

2012: A year of attacks against judicial independence in Central America

The year 2012 posed numerous challenges for judicial independence in Central America. Recent events highlighted the undue influence of the executive and legislative branches on the work of judges and courts in this region. Because of the growing role of constitutional justice, the most visible attacks were those directed against constitutional courts or chambers.

In April, the Legislative Assembly of **El Salvador** launched an attempt to transfer a magistrate out of the Constitutional Chamber because it disagreed with the decisions of this chamber. In addition, the Assembly refused to comply with two rulings of the Constitutional Chamber which had found that the appointments of justices made in 2006 and 2012 were unconstitutional. It was only after a constitutional crisis which lasted almost two months and involved the Central American Court of Justice, that the Assembly finally appointed these justices in order to end the conflict, although it failed to follow the guidelines set out by the Constitutional Chamber.

In November, the Legislative Assembly of **Costa Rica** decided it would not renew the mandate of one of the justices in the Constitutional Chamber of the Supreme Court, in a vote that has been described by one of the political groups in the Assembly as a “wake-up call” to the Supreme Court that its rulings were inconvenient for some sectors.

In **Honduras**, during a midnight session in early December, the members of Congress ordered the removal of four justices from the Constitutional Chamber of the Supreme Court, just days after the Chamber had issued a ruling that caused discontent among some legislators.

In **Panama**, in 2011 the President of the Republic repealed an executive order which regulated and enhanced the transparency of the selection process for justices, and at present there is no guarantee that only the most qualified candidates will be appointed, as opposed to those who are close to the President. In December 2012, in a process marked by opacity and lack of public participation, President Martinelli appointed one of his closest confidants, the then Attorney General, to the Supreme Court and appointed one of his legal advisors as the new Attorney General.

In **Nicaragua**, where lack of judicial independence has been a longstanding problem, due to evident control of the executive over the judiciary there are at present several provisional judges in the Supreme Court. This is because their terms have expired and no new judges have been appointed to replace them.

In **Guatemala**, the Constitutional Court, which is bound to rule on the constitutionality of the amnesty law, has been under great pressure to depart from previous decisions and grant amnesty to perpetrators of crimes of genocide.

Transparent and merit-based selection of justices: An essential condition for judicial independence

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The independence of the judiciary is indispensable for the existence of a democratic State under the rule of law. Several international instruments, as well as the case law of the Inter-American System, recognize the independence of the judiciary from other branches of government. This independence is also a key principle for ensuring respect for human rights.

Article 14(1) of the International Covenant on Civil and Political Rights and Article 8 of the American Convention on Human Rights recognize **judicial independence as a fundamental right**. In this regard, the Inter-American Democratic Charter provides that “[e]ssential elements of representative democracy include [...] the separation of powers and independence of the branches of government” (article 3), and that “respect for the rule of law on the part of all institutions and sectors of society [is] equally essential to democracy” (article 4).

However, a recent study by DPLF¹ has found that lack of judicial independence and transparency continue to be serious problems in Central America. The absence of judicial transparency has reached dramatic proportions. One of the main difficulties is that there is hardly any information available on the administrative or judicial powers of the justice sector. The problems associated with the former include, inter alia, the procurement decisions of the judiciary, the powers of supreme courts to appoint and promote judges, and internal disciplinary measures. In some countries, the Council of the Judiciary handles some aspects of internal administration, but here supreme courts retain a strong influence in the appointment of judges, often because these courts have the final say on this. Therefore, supreme courts have significant control over the judicial career of lower court judges. Full transparency should be ensured to prevent competent authorities from using this power in an arbitrary fashion, among other things, to press low level public officials.

In a similar vein, DPLF research shows that another critical issue is the state of internal independence in the judiciary. The autonomy of judges is extremely precarious, and supreme courts in the region exercise their authority to influence the work of lower court judges.

The above suggests, then, that in many cases the lack of independence of the judicial branches in the region is linked to the performance of the highest judicial bodies: the supreme courts of justice. But how did we get to this point? The study identified **four common deficiencies concerning justice selection processes in Central America**:

1. The lack of an autonomous and independent body responsible for the selection process;
2. The lack of a clearly pre-established appointment procedure detailing how candidates will be assessed;

¹ Due Process of Law Foundation (DPLF), *Indicadores de independencia y transparencia judicial en Centroamérica*, Washington D.C., DPLF, 2012 (forthcoming).

3. The lack of objective criteria for evaluating candidates; and
4. The lack of transparency in the selection process and, in general, the absence of meaningful civil society participation.

These shortcomings indicate that lightly regulated and weak justice selection and appointment processes, at best, lend themselves to arbitrary decisions and, at worst, result in politicization and appointment of individuals who are not objectively qualified for the position. Experience shows that, in general, Supreme Court justices are appointed based on their personal and political proximity to the status quo rather than on the qualifications of candidates. Moreover, it seems that appointing friends to the judiciary is now one of the main ways in which the political powers interfere with the independence of the judicial branch. To address the weaknesses of the judiciaries in the region, steps must be taken to improve the process for the selection of their highest authorities.

The DPLF has a specific proposition for this: we need clear, participatory and transparent processes which are based on a genuine assessment of applicants. The need for such a procedure emanates from the principles of judicial independence and impartiality. As has been established by the Inter-American Commission on Human Rights (IACHR): “[a]n **appropriate procedure for appointing members of the judiciary, one that is transparent and that guarantees the equality of candidates, is a fundamental guarantee for judicial independence.**”²

The 10th Basic Principle on the Independence of the Judiciary -one of a set of universal principles produced by the UN system– further notes that:

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.³

Although more detailed and specific standards for judicial selection are yet to be adopted, many guiding principles applicable to those processes can be found in international instruments, rulings of the Inter-American Court of Human Rights, and reports by the Inter-American Commission on Human Rights. These principles do not establish a single model for conducting selection processes, as the diversity of countries in the region could discourage the adoption of only one model for all.

Experience demonstrates, however, that the only way to ensure that the most qualified candidates are appointed to high judicial office is by implementing a transparent and rigorous procedure for assessing the abilities of applicants. To do this, the requirements for office must be clearly

² IACHR, *Democracy and Human Rights in Venezuela*, Doc. OEA/Ser.L/V/II, Doc. 54, December 30, 2009, para. 187

³ *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November, 1985 and 40/146 of 13 December, 1985.

established in advance and such requirements should, as far as possible, be objective and address a wide range of individual abilities.

In this regard, the IACHR has stated that:

Although states can devise a range of procedures for appointing judges, the Inter-American Court has ruled that not all procedures satisfy the conditions that the Convention demands for the correct implementation of a truly independent regime.⁴ In appointing members of the judiciary, the procedure must not only ensure that candidates meet professional standards and requirements, it must also guarantee equality of opportunities in access to judicial service.⁵

Each State must reflect on what the role of their Supreme Court should be, where the strengths and weaknesses are, and what qualities a new Supreme Court justice should have. Although the conclusions of such reflections will vary with the context of each country, DPLF believes that some attributes are indispensable for all Supreme Court justices. Similarly, a valid selection process should always meet certain minimum criteria. Therefore, DPLF has set out **Guidelines for a transparent and merit-based system for the appointment of Supreme Court justices.**

With regard to the **selection procedure**, the DPLF considers that:

- The entities responsible for shortlisting the candidates must be **autonomous**;
- The **required qualifications** should be **clearly** detailed and **established in advance**;
- The **selection process**, as well as the responsibilities of all actors engaged in it, should be **clearly established**;
- **Transparency** and **publicity** must be ensured at all stages of the process;
- The selection bodies must offer opportunities for different sectors of society to provide **input** on the candidates, as well as for investigating any challenges made; and
- **Public hearings** must be held with candidates to assess their qualifications.

In order to guarantee that the most capable justices are selected, a candidate should have the following required **qualifications**:

- **Independence and impartiality** (both objective and subjective);
- **Reputable conduct** and a **spotless record of integrity**;
- **Outstanding knowledge of the law** (both for “specialists” and “generalists”);
- Excellent **oral and written communication skills and analytical competency**;
- Highly developed **creative intelligence**;
- **Problem solving** abilities;
- Capacity to **build consensus**;
- Ability to **take into account other people's views**;
- Commitment to the **judiciary as a public institution**;

⁴ Inter-Am. C.H.R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 74.

⁵ IACHR, *Democracy and Human Rights in Venezuela*, 2009, para. 188.

- Commitment to the **protection of human rights, democratic values and transparency**;
- Ability to **understand the social and legal consequences** of judicial decisions; and
- Ability to strike a sound **balance** between a high level of **productivity**, the **legal quality** of judicial decisions and **careful consideration** of the cases.

Only by improving the selection method for Supreme Court justices and enhancing the quality and independence of these courts will we be able to cope with other issues of judicial independence (such as the judicial career, the internal disciplinary system and judicial transparency) and strengthen judicial branches in the region. A better regulation of these processes that is consistent with the above guidelines will be an important first step in this direction. However, it must be stressed that such measures will only achieve the intended results if all actors engaged in the process follow those standards and have a genuine interest in selecting the best candidates.

This is illustrated by the experience in Guatemala. A rather sophisticated selection method has been implemented in this country, including a cross-sector Appointment Committee responsible for assessing the abilities of candidates; however, as long as other powers continue to influence the composition of such committee and the scores obtained by candidates in the assessment are not taken into account, it is not the most capable candidates who will be appointed but rather those with links to such powers. These issues have been addressed in the articles by Annabella Morfín (on Guatemala) and Luis Pásara (on the situation in the hemisphere) featured in this magazine. Clearly, transparency and citizen engagement will be essential to overcome these problems, as noted by Álvaro Herrero, who explains how the civil society in Argentina has set about this task with positive results. But civil society involvement is not always easy, as shown in David Lovatón's contribution on the obstacles to effective civil society participation in the appointment of judges in Peru.

DPLF will continue working on the development of better standards for high-court justice selection processes both nationally and internationally.

Editorial

The year 2012 posed numerous challenges for judicial independence in Latin America. Recent events highlighted the undue influence of the executive and legislative branches on the work of judges and courts in this region. Because of the growing role of constitutional justice, the most evident attacks, particularly in Central America, were those directed at constitutional courts or chambers.

Against this backdrop, the undue political influence of the executive and legislative branches in the appointment, reelection or removal of high court magistrates and justices (of supreme courts and constitutional courts) has emerged as a consistent pattern in the region. Why this interest in interfering with the appointment of members of such courts? Because of the broad power they exercise in the justice and administrative sectors, these courts not only are the last resort for judicial cases, but also can strike down laws as unconstitutional, as in the case of the constitutional courts or chambers. Additionally, courts at the top of the judicial structure – like the supreme courts – have far-reaching administrative and government powers including, in some cases, the appointment and dismissal of lower-court judges, as well as final authority in disciplinary matters.

It is past time to do away with opaque processes which are not open to public scrutiny and can only lead to hasty appointments based exclusively on the candidate's proximity to the powers that be. The civil society should promote the implementation of transparent, participatory and merit-based selection processes. Evidence drawn from comparative experiences shows that enhancing the transparency of these processes can help reduce opportunities for undue influence.

This issue of *AportesDPLF* is dedicated mostly to this topic, and includes articles describing the state of affairs in Argentina, Bolivia, Peru and Guatemala, as well as a paper discussing the main problems with the election process for supreme court justices, and another on the significance of judicial independence for strengthening the rule of law.

Recognizing its fundamental role, we decided to include in this edition several articles about the selection procedure for members of the International Criminal Court and the Inter-American Commission and Court of Human Rights. We believe that through our experience in monitoring the procedures for the appointment of national-level judges, DPLF has developed valuable tools which could contribute significantly to the selection of these international officials; hence the decision to explore the topic in this issue.

We also discuss attacks against judicial independence and their impact on pretrial detention, a subject that DPLF started working on during the past year. Finally, as part of our work on extractive industries and human rights, we have featured an article on the situation in Latin America, and a piece about the recent ruling of the Inter-American Court in the Sarayaku case. We close this edition with an interview with the new Executive Secretary of the Inter-American Commission on Human Rights, Emilio Álvarez Icaza.

We trust that this issue will be of interest to you and, as usual, we look forward to your feedback.

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