

Constitutional provisions for the appointment of judges

The constitutional provisions are intended to restrict undue interference, ensure greater independence and impartiality, and allow different voices from within society to be heard in the selection of judges. Although the Constitution provides for the existence of a "Judicial Nominations Committee" and a "Committee of the Citizens' Branch for Evaluating Candidacies" made up of, according to Article 270, representatives from different sectors of society, the Supreme Court justices were not nominated by those committees, but by a law enacted by the National Assembly following the promulgation of the Constitution: the "Special Law for the Ratification or Appointment of Officials of the Citizens' Branch and Justices of the Supreme Court of Justice for the First Constitutional Period."

That Special Law ordered that the Assembly would appoint the Supreme Court justices and other authorities of the citizens' branch, not through the Committee of the Citizens' Branch for Evaluating Candidacies composed solely of representatives of different sectors of society as required by the Constitution, but through a "commission made up of 15 members of the National Assembly, which will serve as the Commission for Evaluating Candidacies" (Article 3), which was established by the same Special Law.

Constitutional Court

Under Step 7 below, 'Transitional measures', there is a recommendation that Venezuela should establish a Constitutional Court on the re-establishment of the rule of law, following the precedent of other countries which have made a similar transition in the past. Since there is nothing in the current Venezuelan constitution which permits this, there would need to be a constitutional change to permit it. The reasons behind such a recommendation are given in that section, after considering in more detail the approach taken by those countries.

Judicial associations

This is dealt with and explained in more detail as a separate step below – Step 6 - to allow judges to form associations in line with international principles and practices. Since the last sentence of Article 256 currently forbids this, this sentence should in due course be deleted from the Constitution.

Steps

1) consideration should be given to changing the constitution to permit the establishment of a Constitutional Court, as successfully introduced by other countries which were in transition to a state governed by the rule of law - more detail given under Step 7 ('Transitional measures')

2) measures should be taken, within the constitutional reform framework, to delete the last sentence of Article 256 regarding judicial associations – see below Step 6 ('Judicial association')

3) the denunciation made to the American Convention on Human Rights should be withdrawn, and recognition of the full jurisdiction of the Inter-American Court of Human Rights should be restored

4) Venezuela should now comply with Inter-American Court of Human Rights rulings, as well as decisions from the Inter-American Commission on Human Rights and United Nations system human rights bodies

5) Venezuela should issue an open invitation to the United Nations mechanisms and special procedures and to the Inter-American Commission to visit the country and open up a space for constructive dialogue with authorities and society

6) Consideration should be given to the introduction of a new and separate article in the Constitution which clearly and separately guarantees the independence of the judiciary

Step two – judicial principles

UN Basic Principles on the independence of the judiciary[5]

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

American Convention on Human Rights[6]

Article 5. Right to Humane Treatment

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 7. Right to Personal Liberty

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[5] http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx
[6] https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court, and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is valid without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recorse, or any other recourse, to a court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce

Statute of the Iberoamerican Judge[7]

JUDICIAL ETHICS

Art.37. Service and respect of the parties
In the context of a constitutional or democratic State of Law and in the exercise of their jurisdictional function, the judges have to go beyond the field of exercise of the said function, trying to give justice in conditions of efficiency, quality, accessibility and transparency, in respect of the dignity of the person demanding the service.

Art.38. Obligation of independence
The judge is obliged to maintain and defend his/her independence in the exercise of the jurisdictional function.

Art.39. Due process
Judges must carry out and make carry out the principle of due process, becoming guarantors of the rights of the parties and, in particular, ensuring they are given an equal treatment avoiding any imbalance motivated by the difference of material conditions between them and, in general, any defenceless situation.

Art.40. Limitations in the inquiry of the truth
Judges shall only use legitimate means that the system makes available for them in the persecution of the truth of the facts in the cases for which they are competent.

Art. 41. Motivation
Judges have the inexcusable obligation, in guarantee of the legitimacy of their function and of the rights of the parties, to duly motivate the decision they dictate.

Art.42. Decision in reasonable delay
Judges must obtain that the procedures they are in charge of get resolved in a reasonable delay. They shall avoid or, in any case, sanction time-wasting or contrary activities to the good procedural faith of the parties.

Art.43. Principle of equity
In the resolution of the conflicts coming to their attention, the judges, without any detriment to the strict respect of the current legislation and having the human background of the said conflicts always present, they shall try to temper with equity criteria the personal, family or social defavorable consequences.

Art.44. Professional secret
Judges have the obligation to keep strict confidence and professional secret in relation to ongoing trials and to the facts or known details in the exercise of their function or in relation with this one.
They shall not consult nor assess in cases of present or possible judicial conflicts.

[7] http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/Statute-Iberoamerican-Judge.pdf

European Charter on the statute for judges[8]

LIABILITY

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

5.2. Compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

As these texts confirm, judicial independence is an aspect of the need for impartial adjudication of all cases. The judge should not be affected by any differences in the litigating parties. The judge must be incorruptible. Impartial adjudication is an essential component of the rule of law: the citizens' ability to have confidence in impartial adjudication provides the certainty that their rights will be protected.

There are two aspects to judicial independence: the independence of the judiciary as a whole and the independence of the judge. The independence of the judiciary as a whole is a prerequisite, but it is not by itself sufficient since the individual judge must be independent, and be seen to be independent, in individual cases over which he or she is presiding.

Steps

1) The Constitution: Although the Constitution recognises judicial independence, there should be provision ensuring that any change to the Constitution concerning such independence cannot be

[8] https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

affected without full democratic consideration and more than a simple majority of the legislature (see above).

2) Governance structure: Again this is a topic dealt with as a separate step below, but judicial independence requires the judiciary to govern itself, preferably through a council composed predominantly of judges.

3) Recognition of need for independence: It must be agreed by all parties that judges will comply with the international principles enunciated above, and the government will comply with the parts which relate to its own actions and to those of bodies under its authority. The part relating to judges should be incorporated in a code of ethics, and there should be criminal sanctions for those judges that violate the most serious provisions of the code. Venezuela has an existing ethical code for judges, which was suspended in 2016: this code should be evaluated in the light of the international principles enunciated above, and then amended if necessary, and re-established.

4) Finance: There must always be adequate funding for the volume of cases that the Judiciary is required to handle.

5) Reform of the judiciary: The judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation.

6) Independence of the individual judge: Pressure can be exerted on individual judges in relation to their individual decision-making. Even if an individual judge resists such pressure, the question of sub-conscious influence is more difficult. Formal and informal rules may exist to eliminate or reduce such pressures, such as the *sub judice* rule. However, training and support should also be focused on helping judges recognise, and deal with, this issue.

7) Disagreement between judges: It is the function of appellate judges to disagree, on occasions, with first instance judges. There may be other instances where judges will express disagreement with their colleagues. The leadership of a court may also exert influence on the judges working in that court. Again there should be training focused on this issue.

8) Training: As apparent from the above and especially given the long period which Venezuela has spent in conditions without the rule of law, and in particular without implementation of the judicial principles enunciated above, there should be training for all judges in the principles enunciated above, and in judicial decision-making and methods in accordance with international standards. It would be advisable to have international expertise in this field.

9) Prosecutors: Prosecutors should be given independence from the executive branch of government.

Step three – judicial career

UN Basic Principles on the independence of the judiciary[9]

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

[9] http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx#navigation

European Charter on the statute for judges[10]

GENERAL PRINCIPLES

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

2.3. The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.2. The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

[10] https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

CAREER DEVELOPMENT

4.1. When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by the authority referred to at paragraph 1.3 hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

4.4. The statute guarantees to judges the maintenance and broadening of their knowledge, technical as well as social and cultural, needed to perform their duties, through regular access to training which the State pays for, and ensures its organization whilst respecting the conditions set out at paragraph 2.3 hereof.

REMUNERATION AND SOCIAL WELFARE

6.1. Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

6.2. Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

6.3. The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death.

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

TERMINATION OF OFFICE
7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

Steps

1) A career structure needs to be established for all judges and prosecutors. The route to enable access to each career should be clearly defined in a statute for judges and prosecutors. This should be close to the structures that Venezuela has known in the past, to make it familiar and easier to operate. In particular, and at a minimum, the following are required:

    a) law degree from a recognised Faculty of Law in Venezuela or abroad (if abroad, properly validated in Venezuela according to the general requirements for validation in Venezuela of University titles from abroad). Degrees from the Bolivarian University of Venezuela should not eligible to access either career until its law studies programme fulfils the minimum standards for these professions

    b) regular examinations as the only way to enter either profession

    c) subsequent selection and recruitment by an independent panel through state exams, in accordance with objective criteria

    d) established criteria for discipline and removal of a judge or prosecutor, with due process guaranteed

    e) objective criteria for promotion (for instance, number of years in a particular post)

f) a remuneration scale and other benefits which remove judges and prosecutors from the temptations of corruption. This is not easy to implement in the present economic circumstances of hyperinflation, and may not be easy on a return to the rule of law, either, when economic conditions will doubtless continue to be extremely difficult, at least at the beginning. Nevertheless, this point of remuneration (to avoid corruption) should always be borne in mind as an important goal.

2) There needs to be a strict regulation of the appointment of provisional judges and prosecutors in the future. These are the factors to be considered:

   a) Given the history of provisional judges and prosecutors in the recent past, should there be a complete prohibition on such appointments in the future?

   b) If they are to continue, should there be a limitation on the number which can be appointed? Minimum requirements to become one? A time limit on their appointment? Any other conditions of appointment?

   Recommendations regarding the future of provisional judges are given under Step 7 below ('Transitional measures').

Step four - oath

It is reported that some judges feel that their primary aim in being judges is to serve the Bolivarian Revolution. However, judges exist to serve justice and the rule of law, which may be in opposition to the political wishes of the government. It is vital that judges understand their role. For this, the re-introduction of the judicial oath, currently suspended, is recommended. Along with the suspended version previously in use in Venezuela, there are various forms in use around the world, all along the following lines:

'*I will administer justice without respect to persons, do equal right to the poor and to the rich, without fear or favour, affection or ill will, in accordance with the law and constitution of Venezuela.*'

There is no religious connotation in the above wording, and it is not intended that there should be any, either. The phrase 'judicial oath' is the traditional one used, but people may prefer 'judicial declaration' or 'judicial affirmation' instead. In South Africa, during the transition from apartheid to the new democratic government, the negotiators established that judges who had been appointed by the old regime could retain their positions on the prior condition of taking a new oath of office – and all judges did so.

Given the current politicisation of particularly the Supreme Court, it is especially important to re-introduce judicial oaths for members of that Court.

Steps

1) Consideration should be given to the re-introduction of the judicial oath, currently suspended, or a new oath along the lines outlined above, to remind judges of the principles that they are supposed to serve in a country governed by the rule of law.

2) The statute of judges and prosecutors may foresee sanctions for not respecting the oath, ranging from a temporary suspension to the removal of the judge or prosecutor, and including criminal sanctions in the most serious cases.

Step five – training

UN Basic Principles on the independence of the judiciary[11]

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

European Judicial Training Network – nine judicial training principles[12]

The nine judicial training principles:

1.Judicial training is a multidisciplinary and practical type of training, essentially intended for the transmission of professional techniques and values complementary to legal education.

2.All judges and prosecutors should receive initial training before or on their appointment.

3.All judges and prosecutors should have the right to regular continuous training after appointment and throughout their careers and it is their responsibility to undertake it. Every Member State should put in place systems that ensure judges and prosecutors are able to exercise this right and responsibility.

4.Training is part of the normal working life of a judge and a prosecutor. All judges and prosecutors should have time to undertake training as part of the normal working time, unless it exceptionally jeopardises the service of justice.

5.In accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine.

6.Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose.

7.Active and modern educational techniques should be given primacy in judicial training.

8.Member States should provide national institutions responsible for judicial training with sufficient funding and other resources to achieve their aims and objectives.

9.The highest judicial authorities should support judicial training.

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[11] http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx
[12] http://www.ejtn.eu/Templates/Public/Pages/NewsItem.aspx?id=3733

CCJE Opinion on appropriate initial and in-service training for judges at national and European levels[13]

(Brief version)

3. It is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily.

4. Such training is also a guarantee of their independence and impartiality, in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms.

5. Lastly, training is a prerequisite if the judiciary is to be respected and worthy of respect. The trust citizens place in the judicial system will be strengthened if judges have a depth and diversity of knowledge which extend beyond the technical field of law to areas of important social concern, as well as courtroom and personal skills and understanding enabling them to manage cases and deal with all persons involved appropriately and sensitively. Training is in short essential for the objective, impartial and competent performance of judicial functions, and to protect judges from inappropriate influences.

CCJE Opinion on appropriate initial and in-service training for judges at national and European levels[14]

(Long version)

I. The right to training and the legal level at which this right should be guaranteed

9. Constitutional principles should guarantee the independence and impartiality on which the legitimacy of judges depends, and judges for their part should ensure that they maintain a high degree of professional competence (see paragraph 50 (ix) of the CCJE Opinion N° 3).

10. In many countries the training of judges is governed by special regulations. The essential point is to include the need for training in the rules governing the status of judges; legal regulations should not detail the precise content of training, but entrust this task to a special body responsible for drawing up the curriculum, providing the training and supervising its provision.

11. The State has a duty to provide the judiciary or other independent body responsible for organising and supervising training with the necessary means, and to meet the costs incurred by judges and others involved.

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13 https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2003)OP4&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true

14 https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2003)OP4&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true

12. The CCJE therefore recommends that, in each country, the legislation on the status of judges should provide for the training of judges.

II. The authority responsible for training

13. The European Charter on the Statute for Judges (paragraph 2.3) states that any authority responsible for supervising the quality of the training programme should be independent of the Executive and the Legislature and that at least half its members should be judges. The Explanatory Memorandum also indicates that the training of judges should not be limited to technical legal training, but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.

14. This highlights the key importance attaching to the independence and composition of the authority responsible for training and its content. This is a corollary of the general principle of judicial independence.

15. Training is a matter of public interest, and the independence of the authority responsible for drawing up syllabuses and deciding what training should be provided must be preserved.

16. The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges' associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.

17. In order to ensure a proper separation of roles, the same authority should not be directly responsible for both training and disciplining judges. The CCJE therefore recommends that, under the authority of the judiciary or other independent body, training should be entrusted to a special autonomous establishment with its own budget, which is thus able, in consultation with judges, to devise training programmes and ensure their implementation.

18. Those responsible for training should not also be **directly** responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) **referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45,** is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks.

19. In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.

20. It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.

21. When judges are in charge of training activities, it is important that these judges preserve contact with court practice.

22. Training methods should be determined and reviewed by the training authority, and there should be regular meetings for trainers to enable them to share their experiences and enhance their approach.

III. Initial training

a. Should training be mandatory?

23. While it is obvious that judges who are recruited at the start of their professional career need to be trained, the question arises whether this is necessary where judges are selected from among the best lawyers, who are experienced, as (for instance) in Common Law countries.

24. In the CCJE's opinion, both groups should receive initial training: the performance of judicial duties is a new profession for both, and involves a particular approach in many areas, notably with respect to the professional ethics of judges, procedure, and relations with all persons involved in court proceedings.

25. On the other hand, it is important to take the specific features of recruitment methods into account so as to target and adapt the training programmes appropriately: experienced lawyers need to be trained only in what is required for their new profession. In some small countries with a very small judiciary, local training opportunities may be more limited and informal, but such countries in particular may benefit from shared training opportunities with other countries.

26. The CCJE therefore recommends mandatory initial training by programmes appropriate to appointees' professional experience.

b. The initial training programme

27. The initial training syllabus and the intensiveness of the training will differ greatly according to the chosen method of recruiting judges. Training should not consist only of instruction in the techniques involved in the handling of cases by judges, but should also take into consideration the need for social awareness and an extensive understanding of different subjects reflecting the complexity of life in society. In addition, the opening up of borders means that future judges need to be aware that they are European judges and be more aware of European issues.

28. In view of the diversity of the systems for training judges in Europe, the CCJE recommends:
i. that all appointees to judicial posts should have or acquire, before they take up their duties, extensive knowledge of substantive national and international law and procedure;
ii. that training programmes more specific to the exercise of the profession of judge should be decided on by the establishment responsible for training, and by the trainers and judges themselves;
iii. that these theoretical and practical programmes should not be limited to techniques in the purely legal fields but should also include training in ethics and an introduction to other fields relevant to judicial activity, such as management of cases and administration of courts, information technology, foreign languages, social sciences and alternative dispute resolution (ADR);
iv. that the training should be pluralist in order to guarantee and strengthen the open-mindedness of the

judge;

v. that, depending upon the existence and length of previous professional experience, training should be of significant length in order to avoid its being purely a matter of form.

29. The CCJE recommends the practice of providing for a period of training common to the various legal and judicial professions (for instance, lawyers and prosecutors in countries where they perform duties separate from those of judges). This practice is likely to foster better knowledge and reciprocal understanding between judges and other professions.

30. The CCJE has also noted that many countries make access to judicial posts conditional upon prior professional experience. While it does not seem possible to impose such a model everywhere, and while the adoption of a system combining various types of recruitment may also have the advantage of diversifying judges' backgrounds, it is important that the period of initial training should include, in the case of candidates who have come straight from university, substantial training periods in a professional environment (lawyers' practices, companies, etc).

IV. <u>In-service training</u>

31. Quite apart from the basic knowledge they need to acquire before they take up their posts, judges are "condemned to perpetual study and learning" (see report of R. Jansen "How to prepare judges to become well-qualified judges in 2003", doc. CCJE-GT (2003) 3).

32. Such training is made indispensable not only by changes in the law, technology and the knowledge required to perform judicial duties but also by the possibility in many countries that judges will acquire new responsibilities when they take up new posts. In-service programmes should therefore offer the possibility of training in the event of career changes, such as a move between criminal and civil court**s**; the assumption of specialist jurisdiction (e.g. in a family, juvenile or social court) and the assumption of a post such as the presidency of a chamber or court. Such a move or the assumption of such a responsibility may be made conditional upon attendance on a relevant training programme.

33. While it is essential to organise in-service training, since society has the right to benefit from a well trained judge, it is also necessary to disseminate a culture of training in the judiciary.

34. It is unrealistic to make in-service training mandatory in every case. The fear is that it would then become bureaucratic and simply a matter of form. The suggested training must be attractive enough to induce judges to take part in it, as participation on a voluntary basis is the best guarantee for the effectiveness of the training. This should also be facilitated by ensuring that every judge is conscious that there is an ethical duty to maintain and update his or her knowledge.

35. The CCJE also encourages in the context of continuous training collaboration with other legal professional bodies responsible for continuous training in relation to matters of common interest (e.g. new legislation).

36. It further stresses the desirability of arranging continuous judicial training in a way which embraces all levels of the judiciary. Whenever feasible, the different levels should all be represented at the same

sessions, giving the opportunity for exchange of views between them. This assists to break-down hierarchical tendencies, keeps all levels of the judiciary informed of each other's problems and concerns, and promotes a more cohesive and consistent approach throughout the judiciary.

37. The CCJE therefore recommends:
i. that the in-service training should normally be based on the voluntary participation of judges;
ii. that there may be mandatory in-service training only in exceptional cases; examples might (if the judicial or other body responsible so decided) include when a judge takes up a new post or a different type of work or functions or in the event of fundamental changes in legislation;
iii. that training programmes should be drawn up under the authority of the judicial or other body responsible for initial and in-service training and by trainers and judges themselves;
iv. that those programmes, implemented under the same authority, should focus on legal and other issues relating to the functions performed by judges and correspond to their needs (see paragraph 27 above);
v. that the courts themselves should encourage their members to attend in-service training courses;
vi. that the programmes should take place in and encourage an environment, in which members of different branches and levels of the judiciary may meet and exchange their experience**s** and achieve common insights;
vii. that, while training is an ethical duty for judges, member states also have a duty to make available to judges the financial resources, time and other means necessary for in-service training.

V. Assessment of training

38. In order continuously to improve the quality of judicial training, the organs responsible for training should conduct frequent assessments of programmes and methods. An important role in this process should be played by opinions expressed by all participants to training initiatives, which may be encouraged through appropriate means (answers to questionnaires, interviews).

39. While there is no doubt that performance of trainers should be monitored, the evaluation of the performance of participants in judicial training initiatives is more questionable. The in-service training of judges may be truly fruitful if their free interaction is not influenced by career considerations.

40. In countries that train judges at the start of their professional career, the CCJE considers evaluation of the results of initial training to be necessary in order to ensure the best appointments to the judiciary. In contrast, in countries that choose judges from the ranks of experienced lawyers, objective evaluation methods are applied before appointment, with training occurring only after candidates have been selected, so that in those countries evaluation during initial training is not appropriate.

41. It is nevertheless important, in the case of candidates subject to an appraisal, that they should enjoy legal safeguards that protect them against arbitrariness in the appraisal of their work. In addition, in the case of States arranging for the provisional appointment of judges, the removal of these from office at the end of the training period should take place with due regard for the safeguards applicable to judges when their removal from office is envisaged.

42. In view of the above, the CCJE recommends:

i. that training programmes and methods should be subject to frequent assessments by the organs responsible for judicial training; ii. that, in principle, participation in judges’ training initiatives should not be subject to qualitative assessment; their participation in itself, objectively considered, may however be taken into account for professional evaluation of judges; iii. that quality of performance of trainees should nonetheless be evaluated, if such evaluation is made necessary by the fact that, in some systems, initial training is a phase of the recruitment process.

EJTN Handbook on Judicial Training Methodology in Europe[15]

Steps

1) A nation-wide scheme for the initial and continuing training of judges and prosecutors should be established through a judicial training institute. At least the initial training should be compulsory, and judges and prosecutors should be allowed time away from their official duties in order to participate in initial and continuing training. Accordingly, there would be two types of training:

    a) Initial training after passing the exams to gain access the profession of judge or prosecutor and before taking the oath as member of the profession; and

    b) Continuing training throughout the career

2) The appropriate Venezuelan authority should join the International Organization for Judicial Training (IOJT). The IOJT was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. Its mission is implemented through international and regional conferences and other exchanges that provide opportunities for judges and judicial educators to discuss strategies for establishing and developing training centres, designing effective curricula, developing faculty capacity, and improving teaching methodology. It is a volunteer, non-profit organization. As of August 2015, it had 123 member-institutes from 75 countries.

[15] http://www.ejtn.eu/Documents/EJTN_JTM_Handbook_2016.pdf

Step six – judicial association

UN Basic Principles on the independence of the judiciary[16]

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

European Charter on the statute for judges[17]

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

1.8. Judges are associated through their representatives and their professional organizations in decisions relating to the administration of the courts and as to the determination of their means, and their allocation at a national and local level. They are consulted in the same manner over plans to modify their statute, and over the determination of the terms of their remuneration and of their social welfare.

Steps

1) Once the Constitution has been changed to allow the establishment of a judicial association, a council or councils (established by the government for the purpose of maintaining judicial standards) and an association or associations of judges (for the purpose of communicating with the government in relation to judicial terms and conditions) should be established, in conformity with international standards.

2) A law should regulate the creation of these new organisations, including setting out the requirements for membership, purpose and funding.

[16] http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx
[17] https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf

Step seven – transitional measures

This step will give consideration to how to go from the current state of the judiciary in Venezuela to one based on the rule of law.

An attempt has been made to look at how other countries have dealt with this problem in the past, and several country case histories which might have parallels to Venezuela are summarised below.

SPAIN[18]

In Spain, after the end of the Franco dictatorship, there was no break in continuity for the judiciary: the same judges who were in post during the dictatorship continued into the new democratic era. Therefore, the judiciary was brought into a new democratic context without having lost the elements which characterised the previous authoritarian regime.

The post-Franco democratisation strategy of the judiciary incorporated two main mechanisms:

1) Legal mechanism: reform of the administration of justice, adapting judicial policies to democratic principles. This was introduced by the Organic Law of the General Council of the Judiciary of 1981 and the Organic Law of the Judiciary of 1985.

The new Organic Law introduced modified access to the judicial profession. For instance, lawyers and other jurists (scholars) became interim members of the judiciary, appointed directly and without the need for examinations, in order to cover vacancies awaiting the introduction of a new system. The entry of non-traditional external players were considered necessary by the legislator for the renewal of the judicial branch. The new judges were appointed by consensus – for instance, the twelve members of the Constitutional Court came from among jurists of recognised prestige, with a strong predominance of university professors.

The Judiciary Council was established with a system of 'qualified majority' in an attempt to overcome the authoritarian legacy. Another innovation was the recognition of a free association of judges to satisfy the aspirations of progressive judges.

The Organic Law of the Judiciary 6/1985 also established the early retirement of one-third of the judicial profession in order to winnow out figures from the old regime who were in the highest judicial spheres. By eliminating conservative elements, there was more freedom and independence in the new judiciary.

2) Political mechanism: the creation of the Constitutional Court, an independent body outside the judiciary. Its supervisory role enabled the Constitutional Court to control laws and other public legal acts. The court was used as a mechanism against restrictive and undemocratic interpretations made by judges.

[18] http://aei.pitt.edu/11883/1/CES_173.pdf
http://www.redalyc.org/pdf/599/59921018006.pdf

The Court has three functions: to determine the constitutionality of laws and other legal acts; to hear citizens' appeals against decisions they considered unconstitutional; and to resolve conflicts of competence between the national government and the regions or between regions. The Court therefore established the crucial division between the new and old regime, mainly through decisions and case law. The Constitutional Court was the path used to reach legal accountability in the courts. Meanwhile the writ of protection was an accountability mechanism aimed at allowing citizens to control the judicial branch.

SOUTH AFRICA[19]

During apartheid, the judiciary served the interests only of the ruling white faction, frequently taking a pro-government stance.

Most members of the judiciary, ostensibly interpreting legislation according to parliamentary will, upheld unjust and oppressive laws and contributed to allegations that the judiciary was complicit in maintaining apartheid's legal order.

Despite the government's claims that the judiciary was independent, and despite the continued functioning of the courts throughout apartheid, by the 1980s - after judges had repeatedly upheld discriminatory and repressive legislation - public perception of the judiciary was increasingly unfavourable. The people for whom independent review of government action was most necessary — the black majority — increasingly lost confidence in the judiciary as an independent institution.

From the beginning of the process in 1990 to end apartheid and transfer power to an elected government, the negotiators viewed an independent judiciary as an essential component of the new constitutional democracy.

Formally, transition to democracy in South Africa started between 1993 and 1994. The negotiators established that judges who had been appointed by the old regime could retain their positions with the prior condition of taking a new oath of office. All judges did so. At the start of the transition, out of 166 high court judges there were 3 black males, 2 white females and 161 white males, appointed by the Executive and predominantly from the ranks of senior advocates. The need to create a judiciary that was more representative of the people of South Africa along both race and gender lines was felt to be indisputable. At that time, there was no possibility of judicial review of legislation, and human rights were seen as political rather than legal principles. For all these reasons, there was no faith that the apartheid judiciary would be able to give effect to the transformative aspirations and spirit of the new Constitution and Bill of Rights.

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[19] http://www.sahistory.org.za/article/establishment-constitutional-court-south-africa-1994
http://www.sabar.co.za/law-journals/1995/november/1995-november-vol008-no2-pp133-134.pdf
http://www.csvr.org.za/docs/transition/3.pdf
http://www.law.uchicago.edu/files/file/388-tg-courts.pdf
http://www.tandfonline.com/doi/full/10.1080/03057070.2016.1084770
http://www.constitutionalcourtreview.co.za/wp-content/uploads/2015/08/Democratic-Risk-to-Democratic-Transitions.pdf

Expressing those values and changes that were most critical to the creation of a new state, the 1993 Interim Constitution included 34 principles with which the final Constitution had to comply in order to be certified by the Constitutional Court Act (200 of 1993). Two of these principles ensured that the final Constitution would create an independent judiciary that could prevent abuse of power by the other branches of government. Specifically, Principle VI provided that there would be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

As a transitional constitution, it required the newly elected Parliament also to serve as a constituent assembly to adopt the final constitution. It introduced an entrenched Bill of Rights against which legislation and government action could be tested, and created the Constitutional Court with broad powers of judicial review to guard the Constitution.

In order to select the candidates to form the Constitutional Court, the President - again after consultation - was to choose the judges from a shortlist sent to him by the Judicial Service Commission. The Commission, the members of which were largely drawn from the legal profession and members of Parliament on the basis of proportional representation, was responsible for whittling down the initial list of 100 to 25 after public hearings, the first ever public judicial hearings in South Africa's history. One of the most significant events was the appointment of a Constitutional Court under the Presidency of Justice A Chaskalson. The Court had three black judges out of eleven, and two women. In almost all aspects, it served as a complete break from the previous judicial system. This process characterised the transition from a society of authority to one of openness and democracy. This first Court, although still far from an exact demographic representation, was the most representative court South Africa had ever had.

After the first constitution draft was finished, the Constitutional Court did not pass it. Therefore, the Constitutional Assembly revised and corrected it to give effect to the concerns expressed by the Court, and this time the Constitutional Court approved it and the final Constitution was passed in 1996. The new Constitutional Court oversaw the transition, even demanding changes in the final draft Constitution to meet the requirements of the Interim Constitution.

The South African judiciary may reject legislation passed by Parliament and signed by the President. The 1996 Constitution created a legal order in which an independent judiciary is empowered to review the legality of all official acts. During apartheid, the lack of a Bill of Rights or other legal norms against which to measure official acts was often seen as an obstacle to a court's effective protection of individual rights; the 1996 Constitution removes this hurdle by insisting that courts invalidate legislation that was inconsistent with the constitutional standards. The existence of a Bill of Rights in the 1996 Constitution not only illuminated to the general public the values to which South Africa now strove but also provided judges with a legal framework to guide their decisions and to clarify the limits of government power and the extent of government obligations.

Furthermore, the pool of candidates from which judges are appointed has increased since 1994 to include not only senior members of the bar but also practising attorneys and academics, thus facilitating the appointment of more women and black judges. The Judicial Service Commission (JSC), a constitutionally mandated body made up of judges, practising advocates and attorneys, academics, members of the

legislative and executive branches and presidential appointees, plays a large role in the appointment of judges to all courts in South Africa. Depending on the vacancy, the JSC researches and interviews candidates, writes lists of nominees and gives advice about appointments. It is a diverse body made up of legal and non-legal governmental and non-governmental members and is required to include representatives from opposition parties. It is supposed to provide protection against appointments of the sort seen during apartheid. According to the Constitutional Court, the JSC provides a broadly based selection panel for appointments to the judiciary, and provides a check and balance to the power of the executive to make such appointments.

CZECH REPUBLIC (former Czechoslovakia)[20]

The Czechoslovak judiciary in the communist era had a highly politicised process of selection and appointment of judges, with major powers resting in the hands of political elites, especially the Minister of Justice. For example, the 1957 Act on election of judges introduced a requirement of loyalty to the regime.

As in other countries in transition, the Constitutional Court set up firstly in Czechoslovakia and later in the Czech Republic played a fundamental role in the development of the new legal system. The Czech Constitutional Court rejected the possibility of interpreting legal regulations independently of the value system of a liberal democratic constitutional state. So, according to the Czechoslovak Constitutional Court, formal continuity of the legal system cannot prevent the application of a principle of substantive discontinuity of the basic values and principles upon which a legal system is based.

In early 1990, the transition decided that it was necessary to 'clean up' the judiciary. The first decision was to shorten the tenure of existing judges to approximately one year, so as to allow for the screening of the judges against whom objections had been raised because of their politically driven decisions during communism, before proceeding with new appointments by the President for a new and life-long tenure. This, combined with the new opportunities emerging in an independent legal profession and linked to the development of the new legal and economic system, prompted a 'judicial exodus'. Within several months, one third of the judges had left active service. At the same time, the process of building a constitutional state through new legislation began to increase the tasks and importance of the judiciary. However, to whatever extent the change of the regime changed the composition of the judiciary, old patterns of behaviour persisted, preserved also by the fact that most of the senior judges were from the communist era.

The breakup of the federation closed the first stage of the development of the judiciary in the Czech Republic, which in the following years concentrated on a general review of the legal system and the elaboration of modern codes of law. It was only at the end of the 1990s that both the legislation and the judiciary had to be remodelled in line with the pre-requisites of membership of the European Union. The

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20 https://www.researchgate.net/publication/242079232_Judiciary_development_after_the_breakdown_of_communism_in_the_Czech_Republic_Slovakia
http://bti2006.bertelsmann-transformation-index.de/index.php?id=174&tt_news=&type=98&L=0
https://ec.europa.eu/europeaid/reforms-legal-system-and-judiciary-czech-republic_en

process of preparation for acceding to the EU defined the third stage of transformation of the judiciary, which again required further reviews of repeatedly amended laws and regulations. However, despite gradual improvements, the status of judges and the basic organisational structure of the Czechoslovak judiciary remained unchanged, as defined in 1991.

In 2002, the Act on Courts and Judges entered into force, introducing a first step towards self-government of the judiciary by the creation of Judicial Councils, which had the status of consultative bodies at all court levels. It sought to promote greater professionalisation of the judiciary by establishing new procedures for the selection, training and evaluation of judges. The Act on Courts and Judges also created a new Judicial Academy. The Ministry of Justice revised the curricula for the training of judges and state prosecutors and established the importance of appointing appropriate representatives of the judiciary involved in the functioning of the Judicial Academy.

During 2001, there were a number of high-profile prosecutions and convictions for economic crimes, thus decreasing corruption rates, the main problem in achieving a consolidated democracy.

In the year 2003, a reform of the administrative jurisdiction was undertaken by introducing the possibility of revising the decisions of administrative bodies by the courts in full jurisdiction. A new Supreme Administrative Court was created; it took over some competences of the Constitutional Court in the area of administrative law. Specialised panels of judges were set up at the Regional Courts. The possibility of protection of citizens against the decision of state institutions was raised.

Judicial independence was one of the essential conditions for accession to the EU, which created a strong incentive to reform the judiciary. The EU was an important influence in transition of the judiciary to an institution suitable for democracy.

CHILE[21]

During Pinochet´s dictatorship, the Supreme Court was considered to be culturally and socially close to the regime elites, and therefore, unfavourable to the previous political regime. The Supreme Court used to impose its will over the entire judiciary and met with minimal disruption. On the other hand, because the Constitutional Court could not be equally trusted and was not under the direct supervision of the Supreme Court, Pinochet eliminated the court and further empowered the Supreme Court.

Nevertheless, in the 1980s, Pinochet decided to establish a new Constitutional Court, which was expected to be loyal to the regime. However, the court proved more independent than anticipated and not completely subservient to the military regime. Far reaching decisions in 1985 supported the basic standard for free and clean elections in the 1988 plebiscite and for later elections that effectively put an end to the regime itself. However, the court was simultaneously docile to the regime in many other matters.

[21] Lisa Hilbink, “Jueces y política en democracia y dictadura: Lecciones desde Chile”
http://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1517&context=facscholar
http://www.law.uchicago.edu/files/file/388-tg-courts.pdf

After the dictatorship, the judiciary was not purged, and the same conservative judges remained in office during the transition.

During Aylwin's democratic government, the Supreme Court became a hindrance to democratic reforms due to its internal legal culture. Because of that, a school was created in 1994 to promote a changed legal culture that would support the new innovative democratic regime.

During the first years of transition, the judiciary's conservative behaviour did not change substantially, and so between 1995 and 1996 the tendency was to provide an amnesty to most of the dictatorship-related cases. Chilean judges had internalized an ideology of 'apoliticism' along with a hierarchical, self-reproducing institutional structure that rendered judges unequipped and disinclined to take stands in defence of liberal democratic principles before, during, or after the authoritarian period.

The real transition started in 1998 when Pinochet was arrested in London due to an order submitted by a Spanish judge to punish Pinochet's crimes against human rights. During that phase, the Constitutional Court took a more important role in re-establishing democratic and liberal principles. The transfer from the Supreme Court to the Constitutional Court of the called 'inapplicability appeal', which allowed lower courts and litigants to challenge legislation for unconstitutionality, greatly expanded the Constitutional Court's judicial standing and caseload. Combined with the elimination from the Constitutional Court of designated seats for Supreme Court justices, these reforms had the effect of empowering younger lower court judges and freeing them from direct scrutiny by their superiors in the judicial hierarchy. The result was a sea change, and a delayed but significant role for the courts. As the authoritarian interlude receded in time, courts became less fearful of ruling against the government.

Furthermore, the Inter-American Court stepped into a very delicate navigation of transitional justice by calling for the invalidation of the 1978 Amnesty Decree, which had been used by Pinochet to absolve the military for the 1973 coup.

Another important step towards democracy was the transfer from the military courts to the normal courts of cases of offences against the military forces committed by civilians.

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Steps

These case histories permit a reflection on what might be the best steps to take on Venezuela's return to the rule of law. The following measures are proposed:

Supreme Court

Given the Supreme Court's close and continuing identification with the policies of the current government, which have led to a crisis in the rule of law, and a loss of faith in the administration of justice, it is proposed that all the judges of the Supreme Court should be immediately replaced with people from outside the current ruling circle. The example of Spain after Franco could be followed, where lawyers and other jurists (scholars) became part of the judiciary, appointed directly and without the need for examinations - jurists of recognised prestige, with a strong predominance of university professors. Such a step will strengthen

the whole court system, and begin to restore faith in it. In addition, it would be very helpful in restoring public faith in the Supreme Court if its new members underwent public hearings before the judicial committee of the National Assembly before appointment, in a similar manner as happens in the United States of America for prospective members of the Supreme Court.

Constitutional Court

At present, the Supreme Court has a constitutional chamber, but there is no separate Constitutional Court. Given the success that a separate Constitutional Court has had in restoring the rule of law and a sense of fair administration of justice in other countries transitioning to democracy, it is proposed that Venezuela consider following the examples of Spain, South Africa, the Czech Republic and Chile in creating such a separate Court.

Clearly, its powers – which vary in the countries mentioned – will need to be adapted to the situation at the time of establishment and the requirements of the local legal system (for the latter reason, the examples of Spain and Chile might be the ones studied most closely). However, the following powers should be considered:

(a) to determine whether an act or decision is lawful in accordance with the constitution;
(b) to make its decisions according to the value system of a liberal democratic constitutional state; and
(c) to allow access to the Court also directly by citizens, subject to appropriate conditions.

Once again, it would be best if the Court's membership came from outside the current judiciary, and from a similar circle as that recommended above for the Supreme Court. However, while the members of the Supreme court should be selected by a Council of the Judiciary, the members of the Constitutional Court should be appointed by different powers on the basis of merit, and should include those not already judges, such as well-known university professors. Again, as above with members of the Supreme Court, it would be useful to consider following the US example of public hearings before the appointment of Constitutional Court judges, to help restore public faith in these members of such an important court. The Spanish example of selection may also be useful, since the Parliament (Congress and Senate) selects 8 members (4 by each chamber), 2 more are appointed by the Government and the last 2 are appointed by the Council of the Judiciary. This creates a kind of check and balance, as all the three powers of the state have appointees.

The Constitutional Court should be a permanent new feature of the Venezuelan judicial landscape. This will require constitutional reform, since the current Constitution does not foresee it.

Provisional judges

The corruption of the current judiciary by the appointment of unqualified and obedient followers of the government to provisional judgeships is another of the major problems facing Venezuela on a return to

the rule of law. Obviously, this problem is particularly acute in relation to the provisional judges working in the criminal courts, whose decisions affect the liberty of those opposed to the government, and so the rest of this section, and the recommendations at the end regarding provisional judges, refer only to those working in the criminal courts. A separate assessment will have to be made about what to do about the provisional judges working in the civil courts, where the human rights questions arising are not so fundamental as in the criminal area.

The question is what should be done with these provisional judges in the criminal courts after a return to the rule of law. There is a range of options, including:

a) to dismiss them all at once

Advantages

- it would remove the people who are causing the principal problem to judicial independence, since they lack impartiality and have not been appointed for their judicial qualities

Disadvantages

- it would leave a gap in the state's ability to provide justice, and might lead to a collapse in the justice system

- it would itself be a violation of the standards regarding discipline and tenure that are advocated elsewhere in this report, particularly if it is done universally without consideration of each provisional judge's merits

b) to review all the appointments made, and see which are able to be transformed into judges capable of continuing within a system based on the rule of law, and which not – and to dismiss only those deemed incapable of making the transition, either in accordance with a) above or c) below; any process of retention or rehiring should follow clear and transparent rules to avoid the reality or appearance of corruption

c) to dismiss them in staged tranches based on a previously established system, say one third every year or two years (or whatever period is chosen), to avoid the justice system potentially collapsing

d) to provide training to all provisional judges on the principles enunciated in this document, and conduct the review after they have all had the opportunity of a period in office under the new system

Having considered the examples of other countries, it is suggested that the dangers posed by the provisional judges in the criminal courts will be lessened if the two previous steps (new membership of the Supreme Court, establishment of a separate Constitutional Court with certain powers) are followed. Therefore, it is further suggested that point (b) above should be followed on a return to the rule of law, namely that all provisional appointments should be reviewed, and after that point (c) above should be

followed, namely that those to be dismissed should be dismissed in three tranches according to a staggered timetable to allow the system to continue to function. For those to be retained or rehired, the process should include an examination, which could be evaluated by well-known professors of law. Obviously, the process should allow the provisional judges who are to take the exam sufficient time for preparation.

Any provisional judge who has been dismissed should be allowed to reapply to become a judge on the basis of the newly established objective criteria, including an examination (both vocational and academic), which would test their suitability to act as judges.

Judges with tenure who were suspended, removed or "invited" to leave their judicial career without due process over the last few years

Again there is a range of options available, including:

a) to do nothing about them

b) to grant them compensation but no re-admission

c) to grant them re-admission

It is proposed that these judges should be evaluated on a case-by-case basis. Those whose dismissal has been evaluated as unfair by international judicial bodies, such as the InterAmerican Court on Human Rights, should be granted automatic re-admission. Others may be granted re-admission on the basis that they undergo certain training before re-starting their judicial career. Their service should be assumed to be continuous for the purpose of pay, pension and promotion.

Prisons

This report has not focused on prisons in Venezuela, which deserve a whole report to themselves. Nevertheless, our Venezuelan partners stress the importance of ending the current practice of holding prisoners in administrative premises, and the need to re-examine the whole prison system, given that so many prisons are in the hands of mob bosses ('*prane*s').

Step eight – rebuilding trust in the judicial system

Given the state of the current judicial system in Venezuela, there will need to be considerable work undertaken to change the popular mistrust that has arisen in the judiciary's integrity, and in its ability to protect civil rights and limit the excesses of elected officials. There has been an increase in extrajudicial settling of scores and similar actions taken to secure rights.

Obviously, the previous steps detailed in this report will go some way to rebuilding such trust, and ensuring that citizens seek to have their disputes settled in court. But consideration should be given to other initiatives which will restore faith in judges and the courts. This will also ensure that good quality candidates will come back to a profession whose reputation has been severely tarnished.

In addition, there are severe problems with the court infrastructure, such as ageing, deteriorating and ill-equipped physical facilities that severely undermine the fair and speedy administration of justice. Courts are often hopelessly overcrowded and underfunded. There are few or no computers, photocopiers and other modern equipment. Thought should be given, on a transition, to applying for funding from the international community to bring the courts up to acceptable standards.

Consideration should be given also to giving the judiciary control over its own budget, maybe by law. This ties in with the concept of the return of independence to judges, so that they can decide where the funds are most needed, for instance in the areas of equipment, working conditions and salaries.

Again, case histories have been studied from other countries as to how they have handled similar problems, and below are relevant case histories:

CIVIL SOCIETY BOARDS[22]

In some countries, civil society boards have been established as court-monitoring systems (for instance, in Singapore and Costa Rica); and in other cases, such bodies were given a conflict resolution function to provide an alternative and informal dispute resolution mechanism (as in the cases of Chile, Colombia, and Guatemala).

But in all the countries mentioned, these civil society-based bodies were recognised by their respective governments in response to the increasing gap between the demand and supply of court services. At the same time, the bodies served the purpose of monitoring the progress of judicial reforms.

In more detail, the boards in Chile, Colombia, Costa Rica, Guatemala and Singapore have helped to resolve civil disputes through informal means, mostly in family and commercial related cases. This has enhanced access to justice in civil cases and reduced the frequency of perceived corruption and institutional illegitimacy.

[22] https://www.unodc.org/pdf/crime/gpacpublications/cicp8.pdf

In Costa Rica and Singapore, the boards have also monitored the functioning of pilot courts during judicial reforms. Pilot courts monitored by civil society and within areas where informal dispute resolution mechanisms exist (e.g. the municipal area of San Pablo de Borbur in Colombia) perform better than other courts subject to the same internal reforms but not subject to civil society monitoring. For example, the access to institutions perceived by court users in Guatemala's courts subject to social control is 17.4% higher than in courts not subject to social control bodies such as the ones described. The same applies to differences in perceptions of transparency in court proceedings, differences in administrative complexity and differences in the effectiveness applied to the provision of court services.

MINNESOTA, USA[23]

In Minnesota, a survey in 2000 showed that nearly 40% of those surveyed did not know a lot about the judiciary, and 48% believed it to be out of touch with their communities. 60% stated that access to courts was difficult. 81% believed that court access was not economically affordable.

In order to remedy this situation, steps were taken, including the following:

- Constitution Day: more than 200 judges and practitioners visited several schools to answer the student's questions so they could learn about the judicial system. This day was as an annual event
- Supreme Court outreach expanded: the Chief Justice visits judicial and community organisations every year to answer questions and talk about the judiciary's work and the challenges the judiciary is facing
- inducting new judges into effective community outreach
- translating court forms into plain English
- establishing self-help centres for self-represented litigants
- greater use of the state court website to improve customer service

NIGERIA[24]

[23] http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/pt-c_survey_strategies.pdf

[24] https://www.unodc.org/documents/nigeria//publications/Otherpublications/Strengthening_Judicial_Integrity_and_Capacity_in_Nigeria_progress_Report_1.pdf
https://www.unodc.org/pdf/crime/corruption/nigeria/Progress_Report_2.pdf
https://www.unodc.org/pdf/crime/gpacpublications/cicp8.pdf

In April 2000, a project to assist the Nigerian judiciary at the national and sub-national level was designed. The objective of the Integrity in Judiciary Project in Nigeria was to reintroduce rule of law and public confidence in the judiciary by strengthening its integrity and capacity.

Key reform areas to be addressed:

- generation of reliable court statistics
- enhancement of case management
- reduction of court delays
- increased judicial control over delays
- strengthened interaction with civil society
- enhanced public confidence in the judiciary
- improved terms and conditions of service
- countering abuse of discretion
- promoting merit based judicial appointments
- enhanced judicial training
- development of transparent case assignment system
- introduction of sentencing guidelines
- development of credible and responsive complaints system
- refining and enforce code of conduct

It emerged that the most effective measures implemented in the course of five years consisted of providing the criminal justice system with the very basics, such as funds, equipment, facilities and an adequate remuneration. Such initiatives seem to have succeeded to some degree in bringing judges out of their traditional isolation and contributed to a more effective use of resources and time within the criminal justice process.

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These case histories give ideas for the kind of measures that could be taken on Venezuela's return to the rule of law. The following are proposed:

Steps

1) Consideration should be given to initiatives to restore public faith in the judicial system, not only to reduce extrajudicial violence between citizens, but also to bring good candidates back to the judiciary – one such example is the civil society board outlined above, which is strongly recommended

2) Funds should be used urgently, maybe also given by the international community, to upgrade the physical environment in which judges work, and also to ensure that some of the initiatives undertaken in the examples given above from Minnesota, USA and Nigeria can be translated into the Venezuelan environment at the appropriate time (for instance, outreach by judges, reliable court statistics, enhancement of case management, reduction of court delays etc.)

Annex 1: List or international and regional standards on the judiciary

International

The UN's Basic Principles on the Independence of the Judiciary (1985) (http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx)

The Universal Charter of the Judge (1999) (http://icj2.wpengine.com/wp-content/uploads/2014/03/IAJ-Universal-Charter-of-the-Judge-instruments-1989-eng.pdf)

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