

# JUDICIAL INDEPENDENCE IN LATIN AMERICA

THE IMPLICATIONS OF TENURE AND APPOINTMENT PROCESSES

*LA INDEPENDENCIA JUDICIAL EN AMÉRICA LATINA*

*Las consecuencias de la permanencia en el cargo y los procesos de designación judicial*

*A INDEPENDÊNCIA JUDICIAL NA AMÉRICA LATINA*

*As implicações da vitaliciedade e os processos de nomeação*

**Bingham Centre for the Rule of Law**

Revised - October 2016

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**MUÑOZ**

**Citation:** This report should be cited as: J van Zyl Smit, *Judicial Appointments in Latin America: The Implications of Tenure and Appointment Processes*, Bingham Centre for the Rule of Law, (Revised – October 2016).

A first version of this report was published in April 2016.

**ISBN:** 978-1-905221-71-4

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**Acknowledgements:** The Bingham Centre is grateful for the generous financial support for this project provided by José Antonio Muñoz, Muñoz Global, [www.MunozGlobal.com](http://www.MunozGlobal.com) together with its partners in the Rule of Law Alliance. At the Bingham Centre, our thanks to Holly Buick for research assistance, to interns Sapna Raheem and Maria Teresa Rovitto for undertaking background research, and Julio Ríos-Figueroa, Jessica Walsh, Carolina Muñoz and German Rojas Mora who provided comments on a draft.

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**Translations:** This report was written in English and translated into Spanish. The executive summary has also been translated into Portuguese. The original report and the translations are available from the web sites of the Bingham Centre and Muñoz Global.

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# FOREWORD / PREFACIO / PREFÁCIO

Muñoz Global is proud to contribute to the promotion of the rule of law culture in Latin America. The alliance with the Bingham Centre for the Rule of Law and being part of this important research is the starting point in developing our aspiration to create awareness, establish rule of law KPIs, influence public policy and develop compliance certification tools. We strongly believe the rule of law is an instrument of empowerment and accountability that will benefit everyone.

Our hope is that the best practices shared in this publication will contribute to the sustainable economic and social development of Latin America.

Muñoz Global está orgulloso de poder contribuir a la promoción de la cultura de la legalidad en América Latina. Nuestra asociación con el Centro Bingham para el Estado de Derecho (Bingham Centre for the Rule of Law, en inglés) y ser parte de esta importante investigación es el punto de inicio de nuestra aspiración por crear conciencia, establecer indicadores clave de desempeño sobre el Estado de Derecho, influir en las políticas públicas y desarrollar herramientas de certificación de cumplimiento. Creemos firmemente que el Estado de Derecho es un instrumento de empoderamiento y de rendición de cuentas que puede beneficiar a todos.

Esperamos que las mejores prácticas que compartimos en esta publicación contribuyan al desarrollo económico y social sustentable de América Latina.

Muñoz Global orgulha-se de contribuir para a promoção da cultura do Estado de Direito na América Latina. Sua aliança com o *Bingham Centre for the Rule of Law* e sua participação nesta importante pesquisa constituem o ponto de partida para o desenvolvimento da nossa aspiração de promover a conscientização, estabelecer KPIs (*Key Performance Indicators*, Indicadores Chave de Desempenho) do Estado de Direito, influenciar políticas públicas e desenvolver ferramentas de certificação de conformidade. Acreditamos firmemente que o Estado de Direito é um instrumento de empoderamento e responsabilização que beneficiará a todos.

Esperamos que as melhores práticas compartilhadas nesta publicação contribuam para o desenvolvimento econômico e social sustentável da América Latina.

José Antonio Muñoz, Managing Partner, Muñoz Global  
San José, Costa Rica, October 2016

# EXECUTIVE SUMMARY

## JUDICIAL INDEPENDENCE IN LATIN AMERICA

### The Implications of Tenure and Appointment Processes

This report examines some of the main ways legal systems can support and maintain judicial independence, a vital element of the rule of law. It considers the approach of Latin American jurisdictions in light of international principles. The report was written for a Bingham Centre for the Rule of Law conference, “Rule of Law Challenges in Latin America: Corruption and Judicial Independence”, held in São Paulo in April 2016. It was presented as part of a panel discussion on judicial independence, in which regional experts underscored the complexity of judicial independence challenges in the region as well as the significance of debates about tenure and appointment processes.

#### Judicial independence

The rule of law depends on judicial independence in at least three senses: the actual independence of judges who adjudicate without fear or favour to anyone, including the government; the perceived independence that gives members of the public the confidence to submit their disputes to judicial resolution; and legal safeguards which support both actual and perceived independence. This report focuses on two principal types of legal safeguards, those relating to tenure and appointment processes.

#### Tenure

Since the *UN Basic Principles on the Independence of the Judiciary* (1985) it has been recognised as an international norm that judges are entitled to “guaranteed tenure” for their “term of office”. This contemplates both fixed-term and permanent appointments but international opinion has become increasingly critical of the lack of job stability and conflicts of interest to which fixed-term appointments give rise, particularly if they are renewable.

Judicial tenure in Latin America has attracted both concern and innovative responses:

- Permanent appointments are rare at the highest level. There are no permanent appointments to constitutional courts except in Brazil, and only Argentina, Brazil and Chile appoint Supreme Court judges permanently.
- One response to the problem of judicial tenure in the highest courts is to provide for automatic renewal of appointments, as in Costa Rica’s Supreme Court. Another, more common response is to delay or prohibit reappointment.
- Judges in other courts also report insecurity of tenure as one of their leading concerns. The practice of appointing a large proportion of temporary or provisional judges is particularly troubling as it undermines tenure protections and thus judicial independence.

#### Appointment processes

International norms on the appointment of judges are undergoing rapid development. Currently, these require: detailed criteria to promote selection on merit and judicial diversity; an independent appointment body such as a judicial council to depoliticise appointments; rigorous and fair assessment of candidates against published criteria; and transparency to both prospective candidates and the general public.

Judicial appointment processes vary widely across Latin America:

- Appointments to the highest courts (supreme and constitutional) are still mostly in the hands of the political branches of government, with some safeguards.

- Requiring a legislative supermajority to confirm candidates can be an effective measure to reduce the influence of partisan politics when combined with greater transparency, as seen in the Supreme Courts of Argentina and Costa Rica.
- Some judicial councils assess candidates for the highest court, but their performance has been criticised in some cases, notably for political interference and lack of transparency in Guatemala and Honduras.
- Appointments to other courts are now made by judicial councils in many countries. Their composition varies widely, from Costa Rica, where the Supreme Court remains dominant, to Argentina, where there have been multiple attempts to increase the number of political representatives on the judicial council. Judicial councils are expected to conduct open competitions in which eligible candidates are assessed against the criteria for judicial office, and efforts to improve their objectivity and transparency have been seen in many jurisdictions.

Judicial tenure and appointments processes are areas of intense contestation in many Latin American states. Areas in which a number of jurisdictions depart from international norms, such as the continuation of fixed-term rather than permanent appointments and the limited role of judicial councils in making senior appointments, are coming under increasing scrutiny. This presents an opportunity to re-examine and strengthen safeguards that provide crucial support for judicial independence in practice.

# RESUMEN EJECUTIVO

## LA INDEPENDENCIA JUDICIAL EN AMÉRICA LATINA

### Las consecuencias de la permanencia en el cargo y los procesos de designación judicial

Este informe analiza algunas de las principales formas en que los sistemas legales pueden contribuir a fortalecer y mantener la independencia judicial, elemento fundamental del estado de derecho. En particular, el informe considera las jurisdicciones latinoamericanas a la luz de los principios internacionales en la materia. El informe fue escrito para ser presentado en la conferencia de El Centro Bingham para el Estado de Derecho, *Rule of Law: Retos para América Latina: Corrupción e Independencia Judicial*, realizada en São Paulo en Abril del 2016. Se presentó como parte del panel sobre independencia judicial, en el cual expertos regionales recalcaron la complejidad de los problemas de independencia judicial en la región así como la importancia de los debates sobre los procesos de designación y permanencia de los jueces.

#### Independencia Judicial

El estado de derecho depende de la independencia judicial en al menos tres formas: la independencia real de los propios jueces, que les permite emitir sentencias sin miedo y sin beneficio a nadie, incluyendo el gobierno; la independencia percibida que da a la ciudadanía la confianza de llevar sus disputas ante un juez; y a través de garantías legales que sostienen tanto a la independencia real como a la percibida. Este informe se enfoca en dos tipos principales de garantías legales: las relacionadas con la permanencia en el cargo y las vinculadas al proceso de designación judicial.

#### Permanencia

Desde la adopción por parte de la ONU de los *Principios básicos relativos a la independencia de la judicatura* en 1985, se ha reconocido como norma internacional que se “garantizará la permanencia en el cargo de los jueces por los periodos establecidos”. Esto incluye a los nombramientos permanentes y a nombramientos por periodos específicos. Sin embargo, la opinión internacional se ha vuelto cada vez más crítica ante la falta de estabilidad laboral y los conflictos de interés que se derivan de los nombramientos por periodos específicos, particularmente si este mandato es renovable.

La duración de los cargos judiciales en América Latina ha traído tanto preocupaciones como respuestas innovadoras:

- En el más alto nivel judicial, los nombramientos permanentes son poco comunes. Las cortes constitucionales de la región no cuentan con nombramientos permanentes con la excepción de Brasil. Solamente Argentina, Brasil y Chile nombran de manera permanente a sus ministros de la Suprema Corte.
- Una respuesta al problema de permanencia en el más alto nivel judicial ha sido la renovación automática de los nombramientos, como ocurre en la Corte Suprema de Costa Rica. Una respuesta más común, en cambio, es demorar o prohibir la renovación del cargo.
- Jueces en otras instancias señalan que una de sus preocupaciones principales tiene que ver con la falta de seguridad en la permanencia de su cargo. El nombramiento de un buen número de jueces temporales o provisionales es de especial cuidado, ya que daña la protección del cargo y con ello la independencia judicial.

#### Procesos de designación

Las normas internacionales sobre la designación de jueces están viviendo una etapa de rápido desarrollo. En la actualidad, estas normas incluyen contar con: criterios detallados para promover la

selección a partir del mérito y la diversidad judicial; un órgano independiente (como un consejo judicial) para evitar la politización de los nombramientos; evaluaciones rigurosas y justas de los candidatos frente a criterios públicos; y transparencia para potenciales candidatos y el público en general.

Hay una gran variedad de procesos de designación judicial en América Latina:

- Las designaciones para las cortes más altas (Corte Suprema y Constitucional) siguen en su mayoría en manos de las ramas políticas del gobierno, aunque ciertas garantías son aplicadas.
- Requerir mayoría calificada en el legislativo para la confirmación de los candidatos a la judicatura –en combinación con una mayor transparencia en el proceso- puede ser una medida efectiva para reducir la influencia de la política partidaria, como sucede en la Suprema Corte de Argentina y Costa Rica.
- En algunos casos, los consejos judiciales son los órganos encargados de evaluar a los candidatos para la judicatura más alta. Sin embargo, su desempeño ha sido criticado principalmente por interferencias política y falta de transparencia, notablemente en los casos de Guatemala y Honduras.
- En cambio, en muchos países, los consejos judiciales participan en las designaciones para otros cargos. La integración de éstos varía de manera importante y va desde Costa Rica, donde la Suprema Corte tiene un papel dominante, hasta Argentina, donde han habido varios intentos para incrementar el número de representantes políticos en el consejo judicial. Se espera que los consejos judiciales realicen procesos abiertos en donde los candidatos elegibles son evaluados a partir de criterios establecidos para el puesto y muchas jurisdicciones han realizado esfuerzos por mejorar su objetividad y transparencia.

La permanencia en el cargo y los procesos de designación judicial son áreas de intenso debate en muchos países de América Latina. Las áreas en que algunas jurisdicciones se apartan de las normas internacionales, como la renovación de cargos por periodos específicos, en lugar de contar con nombramientos permanentes, y el papel limitado de los consejos judiciales en la designación de jueces al más alto nivel, son sometidas cada vez más a un mayor escrutinio. Esto presenta una oportunidad para reexaminar y fortalecer las garantías que otorgan un apoyo fundamental a la independencia judicial en la práctica.

# SUMÁRIO EXECUTIVO

## A INDEPENDÊNCIA JUDICIAL NA AMÉRICA LATINA

### As implicações da vitaliciedade e os processos de nomeação

Este relatório tem como finalidade examinar algumas das principais formas através das quais os sistemas jurídicos protegem e mantêm a independência judicial, um elemento essencial do estado de direito. Nele são abordadas as jurisdições latino-americanas à luz dos princípios internacionais. O relatório foi escrito pelo *Bingham Centre for the Rule of Law* em preparação para a conferência intitulada “Desafios ao Estado de Direito na América Latina: Independência Judicial e Corrupção”, realizada em São Paulo em Abril de 2016. Foi apresentado durante um painel no qual especialistas regionais ressaltaram a complexidade dos desafios para a independência judicial na região, assim como a importância dos debates acerca da vitaliciedade e os processos de nomeação de juízes.

#### A independência judicial

O estado de direito depende da independência judicial em pelo menos três sentidos: a independência efetiva dos magistrados que proferem decisões sem receios nem favorecimento a ninguém, inclusive ao governo; a percepção de independência que dá ao público confiança para encaminhar questões controversas à solução judiciária; e as salvaguardas jurídicas que protegem tanto a percepção de independência como sua real aplicação. Este relatório aborda dois tipos principais de salvaguarda jurídica, as quais referem-se à vitaliciedade e aos processos de nomeação.

#### A vitaliciedade

Desde a criação dos Princípios Básicos sobre a Independência do Judiciário das Nações Unidas (1985), reconhece-se como norma internacional que os magistrados têm direito à “garantia de vitaliciedade” inerente “ao exercício do cargo”. Isso abrange tanto as indicações para mandato por tempo determinado quanto permanentes, mas as críticas internacionais têm aumentado em relação à falta de estabilidade no cargo e conflitos de interesse ensejados pelas indicações para mandato por tempo determinado, especialmente se forem renováveis.

A vitaliciedade judicial na América Latina tem gerado preocupações e reações inovadoras:

- As nomeações permanentes são raras nas mais altas instâncias. Não existem nomeações permanentes para tribunais constitucionais e somente a Argentina, o Brasil e o Chile nomeiam Ministros para o Supremo Tribunal com mandato permanente.
- Uma das respostas ao problema da vitaliciedade em cortes superiores é permitir a renovação automática das nomeações, como no Supremo Tribunal do Costa Rica. Outra, mais comum, é adiar ou proibir a renomeação.
- Os juízes de outros tribunais também relatam a insegurança da vitaliciedade como sendo uma das suas preocupações principais. A prática da nomeanomeação de um grande número de juízes temporários ou provisórios tem sido especialmente preocupante, pois isso enfraquece a proteção da vitaliciedade e, conseqüentemente, a independência judicial.

#### Os processos de nomeação

As normas internacionais relativas à nomeação de juízes vêm sofrendo um rápido desenvolvimento. Atualmente, essas normas exigem: critérios detalhados de seleção de promoção baseados em mérito e diversidade judicial; um órgão de nomeação independente, como um conselho judicial que despolicite as nomeações; avaliação rigorosa e justa dos candidatos com relação aos critérios publicados; e transparência para com os futuros candidatos e o público em geral.

Os processos de nomeação judicial variam enormemente na América Latina:

- As indicações para os tribunais de justiça mais altos (Supremo e Constitucional) ainda estão em sua maioria nas mãos de partidos políticos do governo, com algumas salvaguardas.
- Requerer a maioria absoluta extraordinária no Legislativo para a confirmação de candidatos pode ser uma medida eficaz para a redução da influência da política partidária quando combinado com mais transparência, como se vê na Corte Suprema de Justiça da Argentina e da Costa Rica.
- Alguns conselhos judiciais avaliam os candidatos para a mais alta corte, mas o seu desempenho tem sido criticado em alguns casos, especialmente pela interferência política e falta de transparência, como nos casos da Guatemala e Honduras.
- Atualmente, em muitos países as nomeações para outros tribunais de justiça são feitas por conselhos de justiça. Sua composição varia enormemente, da Costa Rica, onde a Suprema Corte permanece dominante, à Argentina, onde tem havido inúmeras tentativas de se aumentar o número dos representantes políticos no conselho judicial. Os conselhos judiciais buscam realizar concursos abertos através dos quais os candidatos qualificados possam ser avaliados de acordo com critérios específicos para o cargo de juiz, tendo sido observada uma maior objetividade e transparência em várias jurisdições.

A vitaliciedade judicial e os processos de nomeação são áreas intensamente contestadas em vários estados latino-americanos. Áreas em que inúmeras jurisdições inspiram-se em normas internacionais, como a da continuação do mandato fixo em vez de indicações permanentes e a do papel limitado dos conselhos judiciais na nomeação de juízes sob o critério de antiguidade, têm sido objeto de um escrutínio crescente. Isso representa uma oportunidade para o reexame e o fortalecimento das salvaguardas que fornecem a proteção fundamental para a independência judicial na prática.

# 1. INTRODUCTION

1. The rule of law<sup>1</sup> is the foundation of a society that respects everyone's equal dignity and an essential feature of development, including economic development. The rule of law supports respect for equal human dignity because it requires a system of accessible and predictable law, equally enforced, where people can challenge decisions made about their lives by appealing to universal standards of human rights and receive a fair hearing before an independent court or tribunal. The rule of law assists the operation of free markets and the stability of commercial arrangements through clear, non-discriminatory, non-retroactive legislation, respect for corporate legal personality and property rights, neutral courts and clear and fair processes for the determination of rights and obligations.
2. The rule of law is profoundly important to sustainable development. It provides local communities, national governments and international investors with stable and secure justice institutions. It underpins legal certainty, effective dispute resolution, laws and practices that are resistant to corruption, sound public decision making and the ability of all – including the poorest and most vulnerable – to challenge and obtain a remedy for the infringement of rights and the abuse of power.
3. Independent judiciaries are fundamental to the maintenance of the rule of law. This is so in Latin America, no less than anywhere else in the world. Of course, what makes a judiciary independent will vary from country to country. It will depend on many factors, including – but by no means limited to – the constitutional arrangements of the arms of government, the court structure and the culture of the legal profession as well as many non-legal historical,

**The rule of law is the foundation of a society that respects everyone's equal dignity and is an essential feature of development, including economic development.**

**It underpins legal certainty, effective dispute resolution, laws and practices that are resistant to corruption, sound public decision making and the ability of all – including the poorest and most vulnerable – to challenge and obtain a remedy for the infringement of rights and the abuse of power.**

**Independent judiciaries are fundamental to the maintenance of the rule of law.**

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<sup>1</sup> For a discussion of the similarities and differences between the 'rule of law' and the Spanish concept of 'estado de derecho', and their respective origins in common law and civil law systems, see Antonio Carlos Pereira Menaut, 'Estado de derecho y rule of law' (2014) 147 Nueva Revista de Política, Cultura y Arte.

social and economic factors. However, even though there are contextual differences, there are also unifying threads and international standards that make it essential to examine issues at supranational and regional levels.

4. To that end, in this study, we examine two related factors in the Latin American context, and explore their implications for judicial independence:
  - The tenure of judicial appointments
  - The processes for judicial appointments

Both are crucial in ensuring judicial independence and in ensuring that the rule of law is part of the constitutional and democratic bedrock of a country.

5. The methodology of this study is international and comparative. Our starting point is the body of international principles found in instruments such as the *UN Basic Principles on the Independence of the Judiciary* at a global level, and an ever-increasing number of similar regional norms, both in the Americas and in other parts of the world. The constitutional and legal frameworks of Latin American jurisdictions are examined in the light of these international principles. We have confined our study to continental Latin American jurisdictions to the south of, and not including, Mexico. In our research we drew on the rich literature on judicial independence in the region. We sought to balance breadth of coverage across the region with more detailed consideration of the position in selected countries where the issues have been widely discussed and which exhibit a range of different approaches. These include the three largest jurisdictions in the region in terms of population: Argentina, Brazil and Colombia, and three smaller jurisdictions in Central America – Costa Rica, Guatemala and Honduras – chosen in order to understand the dynamics of judicial systems of a similar size and geographic location.
6. The starting point for the analysis and subject of Part 2 is a consideration of what “judicial independence” means, the different ways in which it is important, and why tenure and appointment processes are important.
7. Parts 3 and 4 then examine tenure and appointment processes respectively, looking at international standards and at the different positions in the highest courts, typically supreme and constitutional courts, as against those in other courts. Those other courts may themselves be superior courts of considerable influence and importance, but the complexion of tenure, appointments processes and (real or perceived) relationships with the executive branch of government is often very different in the highest courts than in other courts, thus the delineation in the consideration of them here.
8. The conclusions in Part 5 draw together the connections between tenure and appointments processes and look directly at the implications for judicial independence. Among the arguments, and perhaps the most significant and distinctive point to be made, is that sound judicial tenure and appointment processes do not merely ensure the individual and institutional judicial independence that is pivotal to the maintenance of the rule of law. They do much more than this: they are a concrete foundation for public trust in the institutions and operations of government. They serve as a bulwark against the loss of popular and democratic faith in the functioning of the state, especially in the face of institutional or individual failures in any branch of government. They are not the only safeguards needed, nor perhaps even the most important, but they are essential and their importance, too often overlooked, should be recognised and attended to.

## 2. JUDICIAL INDEPENDENCE

9. Judicial independence is deceptively complex. It is too easy to presume it means the same thing in different jurisdictions and to presume that, even within any single jurisdiction, everyone considers it to mean the same thing. In this Part we explain some of its different meanings and set about defining how it can be most usefully understood. We then explain why tenure and appointments warrant attention in attempts to establish and maintain independent judiciaries.

### A. What is judicial independence?

10. The term “judicial independence” has many different meanings. While rooted in theories of fair adjudication and the separation of powers, it can be applied to the flesh-and-blood judges of a jurisdiction in at least three different ways:
- First, it may describe **judges who in fact adjudicate impartially** the cases before them and who are not motivated by fear or favour of anyone, not even the most powerful figures in government.
  - Secondly, in a wider sense, it can refer to a situation in which **judges are generally perceived and trusted by the public to adjudicate in the way** described above, so that it can be said that there is public confidence in a judiciary that is independent of the other branches of government.
  - A third, and also very common way of using the phrase “judicial independence” is to denote certain **legal safeguards under which judges hold office**, in the constitution or other legal frameworks. These could be, for example, provisions guaranteeing the security of tenure of judges or prohibiting the reduction of their salaries.
11. To avoid confusion among these different meanings, it is important to know why we are interested in judicial independence in a particular context. In this report, as in other work which the Bingham Centre has undertaken on judicial independence, our focus is on the rule of law.<sup>2</sup> How can judicial independence in these various senses support and strengthen the rule of law? It is obviously useful and indeed necessary to have judges who are actually independent in the first sense identified above. Provided that they are also competent, such judges can be relied upon to ensure that the law is applied properly and accurately in those cases that reach the courts. Judicial independence in the second sense of a judiciary which is generally perceived by the public to adjudicate independently is also important for the rule of law. Imagine a situation – and it may not be difficult – in which the honest and legally correct efforts of judges are not trusted, and in which it is easy to

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<sup>2</sup> J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of research undertaken by the Bingham Centre for the Rule of Law), Commonwealth Secretariat, 2015.

spread rumours that the courts are biased or corrupt. The consequences of a lack of public confidence in the independence of the judiciary can be serious. Politicians may feel that they will not suffer any damage to their reputations if they ignore court rulings, and citizens may turn away from the courts, refusing to submit their disputes to them, to inform the police about suspected crimes or testify as witnesses. In such situations, informal dispute resolution and violent self-help become more attractive, and submission to forms of individual, state or corporate power that are maintained by force or coercion becomes more likely, to the detriment of the rule of law.

12. Where does this leave judicial independence in the third sense of legal safeguards? It is in looking at this sense of judicial independence, and its relationship to the first two senses of judicial independence, that we begin to see why tenure and appointment processes matter.

## **B. Why are tenure and appointment processes important?**

13. Where does this leave judicial independence in the third sense, referring to legal safeguards? It is sometimes said that legal safeguards are not valuable in themselves, but only instrumentally, to the extent that they make it easier to create and sustain a body of judges who display actual independence in the first sense.<sup>3</sup> According to this argument, if certain legal safeguards are enshrined in law and respected in practice, that will contribute to creating conditions in which actual judicial independence (judicial independence in the first sense) is more likely to flourish. For example, if the security of tenure of judges is protected by making it difficult to remove them from office, then judges will have less reason to fear arbitrary dismissal, which makes it easier for them to reach decisions which they know will be unpopular with the government or with the government's supporters among the voting public.
14. In addition, legal safeguards have the potential to strengthen public perceptions of judicial independence, either because people notice that actual independence of judges has in fact improved, or because people find it reassuring that a particular safeguard exists – for example security of tenure. In other words, legal safeguards send a signal that the state is committed to securing judicial independence, and citizens interpret this signal as a reason to be more optimistic about how judges will behave. Such connections between legal safeguards and judicial independence in the second, wider sense are less frequently discussed. However, because they relate to public confidence in the judiciary, which is of practical importance for the rule of law, the potential indirect benefits of legal safeguards will be examined further in this report.

**If the security of tenure of judges is protected by making it difficult to remove them from office, then judges will have less reason to fear arbitrary dismissal, which makes it easier for them to reach decisions which they know will be unpopular with the government.**

**Legal safeguards can strengthen public perceptions of judicial independence and thus public confidence in the judiciary, which, in turn, makes it more likely that judges will show actual independence.**

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<sup>3</sup> Peter Russell, 'Towards a General Theory of Judicial Independence' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, University of Virginia Press, 2001, 3.

15. None of this is to say that legal safeguards for judicial independence are sufficient on their own to ensure that the judges of a particular jurisdiction will achieve either actual or perceived judicial independence. It is immediately apparent that if the safeguards exist only on paper and not in practice, then they will not create favourable conditions for independent judges to flourish. For example, if a government shows that it is willing to circumvent onerous removal procedures by forcing judges to resign through intimidation or other forms of pressure, then judges will not feel that it is safe to issue unpopular rulings. But even if legal safeguards are respected in practice, they provide no guarantee that most judges will rise to the occasion and behave in a manner that is actually independent. Many things can still go wrong. Corruption is perhaps the most obvious danger. Other dangers include incompetence, a lack of adequate legal training, and an attachment to ideology that is stronger than the judge's attachment to the law. The underlying causes of such problems are often complex and depend on the local manifestations of a wide range of social, political and economic factors. These include: the political power structure; legacies of recent conflict; the traditions and ethics of the practising legal profession; systems of legal education; and the wider legal culture.

16. The aims of this study are limited to examining how legal safeguards are capable of strengthening judicial independence in Latin America. The report does not delve into the full complexity of the social, political and economic factors that influence the actual independence of the judiciary in individual jurisdictions. Such research would require in-depth study of each jurisdiction examined and is beyond the scope of the present project. What the report does is to examine the legal safeguards that presently exist in the light of international norms and trends in other regions of the world. This comparative method is used both to analyse recent reforms which Latin American jurisdictions have adopted with the stated objective of strengthening judicial independence, and to consider whether there is room for further improvement in some instances.

17. There are many different legal safeguards that can play a role in fostering judicial independence. This report concentrates on safeguards that apply in two main areas: judicial tenure, and the process by which judges are appointed. It does not deal with other legal safeguards that are also of considerable importance, such as disciplinary procedures that lead to the sanctioning or removal of a judge; the extent to which judges are immune from civil or criminal proceedings; guarantees of the adequacy and non-reduction of judicial remuneration; or areas of judicial autonomy in the administration of the courts and the setting of court budgets.

18. **Judicial tenure** is the first theme of the study because it is fundamental to the most common international understanding of what it means to be a judge. The *UN Basic Principles on the Independence of the Judiciary* (1985) state:

This report looks at the legal safeguards that presently exist in Latin America and examines them in the light of international norms and trends in other regions of the world.

It analyses recent reforms which Latin American jurisdictions have adopted with the stated objective of strengthening judicial independence, and considers whether there is room for further improvement in some instances.

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.<sup>4</sup>

There is a great deal to be said about what “guaranteed tenure” means, and how it affects judicial independence. Much of this concerns the need for rigorous safeguards in the process by which judges are liable to be disciplined or removed from office. There is no doubt that this raises important questions in many parts of Latin America where judicial removals have been a frequent occurrence, and threats to remove judges even more frequent. However, judicial discipline is not the subject of the present paper, as it is of itself a distinctive area, and an area that is receiving considerable attention.<sup>5</sup> Our focus, instead, is on examining the period for which judges are appointed, as well as the use of temporary judges in parallel with those who are granted tenure. We pay particular attention to the legal periods of appointment for judicial positions in the court systems of various Latin American jurisdictions, and address one of the especially troubling issues, which is the extent to which these periods – which should constitute safeguards – can be circumvented by appointing a temporary or an acting judge. Our question is how well suited are these legal frameworks to promoting the actual and perceived independence of the judiciary.

19. The second theme of the study is the **processes by which judges are appointed**. The *UN Basic Principles* declare that:

Any method of judicial selection shall safeguard against judicial appointments for improper motives.<sup>6</sup>

Appointing judges for reasons of corruption or patronage would be contrary to this principle. The principle also requires that those appointed should be “individuals of integrity and ability with appropriate training or qualifications in law”, selected without discrimination.<sup>7</sup> Once again, our interest is in legal safeguards within the appointment process that have the potential to improve the actual or perceived independence of the judges who are appointed. This leads us to consider the roles of different branches of government, and specialist bodies such as judicial councils, in the recruitment, shortlisting, selection and confirmation of candidates for judicial office. We also consider measures to increase the transparency of the process and the criteria that are used, as well as methods designed to ensure that candidates are evaluated as objectively as possible against such criteria.

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<sup>4</sup> *UN Basic Principles on the Independence of the Judiciary*, 1985, Principle 12. The Principles were adopted by the Seventh UN Congress on the Treatment of Offenders (Milan, 1985) and endorsed by General Assembly (GA Res 40/32, 29 Nov 1985; GA Res 40/146, 13 Dec 1985): <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. This and all subsequent URLs accessed April 2016.

<sup>5</sup> At the conference at which this report was launched (*Rule of Law Challenges in Latin America: Corruption and Judicial Independence*, São Paulo, Brazil, 18-19 April 2016), the paper presented alongside it dealt with that very issue: Jessica Walsh, International Bar Association Human Rights Institute, ‘The Politicisation and Abuse of Judicial Accountability in Latin America’.

<sup>6</sup> *UN Basic Principles*, Principle 10.

<sup>7</sup> *UN Basic Principles*, Principle 10.

### 3. TENURE

20. How long should judicial appointments last, and how does their duration affect judicial independence? There is a vast diversity of practice with respect to how long appointments can and do last. However, if practice should be guided by principle then the body of international standards is the starting point.

#### A. International principles

21. The *UN Basic Principles on the Independence of the Judiciary* provide perhaps the clearest and most universally agreed statements of principle to which states have committed. As noted above, they require “guaranteed tenure until a mandatory retirement age or the expiry of their term of office”.<sup>8</sup> The phrase “term of office” indicates that appointment should be for a definite period, determined in advance. But the *UN Basic Principles* do not deal explicitly with the duration of judicial appointments.
22. It is widely recognized, however, that appointments for a short period of time can be problematic. According to the UN Special Rapporteur on the Independence of Judges and Lawyers, “a short term for judges weakens the judiciary, affects their independence and their professional development”.<sup>9</sup> The Inter-American Commission on Human Rights reached the same conclusion in 2013, finding that “an established and sufficiently lengthy term gives the justice operator the sense of job stability needed to perform his or her functions with a sense of independence and autonomy, without succumbing to pressure or having to fear that the appointment still has to be confirmed or ratified.”<sup>10</sup> The Inter-American Commission is of the view that longer appointments give judges a form of stability that lowers the costs of displaying actual independence, even if this involves making unpopular decisions.

**It is clear from the UN Principles that appointment should be for a definite period, determined in advance.**

**As the Inter-American Commission on Human Rights has noted, appointments for short periods of time diminish the stability required to carry out judicial functions properly, weakening judicial independence and autonomy.**

<sup>8</sup> *UN Basic Principles*, Principle 12.

<sup>9</sup> *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 24 March 2009, A/HRC/11/41, [54].

<sup>10</sup> Inter-American Commission on Human Rights, *Guarantees for the Independence of Justice Operators: Towards strengthening of access to justice and the rule of law in the Americas* OEA/Ser.L/V/II ('IACHR Guarantees Report'), 5 December 2013, [154].

23. A second and related problem occurs when judges are eligible for renewal of their appointments when their terms of office expire. The UN Special Rapporteur has highlighted that renewal is particularly problematic when it involves members of the executive branch of government reviewing the judge's record,<sup>11</sup> and the Inter-American Commission has noted that it is problematic for judges to face the prospect of being re-elected.<sup>12</sup> Once again, it is clear that actual independence is at risk if judges have reason to fear that any unpopular decisions they make will have consequences at the renewal stage
24. An example of this problem has occurred in Costa Rica. In that jurisdiction, judges of the Supreme Court are appointed for a term of eight years, which is automatically renewed unless there is a vote in Congress to bar their re-appointment (for which a two-thirds majority is required). In 2012, for the first time in the history of the country, a judge (Justice Fernando Cruz of the Constitutional Chamber) was refused re-appointment in this way. Members of Congress justified their decision as a "wake-up call" which aimed to "restore the primacy of the Legislative Assembly among the branches of government".<sup>13</sup> Some members of Congress sought to use the denial of re-appointment as a means of combating what they saw as the Constitutional Chamber exceeding its powers, while others were critical of how Justice Cruz had voted in certain cases of national importance.<sup>14</sup>
25. An obvious way of addressing both problems is to require judicial appointments to be permanent (subject to a standard age of retirement). The General Assembly of the Latin American Federation of Judges has called for permanent appointments in its Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (the "Campeche Declaration"), stating that judges "have to be appointed in a permanent way, and cannot be appointed for a period of time."<sup>15</sup>
26. There is considerable support for permanent appointments in other international and regional statements and norms. The *International Bar Association Minimum Standards on Judicial Independence* state that "Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the

The UN Special Rapporteur has noted that when a judge's term of office expires and they are eligible for renewal, it is particularly problematic when renewal process involves members of the executive branch of government reviewing the judge's record.

It is clear that actual independence is at risk if judges have reason to fear that any unpopular decisions they make will have consequences at the renewal stage.

The Latin American Federation of Judges has called for permanent appointments in its Declaration of Minimum Principles.

<sup>11</sup> *Special Rapporteur Report*, 2009, n9, [54].

<sup>12</sup> *IACHR Guarantees Report*, 2013, n10, [87].

<sup>13</sup> Jorge Enrique Romero Pérez, 'Derecho Constitucional y Reelección de Magistrados del Poder Judicial' (2013) 130 *Revista de Ciencias Jurídicas* 125, 159.

<sup>14</sup> It is noteworthy that the Constitutional Chamber of Costa Rica, 6247-2013 by voting annulled the vote in which Justice Cruz was not re-appointed. The Constitutional Court argued that in the interests of judicial independence ideological orientation cannot be an obstacle to the re-election of a judge.

<sup>15</sup> Article 7 of the Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America (the "Campeche Declaration"): <http://www.flammagistrados.com/?p=3593>.

date of appointment.”<sup>16</sup> The African Commission on Human and Peoples’ Rights has declared that judicial officers should not be “appointed under a contract for a fixed term.”<sup>17</sup> The Council of Europe’s Commission for Democracy through Law (“the Venice Commission”) advises against fixed-term appointments for ordinary judges due to concerns about judicial independence, although the Commission makes an exception for constitutional court judges who are appointed for a fixed term in some European countries.<sup>18</sup>

27. Permanent judicial appointments have become the norm in many parts of the world. Among the 53 member states of the Commonwealth, most of which have historic links to Britain, more than 90% of constitutions make provision for permanent appointments until a standard age of retirement, although in a number of mostly smaller jurisdictions fixed-term appointments are allowed as well.<sup>19</sup>
28. Despite the wide international support in theory and practice for permanent judicial appointments, and common threads of concern and criticism in both reports by international reviewers and in the views of judges, fixed term appointments are still well established in Latin America. To what extent that approach departs from the prevailing standards depends to some extent on whether a specific term appointment is renewable (and, if so, also on the processes for renewal). This can be seen in two notably different recommendations regarding the region:
- On the one hand, the Inter-American Commission seems to view this state of affairs as potentially consistent with adequate standards for judicial independence, recommending that non-renewable appointments for a single fixed period can be acceptable.<sup>20</sup>
  - In contrast, the UN Special Rapporteur on the Independence of Judges and Lawyers, commenting on the protection of judicial independence in Central America, has recommended that fixed-term appointments should be renewed automatically on the expiry of a judge’s term, unless there are disciplinary reasons not to do so which have been established through a rigorous and fair process.<sup>21</sup>
29. These divergent recommendations hint at some of the different approaches that have been developed in Latin America to address the impact of the duration of judicial appointments on judicial independence.

## **B. Duration of judicial appointments in the highest courts**

30. It is important to distinguish at the outset between the highest courts, such as the supreme court, or a constitutional court, and to the remaining courts of the jurisdiction which we generally refer to as “other courts”. There are particular reasons why this distinction matters in the Latin American context. Following the model of civil law jurisdictions in Europe, courts below the highest courts have a career judiciary. Judges may be appointed to these courts at a young age and systems of promotion are akin to those that commonly exist in a civil service. By contrast, the highest courts have a “recognition judiciary”, in which appointments are also open to legally qualified persons who need not already be judges but are expected to have distinguished themselves in other fields,

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<sup>16</sup> *International Bar Association Minimum Standards of Judicial Independence*, 1982, (‘IBA Minimum Standards’), art 22.

<sup>17</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, art A4(n)(3).

<sup>18</sup> *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004 (adopted 16 March 2010), [35].

<sup>19</sup> Van Zyl Smit, *Commonwealth Compendium*, 2015, n2.

<sup>20</sup> *IACHR Guarantees Report*, 2013, n10, [85].

<sup>21</sup> United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum: Mission to Guatemala. A/HRC/11/41/Add.3, 1 October 2009, [110] cited in *IACHR Guarantees Report*, 2013, n10, [87].

including legal practice, academia and in some cases also politics. This is a more familiar system in common-law countries, though it exists at the highest level in many civil law jurisdictions too.<sup>22</sup>

31. Some Latin American jurisdictions have a single highest court, usually styled the Supreme Court. However, there is a separate constitutional court in seven countries: Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala and Peru.<sup>23</sup> The duration of appointments in both supreme courts and constitutional courts is striking in contrast to the main current of international standards:

- Of the constitutional courts, only Brazil's Supreme Federal Tribunal (Supremo Tribunal Federal) has judges who serve permanently. There are limits on renewal of appointments in some other jurisdictions. In Bolivia, Chile, Colombia and Peru there is a constitutional restriction on reappointment of members of the constitutional court. In Ecuador, reappointment is only permitted following a certain time out of office.<sup>24</sup>
- Of the Supreme Courts, only in Argentina, Brazil and Chile are appointments permanent. In Paraguay, appointments become permanent after two periods or 15 years and by 2009, no fewer than six Latin American countries imposed this restriction.<sup>25</sup> However, in most countries appointments are for ten years or less, and in some instances substantially less. Appointments are for just five years in Nicaragua, seven in Honduras, and what Rivillas and Lejarraga describe as a "more respectable" nine years in El Salvador.<sup>26</sup> Bolivia, Colombia, Ecuador, Peru, Paraguay, Venezuela and Costa Rica have tenure periods ranging from 6 to 10 years

- **Automatic reappointment:** Arguably the most effective example of this approach has been found in **Costa Rica**, where Supreme Court terms are eight years and will be automatically renewed unless two-thirds of Congress votes against renewal. In the Central American region, Rivillas argues that the Supreme Court in Costa Rica has "demonstrated a higher level of independence due to security of tenure." This observation continues to hold true despite the dispute concerning the re-appointment of Justice Cruz (discussed in para 24 above). It is worth highlighting the successful resistance by the Costa Rican courts against attempts to block the reappointment of Justice Cruz. The principle invoked in support of this resistance was judicial independence.
- **No reappointment:** This, and no immediate reappointment, is a more common approach to restrictions accompanying limited terms. Since 1991, **Colombia** has completely prohibited reappointment to its Supreme Court. By 2009, this approach was taken in no fewer than six countries in Latin America.
- **No immediate reappointment:** This approach is taken in, for example, the constitutional court in **Ecuador**), and in the **Uruguay** Supreme Court where appointments are for 10 years and a judge cannot be reappointed until they have been out of office for at least 5 years.

<sup>22</sup> Tom Ginsburg and Nuno Garoupa, *Judicial Reputation: A Comparative Theory*, University of Chicago Press, 2015, 99-100.

<sup>23</sup> See Julio Ríos-Figueroa, 'Institutions for Constitutional Justice in Latin America' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America*, Cambridge University Press, 2011, 38.

<sup>24</sup> Oswald Lara-Borges, Andrea Gastagnol and Aníbal Pérez-Liñán, 'Diseño constitucional y estabilidad judicial en América Latina, 1900-2009' (2012) 19 (1) *Política y Gobierno*, 11.

<sup>25</sup> *Ibid*, 17. One of the six countries included in this analysis was Mexico, which is not within the scope of the present report.

<sup>26</sup> Rachel Bowen, 'Judicial Autonomy in Central America' (2013) 66 (4) *Political Research Quarterly*, 839 citing Borja Díaz Rivillas and Sebastián Linares Lejarraga, 'Fortalecimiento De La Independencia Judicial En Centroamérica: Un Balance Tras Veinte Años De Reformas' (2005) 39 *América Latina Hoy* 47.

but, as Calleros-Alarcón has observed, “most countries in practice show a pattern of even shorter terms”.<sup>27</sup>

32. With fixed-term appointments being the norm, though varying in duration, different safeguards have been taken across the region to provide a level of independence and security. While the success of methods used always depends on practice, application, and on the legal and political culture, the experience in some countries has been that safeguards have been effective. Among the noteworthy approaches are automatic reappointment, no reappointment at all, and no immediate reappointment.
33. It is clear, then, that overall in Latin America, appointments to the highest courts depart considerably from international standards, even though some countries have maintained consistency with Inter-American Commission views. This has been the subject of concern, with reviewers and analysts exploring reasons, context and implications.
34. In a special report on judicial autonomy in Central America, the UN Special Rapporteur observed that “[e]nsuring tenure of office and the stability of judges in their functions would help prevent internal and external interference in the judiciary and ensure the effectiveness of the judicial service.”<sup>28</sup>
35. The patterns and effects do not necessarily run in one simple direction. In El Salvador, for example, Rivillas and Lejarraga have argued that terms of nine years are long enough to contribute to “guaranteeing a lesser political subordination”.<sup>29</sup> This is tempered, however, by the effects of the reappointment possibility. Bowen concludes that the short but often renewable tenure that is typical of judges in partisan judicial regimes builds in an avenue for elected politicians to influence the judiciary. In El Salvador, judges have become increasingly partisan as the reappointment process has played out.<sup>30</sup>
36. Julio Ríos-Figueroa argues that if the tenure of judges coincides with the tenure of their appointers or with that of the executive and legislators, there is potential for undue pressure. In a study of 18 Latin American countries from 1996 to 2002 in order to explore the relationship between certain institutional variables and corruption, he found that with respect to external independence the single most important discriminatory variable in the dataset is whether the tenure of Supreme Court judges is longer than that of their appointers.<sup>31</sup> Basabe-Serrano explores whether there is a causal

**Lack of secure tenure puts pressures on judges. It encourages them to act opportunistically during their unpredictable stay in office.**

**Whether low level or high level, corruption in every instance goes to the heart of fairness, predictability and certainty, undermining the rule of law.**

<sup>27</sup> Sample includes Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru, Paraguay, Venezuela, and Costa Rica: Juan Carlos Calleros-Alarcón, *The Unfinished Transition to Democracy in Latin America*, Routledge, 2012, 80.

<sup>28</sup> *Report of the Special Rapporteur on the independence of judges and lawyers*, Gabriela Knaul, ‘Annex - Subregional consultation on the independence of the judiciary in Central America’, A/HRC/23/43/Add.4 15 March 2013, [87].

<sup>29</sup> Rivillas and Lejarraga 2005, n26, 90.

<sup>30</sup> Bowen 2013, n26, 834.

<sup>31</sup> Julio Ríos-Figueroa, ‘Judicial Independence and Corruption: An Analysis of Latin America’ (2006) Department of Politics; Centro de Investigación y Docencia Económicas (CIDE), 24, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=912924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912924). See further Julio Ríos-Figueroa ‘Justice System Institutions and Corruption Control’ (2012) 33 *The Justice System Journal*.

relationship between the variables of institutional stability and conviction voting. He notes that the literature agrees that judges will vote with their convictions when their jobs on the bench are more stable, and will vote strategically when they lack security of tenure.<sup>32</sup> Despite serving in stable courts, judges tend to display actual independence in this sense until their last months in office, at which point they start voting strategically in order to improve their chances of securing their next appointment, whether in the public or private sector.

37. On the other hand, another study of the mandate of supreme courts and constitutional tribunals in 17 Latin American countries between 1900 and 2009 finds that lifelong tenures have not in practice guaranteed better security of tenure than long fixed terms. Put simply, a permanent appointment may not, in practice, be a permanent appointment, and all involved will know that. In some cases unlawful means may be used by political actors to secure the exit of judges that displease them, while in others the constitutional framework has simply been changed.<sup>33</sup>

### C. Duration of tenure in other courts

38. What is the nature of tenure in courts other than supreme and constitutional courts? In considering this, it should not be forgotten that although the apex courts and their judges may have the highest public profiles, may have great constitutional power, and may be the court of final and last resort for the resolution of disputes, the *standards* for judicial independence are the same in the lowest courts as in the highest courts and all levels in between.
39. Just as tenure has been problematic in the highest courts, it has been an issue in other courts. For example, the literature on Central America is consistent in revealing concerns about the duration of appointments and conditions of tenure:
- Ramos Rollon conducted a study in 2004 in which she asked judges to state the principal obstacles to judicial independence in their respective countries.<sup>34</sup> Insecurity of tenure was cited as the most significant obstacle by 30.2% in Guatemala, 31.4% in Honduras and 34.5% in Nicaragua.<sup>35</sup>
  - Rivillas and Lejarraga's 2005 study of lower courts found that insecurity of tenure is a significant obstacle to judicial independence, with Nicaragua, Honduras, and Guatemala being the most problematic countries.<sup>36</sup>
40. However, while tenure problems are very marked in some countries, there is evidence that it raises difficulties for judges across the region. Even in Costa Rica, where tenure is dealt with well in the highest courts, Ramos Rollon found that 17.6% of judges saw tenure as the most significant obstacle to independence.<sup>37</sup>

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<sup>32</sup> Santiago Basabe-Serrano, 'Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007' (2012) 44(1) *Journal of Latin American Studies*, 132.

<sup>33</sup> Lara-Borges et al 2012, n24, 1. Argentina, for example, had a long history in the 20<sup>th</sup> century of dismissing Supreme Court justices upon a change of regime, despite a constitutional guarantee of lifetime appointments and secure tenure. See Gretchen Helmke, 'The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy' (2002) 96 *Am Pol Sci Rev*, 292 and Christopher Larkins, 'The Judiciary and Delegative Democracy in Argentina' (1998) *Comparative Politics*, 428.

<sup>34</sup> María Liusa Ramos Rollon et al, *La Justicia vista por los jueces: diagnóstico del funcionamiento de los sistemas judiciales centroamericanos*, Ministerio de Asuntos Exteriores-Agencia Española de la Cooperación Internacional, Fundación Universidad de Salamanca, 2004; results cited in Rivillas and Lejarraga 2005, n26, 91.

<sup>35</sup> Rivillas and Lejarraga 2005, n26, 91.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

41. The UN Special Rapporteur's 2013 report on Central America raised tenure concerns: "Another challenge that affects the independence of the judiciary is the short term of office and the need for constant re-elections of magistrates and judges, who depend on those wielding political power for re-election. Ensuring tenure of office and the stability of judges in their functions would help prevent internal and external interference in the judiciary and ensure the effectiveness of the judicial service."<sup>38</sup> Her key recommendations included ensuring security of tenure.<sup>39</sup>
42. The UN Special Rapporteur has criticized Guatemala in this regard: "The five-year term for judges weakens the judiciary and affects their independence and their professional development" and "irremovability of judges should be protected through legislative mechanisms, which also provide for the existence of a veritable judicial career."<sup>40</sup>
43. Corruption and attempts to combat it are recurrent themes, with the scope of concerns ranging from low-level opportunism through to higher level bribery, but in every instance it goes to the heart of fairness, predictability and certainty, undermining the rule of law. Linn Hammergren observes that "when Latin America's most recent judicial reform movement began in the 1980s, corruption was a complaint directed at courts and judges .... Lack of secure tenure (even in systems with formal judicial careers) put additional pressures on judges and encouraged them to act opportunistically during their unpredictable stay in office."<sup>41</sup>

#### D. Provisional judicial appointments

44. A distinctive tenure issue in the lower courts is the use of provisional judicial appointments, under which a person is appointed to judicial office temporarily. Provisional appointments engage both the principle and practice of tenure and judicial independence and there is some evidence of such appointments being used systematically to shape and limit the power of the judiciary.
45. In some limited situations the appointment of temporary judges may be justifiable, and even valuable. Authorising legally trained persons to serve on the bench temporarily might be justifiable if there is a need for judicial numbers to be flexible in response to a varying case load, and arguably also, as the Venice Commission has recognised, it can provide an opportunity for prospective candidates to gain experience before applying for permanent judicial office.<sup>42</sup> However, as is abundantly clear from the discussions above, lack of security of tenure weakens judicial independence and so temporary appointments must be used in a limited way, with caution and only when no alternatives are available.
46. The *IBA Minimum Standards of Judicial Independence* recommend that "[t]he institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition."<sup>43</sup> Fixed-term appointments may be a better alternative in these settings because they present fewer drawbacks than the use of temporary judges. If a jurisdiction needs to respond flexibly to demands on the justice system or wants to provide experience for judges, then fixed-term appointments should also be considered, as they would offer better protection for the

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<sup>38</sup> Special Rapporteur (Knaul), Subregional consultation on Central America, 2013, n28, [87].

<sup>39</sup> *Ibid*, [101].

<sup>40</sup> 'UN expert on independence of judges and lawyers calls for major reforms in Guatemala', 10 February 2009 (UN Human Rights Office of the High Commissioner, cached at

[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8845&LangID=E#sthash.OBSQMdUF.dpuf](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8845&LangID=E#sthash.OBSQMdUF.dpuf)

<sup>41</sup> Linn Hamnergren, 'Fighting judicial corruption: a comparative perspective from Latin America' in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems*, 2007, 138.

<sup>42</sup> Venice Commission, *Judicial Appointments*, CDL-AD (2007)028 (adopted 17 March 2007), [38]-[43].

<sup>43</sup> Art 23(b).

independence of the judiciary. This compromise would also allow persons interested in applying for permanent judicial office to gain judicial experience, which can be maximised by offering part-time positions tenable for a fairly long fixed period.

47. The issue of the “provisional status” of many judges has caught the attention of the Inter-American Commission of Human Rights, with observations that where appointments are provisional and for indefinite periods of time, without any guarantees of stability, judges “may well make decisions for the sole purpose of pleasing the authority that determines whether to renew his or her appointment or make the justice operator permanent in his or her post.”<sup>44</sup> In 2013, the Commission identified the “provisional status of justice operators” as one of the most frequent problems in the region undermining judicial independence.
48. The Inter-American Court of Human Rights has also ruled in cases brought against Venezuela that the removability of temporary judges gives rise to “objective doubts about whether they can participate in proceedings independently.”<sup>45</sup> Provisional appointments must be the exception and not the rule.<sup>46</sup> While it may be necessary in exceptional circumstances to appoint judges on a temporary basis, “such judges must not only be selected by means of an appropriate procedure, they must also enjoy a certain guarantee of tenure in their positions.”<sup>47</sup> Where provisional judges act for a long time, or where in practice most judges are provisional, “material hindrances to the independence of the judiciary are generated. Such vulnerable situation of the Judiciary is compounded if no removal from office procedures respectful of the international duties of the States are in place.”<sup>48</sup>
49. The Inter-American Commission has also observed that the laws in some countries provide for a probationary period to determine whether a judge will eventually be admitted into the judicial career service. This occurs in, for example, Colombia<sup>49</sup> and Honduras,<sup>50</sup> and the Commission has noted that judges required to undergo a probationary period “may sometimes be subjected to pressures to take certain decisions or courses of action that serve the interests of the authority upon whom his or her permanent appointment depends, thereby putting his or her independence at risk.”<sup>51</sup>
50. While the general and regional statement of issues is sufficient to show the level of concern that is warranted, and the Inter-American Commission has pointed to problems with provisional appointments of judges in countries such as Bolivia<sup>52</sup> Peru<sup>53</sup> Venezuela<sup>54</sup> and Nicaragua<sup>55</sup>, the worries are accentuated when individual jurisdictions are examined.

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<sup>44</sup> IACHR *Guarantees Report*, 2013, n10, [89], [90].

<sup>45</sup> Inter-American Court of Human Rights, Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009, Series C No 197, [78].

<sup>46</sup> Inter-American Court of Human Rights, Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, [107].

<sup>47</sup> IACHR *Guarantees Report*, 2013, n10, [93].

<sup>48</sup> Inter-American Court of Human Rights, Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, [43]. See also, Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, [107]; Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, [118]; and IACHR, Second Report on the Situation of Human Rights Defenders. OEA/Ser.L/V/II. Doc.66, December 31, 2011, [364].

<sup>49</sup> Colombia, Law 270 of 1996, art. 193.

<sup>50</sup> Honduras, Judicial Career Service Law, art. 23.

<sup>51</sup> IACHR *Guarantees Report*, 2013, n10, [97].

<sup>52</sup> IACHR, *Follow-Up Report – Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II.135. Doc. 40, 7 August 2009, [76]; and *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II. Doc. 34, June 28, 2007, [81]-[87].

51. The most extreme example of reliance on temporary judges is in Venezuela, where since 2003 there have been no public competitions for judicial appointments.<sup>56</sup> As a result, 80% of judges in Venezuela are provisional, have not undergone formal selection procedures, and may be removed at will by the Judicial Commission of the Supreme Court.<sup>57</sup> In *Apitz v Venezuela* in 2008, the Inter-American Court of Human Rights emphasised that provisional appointments must be the exception and ordered the State to end the regime of provisional judges.<sup>58</sup> In Peru, from 1997 to 2001, the executive “circumvented the judicial council and made its own provisional and temporary appointments.”<sup>59</sup> Peru later took steps to replace these provisional judges with permanent appointments.<sup>60</sup> This has been an important measure to boost judicial independence.<sup>61</sup>

**In Venezuela, since 2003 there have been no public competitions for judicial appointments, 80% of judges are provisional, have not undergone formal selection procedures and may be removed at will by the Judicial Commission of the Supreme Court.**

52. Although Venezuela and Peru are two of the countries most frequently cited, others in the region have been criticized for the use of temporary judges.
53. For example, in Argentina in 2012, 18 % of judges were substitutes (“subrogantes”), a number which had remained steady for a number of years, due to the delays by the Judicial Council in completing the competitions and delays by the executive in sending lists to the Senate.<sup>62</sup> By 2014, according to a Supreme Court ruling, naming substitute judges had become the norm, with appointment of permanent judges the exception.<sup>63</sup> Civil society organizations have noted that substitute judges do not have the same security of tenure as permanent judges and can be removed by the Judicial Council leading to concern over the effects on judicial independence.<sup>64</sup>
54. A recent study of Colombia has found that, according to information provided by the sectional judicial councils, temporary judges occupy 31% of posts. In regional terms, the percentage of all provisional judges is equal to or greater than 80% in 425 municipalities (from a total of 1103). This

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<sup>53</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, June 2, 2000, [14].

<sup>54</sup> IACHR, Annual Report 2010, Chapter IV, Venezuela, [621]; Annual Report 2011, Chapter IV, Venezuela, [453].

<sup>55</sup> Supreme Court justices have provisional appointments by virtue of a decision by the executive not to present the respective slates of candidates to the Legislature for election to tenured position.

<sup>56</sup> International Commission of Jurists, ‘Strengthening the Rule of Law in Venezuela’, 2014, 5.

<sup>57</sup> *Ibid.*

<sup>58</sup> Inter-American Court of Human Rights, Case of *Apitz Barbera et al. v. Venezuela*, Judgment of August 5, 2008.

<sup>59</sup> Linn Hambergren, ‘Do Judicial Councils further Judicial Reform?’ (2002) Carnegie Endowment Working Papers No. 28, 16.

<sup>60</sup> Linn Hambergren ‘Twenty-Five Years of Latin American Judicial Reforms: Achievements, Disappointments, and Emerging Issues’ (2008) 9(1) *Whitehead Journal of Diplomacy and International Relations*, 95.

<sup>61</sup> Santiago Basabe-Serrano, ‘Some determinants of internal judicial independence: A comparative study of the courts in Chile, Peru and Ecuador’ (2014) 42 *International Journal of Law, Crime and Justice*, 139.

<sup>62</sup> Asociación por los Derechos Civiles, ‘Los Jueces Subrogantes en el Poder Judicial de la Nación’ (Informe), 2012 [Association for Civil Rights ‘Substitute Judges in the National Judiciary’ (Report)], 7, [www.oas.org/juridico/pdfs/mesicic4\\_arg\\_anex1.pdf](http://www.oas.org/juridico/pdfs/mesicic4_arg_anex1.pdf); see also Manuel Garrido, ‘La Situación actual de los jueces subrogantes en el ámbito federal’, April 2010, [www.cippe.org/-/la-situacion-actual-de-los-jueces-subrogantes-en-el-ambito-federal](http://www.cippe.org/-/la-situacion-actual-de-los-jueces-subrogantes-en-el-ambito-federal).

<sup>63</sup> Uriarte, Rodolfo Marcelo y otro c/ Consejo de la Magistratura de la Nación s/ acción declarativa de inconstitucionalidad, Sentencia 2 de noviembre del 2015; Centro de Información Judicial ‘La Corte Suprema declaró por unanimidad la inconstitucionalidad de la ley de jueces subrogantes’, 4 November 2015, <http://cij.gov.ar/nota-18819-La-Corte-Suprema-declarar-por-unanimidad-la-inconstitucionalidad-de-la-ley-de-jueces-subrogantes.html>.

<sup>64</sup> Asociación por los Derechos Civiles, n62, 19.

“provisionality” is not randomly distributed across the country, rather it tends to concentrate in peripheral municipalities.<sup>65</sup>

55. Looking ahead, the identification of, and adherence to, principles that will see appropriate security of tenure are of vital importance, and the use of provisional judges clearly needs to be addressed across the region, avoiding unnecessary use of the practice where alternatives might be better, and the need for addressing concerns is especially strong in countries where the use of provisional judges is extensive or systemic. The Inter-American Commission provides a good point of reference for reform in its recommendation that once the requirements under the merit-based competition have been met and the examinations passed, justice operators should be permanently appointed to the post for which they were selected, without any probationary period and without being subjected to any other discretionary evaluation that might affect their independence.<sup>66</sup> The Commission also notes the UN Special Rapporteur’s observation to the effect that if a probationary period is required, it should be short and non-extendable, and a permanent appointment or fixed tenure should be granted thereafter.<sup>67</sup>

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<sup>65</sup> Mauricio García-Villegas and Jose Rafael Espinos, ‘The Geography of Justice: Assessing Local Justice in Colombia’s Post-Conflict Phase’ (2015) 4(1) *Stability International Journal of Security and Development*.

<sup>66</sup> *IACHR Guarantees Report*, 2013, n10, [97].

<sup>67</sup> United Nations General Assembly, Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, [56], cited in *IACHR Guarantees Report*, 2013, n10, [97].

## 4. APPOINTMENT PROCESSES

### A. International Principles

56. In the appointment of judges, what should be the criteria for judicial office? Which bodies should be responsible, alone or in combination, from the initial call for applications or nominations to the final confirmation of selected candidates? How should this process be carried out? The way a jurisdiction approaches these matters has the potential to affect not only the quality of the judges who are appointed, including their independence, but also the public's perceptions of judicial independence in the wider sense we identified in Part 2. International principles increasingly address these challenges, particularly in recent years as systems of appointment have been subject to rapid change in many parts of the world.

#### *Criteria for judicial office*

57. Principle 10 of the *UN Basic Principles on the Independence of the Judiciary* requires judges to be chosen from among "individuals of integrity and ability with appropriate training or qualifications in law", without discrimination on any of the main grounds recognized in international human rights law, save that a judge may be required to be a national of the state.<sup>68</sup> This is effectively a commitment to selection on "merit", in the sense of suitability to perform a judge's functions. Merit selection is also found in many international statements, with some simply stating that it is the basis on which judges are appointed, while others go some way towards defining the qualities that constitute merit.<sup>69</sup> Among the aims of merit selection is to identify candidates who will display actual independence, as this is vital to the judicial role in upholding the rule of law. Qualities of integrity and legal training, both highlighted in Principle 10, are among those which equip candidates to decide cases without fear or favour and in accordance with the law. Principle 10 further stipulates that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."<sup>70</sup> This serves as a warning that appointment processes should be designed to guard

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<sup>68</sup> Principle 10.

<sup>69</sup> The *IBA Minimum Standards of Judicial Independence* take the former approach (art. 26). The Committee of Ministers of the Council of Europe, in its *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, goes further, requiring that appointments "should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity" ([44]). The African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* state that 'integrity, appropriate training or learning and ability' should be the 'sole criteria' (art. A.4(i)). The *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, issued by Chief Justices of the region in 1998, makes the link between the criteria for judicial office and the functions to be performed explicit: "To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence."

<sup>70</sup> Principle 10. Similarly, as regards promotion: the *UN Basic Principles* state that the promotion of judges "should be based on objective factors, in particular ability, integrity and experience", (Principle 13) and this is underscored by regional declarations (*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, art. A.4(o) and *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*, art. 17: "Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience." See also European Network of

against corruption and patronage. Judges who owe their position to corruption or patronage are unlikely to display actual independence, especially in cases involving those who were responsible for appointing them. Moreover, the mere fact that a particular appointment system is vulnerable to such appointments may affect perceptions of judicial independence.

58. The UN Special Rapporteur on the Independence of Judges and Lawyers has acknowledged that to secure judicial independence it may be necessary to enact criteria that are more detailed than those contained in Principle 10 of the *UN Basic Principles*. In her 2013 report on judicial independence issues in Central America, the Special Rapporteur noted that judicial appointments had become “highly politicized” in many jurisdictions where the power to make judicial appointments is in the hands of the legislature or the executive and the only appointment criteria that exist are broad and general. This creates a risk of patronage and in the worst cases also corruption:

The appointment of magistrates of the highest courts, and in some countries even judges of lower courts, is by decision of the legislative or executive branch based on selection criteria which, although established by the Constitution and legislation, are very broad, general and subjective, thus making it difficult to adequately assess the personal integrity, independence and professional qualifications of the candidates. Consequently, although the norms of all these countries are in conformity with principle 10 of the Basic Principles, practice reveals an absence of proper and more specific selection criteria as well as a lack of transparency and public scrutiny in the procedures for the appointment or election of magistrates and judges, a circumstance which has opened the door to interference by political parties and economic groups, generating a system based on political favours and patronage.<sup>71</sup>

59. The Inter-American Commission on Human Rights agreed with the UN Special Rapporteur’s assessment in its report on guarantees for the independence of justice operators across the whole of the Americas, published in the same year.<sup>72</sup> The Commission’s report re-iterates the Special Rapporteur’s view that more specific criteria are required to combat the politicisation of appointments, and warns against the risk that vague criteria such as “morality” may be used to exclude disfavoured individuals or groups.<sup>73</sup> In addition, the Commission points to the need for appropriate selection criteria as well as training in non-discrimination to address the underrepresentation of women and minority groups in many jurisdictions in the region.<sup>74</sup> It further calls for criteria to be designed so as to ensure that candidates are selected on the basis of “personal merit and professional qualifications, taking into account the singular and specific nature of the duties to be performed, in such a way as to ensure equal

**The UN Special Rapporteur’s report on judicial independence issues in Central America noted that judicial appointments had become “highly politicized” in many jurisdictions where the power to make judicial appointments is in the hands of the legislature or the executive and the only appointment criteria that exist are broad and general.**

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Councils of the Judiciary, *Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (2012), para I.12).

<sup>71</sup> Special Rapporteur (Knaul), Subregional consultation on Central America, 2013, n28, [80].

<sup>72</sup> IACHR *Guarantees Report*, 2013, n10, [57].

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, [62]-[74].

opportunity, and with no unreasonable advantages or privileges.”<sup>75</sup>

*Which bodies should conduct the process*

60. The *UN Basic Principles* are silent on which bodies should be responsible for appointing judges, no doubt in recognition of the vast range of processes that existed around the world when they were drawn up in 1985. For example, only about 10% of the world’s jurisdictions then used judicial councils to select judges, whereas today such bodies are involved in appointments in over 60% of jurisdictions.<sup>76</sup>
61. We have seen that in her 2013 report on Central America, the UN Special Rapporteur warns against the involvement of the legislature or the executive in judicial appointments. Her predecessor as Special Rapporteur had already argued in 2009 that transitional societies and new constitutional democracies (which many Latin American countries are) should not entrust the appointment of judges to the executive or the legislature.<sup>77</sup> Instead, he urged such countries to establish judicial councils or other independent bodies to undertake the selection of judges, in order for the public to “gain confidence in a court system administering justice in an independent and impartial manner, free from political considerations”.<sup>78</sup> The Inter-American Commission, while observing that there is no requirement in international law for such bodies to be established, agrees that they are highly desirable.<sup>79</sup>
62. Regarding the composition of such bodies, it is widely recognised that legislators, lawyers, academics should be represented, and that civil society groups and “lay” members (outside the dynamics of the legal community) can play important roles – all will bring perspectives to bear that will assist in identifying candidates most likely to demonstrate actual independence. However, very importantly, there is a strong view that it will generally be necessary to have a majority of judicial members in order to guard against political interference.<sup>80</sup> The UN Special Rapporteur, the Inter-American Commission on Human Rights and the Council of Europe all recommend that such bodies have majority judicial membership.<sup>81</sup>
63. Of note, and by contrast, the recommendations of the Venice Commission, which has a track record of dealing with judicial appointments in new constitutional democracies mainly in the former Eastern Europe, are more complex. We have already seen that the Venice Commission draws a distinction between the appointment of “ordinary judges” and judges who are to serve in constitutional courts. In respect of constitutional courts, given their more political nature and function, it may be possible to justify a role for the legislature.<sup>82</sup> Of course, there is still a need to guard against the dangers of patronage and corruption in such situations, and we will see that Latin American jurisdictions have devised some rather elaborate procedures involving multiple branches of government in the selection of their constitutional judges.
64. As regards the members of independent bodies which are to be entrusted with making appointments to other judicial posts, the Venice Commission recommends that these should not all be judges in order to avoid a situation of “corporatism”, in which the existing judiciary may make

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<sup>75</sup> *Ibid*, [75].

<sup>76</sup> Ginsburg & Garoupa, n19, 101.

<sup>77</sup> *Special Rapporteur Report*, 2009, n9, [28].

<sup>78</sup> *Ibid*, [25], also [24], [26].

<sup>79</sup> *IACHR Guarantees Report*, 2013, n10, [242].

<sup>80</sup> *Special Rapporteur Report*, 2009, n9, [28].

<sup>81</sup> *Ibid*; *IACHR Guarantees Report*, 2013, n10, [244]-[245]; *CoE Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, [46].

<sup>82</sup> *Special Rapporteur Report*, 2009, n9, [28], [9]-[12], [47].

appointments that further its own interests or develop an unduly narrow view of the qualities that are desirable in a judge.<sup>83</sup> The Inter-American Commission recognises this and also argues that Councils should be separate from the Supreme Courts and not chaired by the Chief Justice of their jurisdiction.<sup>84</sup>

*How the process is conducted: assessment of candidates and transparency*

65. Internationally, including in Latin American jurisdictions, experience has shown that it is not enough to concentrate on the bodies involved in the appointment process. How the process is conducted is also crucial to securing and maintaining an independent judiciary. Principles and guidelines in Europe, Africa and the Commonwealth have emphasised the need for candidates to be assessed fairly and rigorously against established criteria for judicial office, and for the process to be transparent both to prospective candidates and to the general public.<sup>85</sup> For instance, the *Latimer House Principles* adopted by Commonwealth member states in 2003 require that “Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure equality of opportunity for all who are eligible for judicial office [and] appointment on merit”.<sup>86</sup>
66. The emphasis on assessment and transparency has the potential to benefit both the actual and perceived independence of the judiciary. Both aspects are highlighted in the *Dublin Declaration* of the European Network of Councils for the Judiciary. The *Dublin Declaration* calls for “a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process”,<sup>87</sup> and notes that an appointments body may consult psychologists or other experts, although it should make the final selection decision “free from any influences other than the serious and in-depth examination of the candidate’s competencies against which the candidate is to be assessed”.<sup>88</sup> By ensuring that the entire selection process remains focused on the criteria, this approach is designed to maximise the likelihood of securing the

**A rigorous and transparent process also has the potential to strengthen perceived judicial independence by giving the public greater confidence in the independence of those who are appointed.**

**Moreover, if it is generally known that the process is fair and that patronage and corruption will not play a role, a wider range of applicants may be encouraged to apply.**

<sup>83</sup> Venice Commission, *Judicial Appointments 2007*, n42, [27]-[30]. The *Dublin Declaration*, n70, para II.2, notes the view in some countries that even a majority of judges creates this danger.

<sup>84</sup> IACHR *Guarantees Report*, 2013, n10, [246].

<sup>85</sup> Transparency has furthermore been highlighted in a number of instruments: The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2005 by the African Commission on Human and Peoples’ Rights, declare that “[t]he process for appointments to judicial bodies shall be transparent and accountable” (art A.4(h)). The Committee of Ministers of the Council of Europe, *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities* states that “[d]ecisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities” (para 44) and that “procedures should be transparent” (para 48). See also the Council of Europe’s Commission for Democracy Through Law (the Venice Commission), *Report on the Independence of the Judicial System – Part One: The Independence of Judges*, CDL-AD(2010)004, [23]-[25].

<sup>86</sup> *Principle IV(a)*.

<sup>87</sup> *Dublin Declaration*, n70, para I.1.

<sup>88</sup> *Ibid*, para II.3-4.

best judges on merit, including the probability that they will display actual independence once appointed.

67. At the same time, the *Dublin Declaration* also states that “the public has a right to know how its judges are selected”.<sup>89</sup> This is a reminder that a rigorous and transparent process also has the potential to strengthen perceived judicial independence by giving the public greater confidence in the independence of those who are appointed. Moreover, if it is generally known that the process is fair and that patronage and corruption will not play a role, a wider range of applicants may be encouraged to apply. This should in turn lead to further improvements in the quality of candidates who are appointed, including their actual independence.
68. In Latin America, similar principles regarding assessment of candidates and transparency have been stated. The *Campeche Declaration* of the General Assembly of the Latin American Federation of Judges in 2008 establishes that “Selection and promotion of judges should be ruled by public and transparent proceedings, based on the weighting criteria of training, background and professional eligibility”.<sup>90</sup>
69. With regard to assessment of candidates, the UN Special Rapporteur’s report on Central America supported the view that “selection processes should include written, anonymous examinations, with complete interviews and psychometric tests, in order to ascertain whether the candidate is able to discharge his or her functions independently and impartially.”<sup>91</sup> She also noted that such reforms to the assessment of candidates “could help prevent appointments for improper reasons”,<sup>92</sup> which would include patronage or corruption. The Inter-American Commission has expressed a similar view, calling for positions to be open to all qualified applicants:
- Competitive, merit-based competitions can be a suitable means to appoint justice operators on the basis of merit and professional qualifications. Such competitions can consider such aspects as professional instruction and years of experience required for the post, the results of examinations when the anonymity of the examinations is maintained thereby ensuring that justice operators are not selected on the basis of discretionary appointments and that persons who are interested in applying and who meet the requirements are able to do so.<sup>93</sup>
70. On transparency, the Inter-American Court of Human Rights held in *Trujillo v Venezuela* that it is imperative that an open and equal opportunity be given to potential candidates through widely publicized announcements that are clear and transparent as regards the eligibility requirements for the post in question.<sup>94</sup> The Inter-American Commission has further explained that this requires states to publish in advance the vacancy announcements and procedures for applying, the

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<sup>89</sup> Ibid, para II.9.

<sup>90</sup> Article 6(a) of the Declaration of Minimum Principles on the Independence of Judiciaries and Judges in Latin America, adopted by the General Assembly of the Latin American Federation of Judges (FLAM) in 2008 see <http://www.flammagistrados.com/?p=3593>. See also the The Statute of the Iberoamerican Judge, Article 11, adopted by The VI Iberoamerican Summit of President of Supreme Courts and Tribunals of Justice (2001), [www.ceja.cl/index.php/biblioteca/biblioteca-virtual/doc\\_view/1714-statute-of-the-iberoamerican-judge-documento-en-ingl%C3%A9s.html](http://www.ceja.cl/index.php/biblioteca/biblioteca-virtual/doc_view/1714-statute-of-the-iberoamerican-judge-documento-en-ingl%C3%A9s.html), which declares that “the processes of selection and appointment have to be realised through organs predetermined by the law, which also apply predetermined and public processes assessing objectively the professional knowledge and merits of the applicants.”

<sup>91</sup> Special Rapporteur (Knaul), Subregional consultation on Central America, 2013, n28, [81].

<sup>92</sup> Ibid.

<sup>93</sup> IACHR *Guarantees Report*, 2013, n10, [76]; IACHR. Second Report on the Situation of Human Rights Defenders. OEA/Ser.L/V/II. Doc.66, December 31, de 2011, para. 36.

<sup>94</sup> Inter-American Court of Human Rights, Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, [73].

qualifications required, the criteria and the deadlines, so that any person who believes he or she meets the requirements can apply for a post.<sup>95</sup>

71. It is now relatively settled as a matter of international principle that there should be general transparency concerning the criteria and the process to be followed in appointing judges. However, it is a live question to what extent individual decisions that are made in the appointment process should be open to scrutiny.
- Some European jurisdictions take the view that applications should remain confidential, with only the names of candidates who are finally selected being published, so that candidates are not put off applying by a fear of embarrassment if they are not successful. However, as the Council of Europe recommendations indicate, unsuccessful candidates should be entitled to reasons and an opportunity to challenge the decision, but this may also be done confidentially (as occurs, for example, in England and Wales).<sup>96</sup>
  - Elsewhere, there have been moves to introduce greater transparency to combat the risks of patronage and corruption. The UN Special Rapporteur has recommended that, particularly in countries undergoing a constitutional transition, there should be an opportunity for civil society scrutiny before an appointment is made, in order to ensure greater public confidence in the integrity of candidates.<sup>97</sup> Such measures have the potential to improve both perceived and actual judicial independence, because civil society organisations can provide useful information which helps the appointment bodies to screen out candidates whose track record or current affiliations call their independence into question.
72. A leading example of the more extensive approach to transparency is provided by the Judicial Service Commission in South Africa, which has interviewed candidates in public since it was established under the first post-apartheid constitution.<sup>98</sup> Although civil society does not have a formal role in questioning candidates, the names of those shortlisted for interview are published in advance, enabling NGOs and other interested persons to make submissions about the suitability of particular candidates to the Judicial Service Commission prior to interview. Opinion is divided about the merits of public interviews. Commonwealth organisations have noted that “reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large.”<sup>99</sup>
73. The Inter-American Commission advocates this kind of transparency for Latin America, arguing that “[i]n addition to publishing the requirements and procedures, another transparency-related factor is that the selection procedures should be open to public scrutiny, which will significantly reduce the degree of discretion exercised by the authorities in charge of the selection and appointment process and the possibility of interference from other quarters. In this way, the candidates’ merits and professional qualifications can be more readily identified.”<sup>100</sup>
74. The Commission further proposes that “public hearings or interviews should be held, with adequate advance preparations, where the public, nongovernmental organizations and other interested

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<sup>95</sup> *IACHR Guarantees Report*, 2013, n10, [79].

<sup>96</sup> *Recommendation to Member States on Judges: Independence, Efficiency and Responsibilities*, [48]. In England and Wales, the Judicial Appointments and Conduct Ombudsman performs this function.

<sup>97</sup> *Special Rapporteur Report*, 2009, n9, [31].

<sup>98</sup> Procedure of the Judicial Service Commission, Government Notice RR423 (2003), [2(i)], [3(i)].

<sup>99</sup> Karen Brewer, James Dingemans and Peter Slinn, *Judicial Appointments Commissions: A Model Clause For Constitutions* (report on behalf of the Commonwealth Magistrates’ and Judges’ Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association, 2013), 14.

<sup>100</sup> *IACHR Guarantees Report*, 2013, n10, [80].

parties will have an opportunity to see what the selection criteria are, to challenge candidates and express either their concern or support”, and notes that this form of scrutiny is “essential when appointing the highest-ranking justice operators, when procedure and selection is in the hands of the executive or legislative branch.”<sup>101</sup>

75. The main developments advocated for in the international principles just discussed are detailed criteria of appointment, the depoliticisation of the appointment bodies, more rigorous assessment of candidates, and increased transparency at least with regard to the criteria and appointments process, and possibly also individual appointment decisions.
76. The next two sections consider how appointments processes function in Latin American jurisdictions and discuss the extent to which reforms in recent years give effect to some of the international principles.

## B. Appointments to the highest courts

### *Constitutional Courts*

77. The examination of judicial tenure in Part 3 considered seven jurisdictions where constitutional courts exist: Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala and Peru.<sup>102</sup> With their distinctive appointment systems, we again look at these courts.
78. It is still the norm for the political branches of government to play a central role in constitutional court appointments. In **Brazil**, something akin to the US Supreme Court confirmation mechanism governs appointments to the Supreme Federal Tribunal (Supremo Tribunal Federal), which exercises final jurisdiction in constitutional matters. The President of the Republic proposes the nominee and submits his or her name to a public hearing before the Senate. The nominee must be approved by an absolute majority of the Senate.<sup>103</sup>
79. **Bolivia’s** 2009 constitution represents the furthest any country in Latin America has gone in embracing the political process in selecting judges for its highest courts. The members of the Constitutional Tribunal, Supreme Court and Agricultural Court are elected by the public.<sup>104</sup> At the same time, the Constitution requires judges to be elected “on the basis of pluri-nationality, with representation from the ordinary system and the rural native indigenous system”,<sup>105</sup> and sets quotas for the representation of women and persons of indigenous descent on candidate lists. The list of candidates is prepared by the Pluri-national Legislative Assembly, which pre-selects candidates who secure the support of a two-thirds majority and sends their names to the electoral body for the organization of elections.<sup>106</sup> Candidates are forbidden from campaigning and the electoral body is solely responsible for publishing information about their merits. In the first elections held in 2011, a majority of the Constitutional Tribunal judges elected were women, and indigenous candidates formed a majority among the total number of judges elected across the three courts for which elections were held.<sup>107</sup> This was a landmark achievement in terms of judicial diversity, but the process of selection attracted criticism from the Organisation of American States for being

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<sup>101</sup> Ibid, [80], [81].

<sup>102</sup> See n23 and accompanying text, above.

<sup>103</sup> Constitution art. 101.

<sup>104</sup> Constitution art. 199.

<sup>105</sup> Constitution art. 197(l).

<sup>106</sup> Constitution arts. 182, 198.

<sup>107</sup> Amanda Driscoll and Michael J Nelson ‘The 2011 judicial elections in Bolivia’ (2012) *Electoral Studies*, 2.

politicised.<sup>108</sup> Although formally not allowed to have party links, many selected candidates had connections to the ruling party as organizers, aides or legal advisors. Following the legislative vote, some legislators from the ruling party admitted to lack of knowledge of the candidates and voting in line with the party's instructions.<sup>109</sup> In events which Human Rights Watch described as "undermining judicial independence", the Pluri-national Legislative Assembly subsequently initiated a process to remove three of the Constitutional Tribunal members because it disagreed with a decision of the Tribunal, and sought the imposition of criminal penalties.<sup>110</sup>

80. A more common approach is that the power to appoint constitutional court judges is shared between several public institutions, sometimes including all three main branches of government, with each institution able to fill some seats directly. This is the approach in three jurisdictions:

- **Chile:** The Constitutional Court has ten members. Three are appointed by the President, four selected by Congress (two directly appointed by the Senate and two proposed by the Lower House, for approval or rejection by the Senate by a two-thirds majority) and three selected by the Supreme Court in a secret vote.<sup>111</sup>

**Transparency campaigns** have had some impact in combatting more subtle forms of politicization. In 2009 a group of **Colombian** organizations created *Elección Visible* (Visible Election, <http://eleccionvisible.com>) as a citizen oversight coalition to monitor the process of selecting the new justices. Their objective was to demand from the nominators and electors that all the candidates included in their slates would be qualified and independent; that political agreements would play no role in their selection; and that there should be no "filler" candidates but only a list of persons who in the nominating body's view were the best possible candidates to fill their positions. The coalition successfully persuaded the Supreme Court to adopt the transparency measures. However, President Uribe simply ignored the demands for accountability and revealed his nominations at the last minute, suggesting that the initiative is still a work in progress.

Campaigns for greater transparency and more rigorous assessment of candidates have also been seen in **Peru**, where Constitutional Court judges are appointed by a two-thirds majority vote in Congress. The Inter-American Commission expressed its disquiet following events in which investigative journalists released a recording of conversations between politicians agreeing to trade votes so that they could achieve the two-thirds supermajority required for their preferred candidates by voting in blocs without analyzing the candidates' credentials. These events show that a supermajority confirmation requirement may practice result in bargains that enable various parties to share the appointments between themselves. While this is to some extent understandable as a strategy to avoid deadlock, the actual and perceived independence of the judiciary risk being damaged if the result is that the suitability of nominees is not scrutinised. The revelations about block voting led to legal challenges by civil society organisations, which argued that procedural rules requiring the legislature to consider candidates individually had been breached. There were also public protests in several parts of the country, following which most of the appointees agreed to withdraw. Congress proceeded to carry out a new selection procedure, in which candidates were voted upon one by one in alphabetic order in order to avoid block voting.

*Colombia: Elección Visible, Herrero 2010; Peru: IACHR 2013; Ríos-Figueroa 2011, Coordinadora Nacional de Derechos Humanos, EL Mercurio 2014.*

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Human Rights Watch 2015 World Report, [www.hrw.org/world-report/2015/country-chapters/bolivia](http://www.hrw.org/world-report/2015/country-chapters/bolivia).

<sup>111</sup> Constitution art. 92.

- **Guatemala:** The five Constitutional Court justices are appointed by allowing five institutions to fill one seat each: the Supreme Court; Congress; the President; the Higher Council of the University of San Carlos; and the General Assembly of the College of Lawyers.<sup>112</sup>
- **Colombia:** The nine members of the Constitutional Court are elected by the Senate from shortlists presented by the President, the Supreme Court and the Council of State.<sup>113</sup>

81. There has also been a move to greater transparency in some of these jurisdictions, which for reasons already discussed is an important measure to promote both actual and perceived judicial independence. In Guatemala, Congress, the Supreme Court and the Higher Council of the University of San Carlos all voluntarily made public calls for applications for their 2011 nominations, while the President was criticized for lack of transparency in selecting his candidates.<sup>114</sup> The Supreme Court's public call for applications noted that there was no explicit requirement for the Court to do this, but that "the rule of law requires that any public decision should be reasoned and transparent".<sup>115</sup>
82. The Colombian selection process has been extensively studied. It is widely thought that the complex appointment formula fragmenting appointment power between four different institutions makes it more difficult for the executive government to manipulate the composition of the Court. The weakness of the party system amplifies this effect by making Senate votes on shortlists sometimes unpredictable.<sup>116</sup> One commentator notes that politicians have exercised remarkably little control over the Constitutional Court by way of appointments.<sup>117</sup> The ability of the two judicial bodies (the Supreme Court and the Council of State, which is the highest tribunal in administrative matters) to shortlist gives them the opportunity to choose candidates on merit, though it has been alleged that there are "hidden" political criteria behind the Council of State and Supreme Court's decisions.<sup>118</sup> Political ideology may play a role,<sup>119</sup> as may views on the competing jurisdictions of the Constitutional Court and the Supreme Court.<sup>120</sup>
83. In **Ecuador**, the last of the seven jurisdictions with constitutional courts, appointments are made by a six-member Evaluation Committee (Comisión Calificadora) comprised of two persons appointed by each of the branches of government: the legislative branch, the executive branch and "Transparency and Social Control", a new branch introduced in 2008.<sup>121</sup> Members are selected through a public examination process, with citizen oversight and options for challenging the process. However, in practice, transparency has been a problem and the Evaluation Committee has been criticized by the Inter-American Special Rapporteur on Freedom of Expression.<sup>122</sup> In one

<sup>112</sup> Constitution art. 269.

<sup>113</sup> Constitution art. 239, Law 270 of 1996 on the Administration of Justice, art. 44.

<sup>114</sup> See Movimiento Pro Justicia 'Proceso de integración de la Corte de Constitucionalidad para el período 2011 – 2016', 6, [www.movimientoprojusticia.org.gt/files/PDF/Informe%20Proceso%20integraci%C3%B3n%20CC%202011-2016.pdf](http://www.movimientoprojusticia.org.gt/files/PDF/Informe%20Proceso%20integraci%C3%B3n%20CC%202011-2016.pdf).

<sup>115</sup> See Corte Suprema de Justicia, Guatemala, [www.oj.gob.gt/csjmagistradocc/convocatoria.pdf](http://www.oj.gob.gt/csjmagistradocc/convocatoria.pdf) (translation from Spanish).

<sup>116</sup> David Evan Landau, 'Beyond Judicial Independence: The Construction of Judicial Power in Colombia', Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences, 2015, 316, <https://dash.harvard.edu/handle/1/14226088>.

<sup>117</sup> Ibid.

<sup>118</sup> Sebastián Rubiano Galvis, 'La Corte Constitucional: entre la independencia judicial y la captura política' in *Mayorías sin Democracia: Desequilibrio de poderes y el Estado de Derecho en Colombia 2002 – 2009*, De Justicia, Bogota, 2009, 89.

<sup>119</sup> Everaldo Lamprea, 'When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court's Nominations' (2010) 10 (1) *Global Jurist*, 16; Helena Durán Crane, '¿Una Corte de bolsillo? Reección presidencial e independencia judicial: un contraste entre las consecuencias institucionales de la reelección presidencial en y Colombia y la percepción de la opinión pública tras la elección de la tercera Corte Constitucional' (2014) 32 *Derecho Público*, 5.

<sup>120</sup> Lamprea 2010, n119, 16.

<sup>121</sup> 2008 Constitution, art 434.

<sup>122</sup> See Letter to Ecuador 2 December 2013:

[www.oas.org/es/cidh/expresion/docs/otros/2013\\_12\\_02\\_Carta\\_a\\_Estado\\_de\\_Ecuador\\_ENG.pdf](http://www.oas.org/es/cidh/expresion/docs/otros/2013_12_02_Carta_a_Estado_de_Ecuador_ENG.pdf).

incident, several journalists were reportedly removed from the premises where the Committee was carrying out its assessment of the candidates.<sup>123</sup> The Committee has been seen by some as highly politicised and it has been suggested that the Committee provides the executive with the ability to influence the independence of the judiciary in practice.<sup>124</sup> Such perceptions are inevitably damaging to public confidence in the independence of the judiciary and Ecuador's experience illustrates the difficulty of achieving judicial independence in a court with a special appointments mechanism and a constitutional jurisdiction which is bound to bring it politically sensitive cases.

### *Supreme Courts*

84. There is a long history in Latin America of Presidents "mobilising partisan majorities in Congress to secure the appointment of friendly justices, particularly early during their terms".<sup>125</sup> Moreover, short periods of judicial tenure and weak protections against removal have helped to produce vacancies. However, more recent trends are towards greater checks and balances, including notably:

- Supermajority requirements for confirmation in the legislature
- Nomination by a judicial council or similar body
- Nomination or selection by the Supreme Court itself

85. The Inter-American Commission has noted that supermajority requirements can be effective when combined with measures to improve transparency and the rigorous assessment of candidates against criteria for judicial office.<sup>126</sup> The Costa Rica Supreme Court illustrates this well. A nominations committee was created within the legislative assembly in 1999 with the aim of introducing a technical procedure with clear criteria for appointments, and a vote of two-thirds of the Senate is required to confirm the selection of a Justice (it is important to note the nominations committee is confined to recommendations which are not binding and set out a shortlist of candidates, and that final decisions are made by the Congress in full session).<sup>127</sup> More generally, Hammergren observes that "invitations for civil society and citizen comments on candidates to Supreme Courts in Argentina, Ecuador, Paraguay and Peru have at least revealed the questionable backgrounds of certain candidates,

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**Short periods of judicial tenure and weak protections against removal have helped to produce vacancies.**

**More recent trends, however, are towards greater checks and balances.**

<sup>123</sup> Cadena Radial Vision, 26 October 2012, Press Release – *Comisión Calificadora no debe sesionar a puerta cerrada*; El Mercurio, 'En secreto designan jueces de la CC', 26 October 2012, [www.elmercurio.com.ec/354425-en-secreto-designan-a-nuevos-jueces-de-la-cc.html](http://www.elmercurio.com.ec/354425-en-secreto-designan-a-nuevos-jueces-de-la-cc.html).

<sup>124</sup> 'Concerns Arise over New Constitutional Court Judges in Ecuador' Americas Society / Council of the Americas, 10 October 2012, [www.as-coa.org/articles/concerns-arise-over-new-constitutional-court-judges-ecuador](http://www.as-coa.org/articles/concerns-arise-over-new-constitutional-court-judges-ecuador).

<sup>125</sup> Aníbal Pérez-Liñán and Andrea Castagnola, 'Presidential Control of High Courts in Latin America: A Long-term View (1904-2006)' (2009) 2 *Journal of Politics in Latin America*, 90.

<sup>126</sup> *IACHR Guarantees Report*, 2013, n10, [104].

<sup>127</sup> Constitution art. 160. See further Juan Manuel Muñoz Portillo, 'Política e independencia judicial: Los mecanismos de elección de Magistradas y Magistrados en Costa Rica, 1990-2013, June 2010, <http://www.estadonacion.or.cr/justicia/assets/juan-manuel-mu%C3%B1oz-kam.pdf>. More information on the system of judicial appointments in both the Supreme Court and the other courts of Costa Rica is available from <http://www.poder-judicial.go.cr/> and <http://www.estadonacion.or.cr/justicia/#inicio>.

although those ultimately responsible for selection have not always taken this into account.”<sup>128</sup>

86. The Argentinian Supreme Court appointments process provides a good case study for seeing how supermajority requirements and improved assessment and transparency can strengthen judicial independence. Since 1994 the President has had the power to appoint Supreme Court justices only with the consent of the Senate by two-thirds of its members present, in a public meeting convened to this effect.<sup>129</sup> Previously, only a simple majority was required. Brinks noted that the reforms diffuse control over these areas to a broader range of political actors, reducing partisan threats to judicial independence.<sup>130</sup>
87. Equally significant are further changes which President Nestor Kirchner introduced in 2003, which require that, when there is a vacancy in the Supreme Court, the President proposes one or more candidates whose names are published for 30 days in the Official Bulletin, for three days in two newspapers of national circulation, and on the website of Ministry of Justice.<sup>131</sup> Candidates must file a sworn statement of their assets and affiliations, law firms and client lists for past 8 years.<sup>132</sup> Individuals, NGOs and professional associations then have 15 days to file objections.<sup>133</sup> Tax services conduct an investigation.<sup>134</sup> After considering any objections received, the President then decides whether to submit the nomination for approval by the Senate (for approval by a two-thirds majority at a public hearing).<sup>135</sup> The practical effect of these measures is that the President can reconsider a provisional nominee in the light of comments received from civil society following the publication of their records. It has been claimed that civil society involvement was a determining factor in the configuration of incentives for the executive to initiate the 2003 reform process as well as the content of the changes.<sup>136</sup>
88. In line with these executive reforms, the Argentinian

**In Costa Rica several elements converged in a relevant way: the establishment of the nominations committee, the constitutional reform of 2003 which requires a qualified majority for the appointment of judges, and the development of a multiparty system in Congress among others. This would appear to have had positive consequences (as indicated in the Report on the State of Justice, the State of the Nation), for example, of the 18 appointments made between 2000 and 2013, seven were women (in the previous 11 appointment cycles, only one woman was elected) and there was also a significant improvement in the number of appointees who were already judges (16 of the 18 appointments)**

<sup>128</sup> Hambergren, 2007, n41, 140.

<sup>129</sup> Constitution, art. 99(4).

<sup>130</sup> Daniel Brinks, 'Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?' (2005) 40 (3) Texas International Law Journal, 621.

<sup>131</sup> Decree 222/2003 of 19 June 2003, Art. 4.

<sup>132</sup> Decree 222/2003 of 19 June 2003, Art. 5.

<sup>133</sup> Decree 222/2003 of 19 June 2003, Art. 6.

<sup>134</sup> Decree 222/2003 of 19 June 2003, Art. 8.

<sup>135</sup> Decree 222/2003 of 19 June 2003, Art. 9.

<sup>136</sup> Alba M Ruibal, 'La sociedad civil en el proceso de reformas a la Corte Suprema Argentina' (2008) 70(4) Revista Mexicana de Sociología, 715.

Senate improved its approval process so that hearings have public participation, civil society involvement is promoted, the Appointments Committee must issue an opinion after the hearings, and Senators' individual decisions are disclosed.<sup>137</sup>

89. A World Bank study found these changes "resulted in an improved image of the Court vis-à-vis society, granting it greater legitimacy derived from the broad consensus on the appointed candidates."<sup>138</sup> Additionally, the changes contributed to consolidating the Court's institutional strength, giving its members more authority and independence. This is reflected in decisions that are often divergent from the interests of the executive, breaking with the general trend of agreement with the executive that characterized the body when it was composed of judges appointed through the previous procedure.<sup>139</sup> Walker sees Nestor Kirchner's reforms as an attempt to restore public trust in the institution, which had been perceived to lack independence.<sup>140</sup>
90. Judicial appointments under Nestor Kirchner enjoyed high levels of public interest. For instance, following the nomination of Eugenio Zaffaroni 88.6% of respondents to a poll were aware of his nomination,<sup>141</sup> which contrasts sharply with the situation under President Menem prior to the reforms.<sup>142</sup> Local NGOs also note that since 2003 the Supreme Court has increased its legitimacy and gained the respect of the public and legal community.<sup>143</sup> Reforms resulted in an improved image of the Court, granting it greater legitimacy derived from the broad consensus on the appointed candidates.<sup>144</sup>
91. Perhaps these procedures have become too onerous, as there are recent examples of presidential reluctance to follow the post-2003 procedures. The first such instance was President Cristina Kirchner's decision in 2015, shortly before leaving power, to nominate 33 year old Roberto Carlés, who was said to be affiliated to her ruling party,<sup>145</sup> allegedly breaking the consensus since the 2003 reforms whereby the executive would not make "political" appointments to the Supreme Court.<sup>146</sup> The nomination appears to have remained in limbo until Kirchner's exit, as the President was aware that Carlés did not have sufficient support in the Senate.
92. When Mauricio Macri became President in late 2015, two of the five Supreme Court seats were vacant. President Macri attempted to appoint two Justices without involving the Senate, using powers available during a parliamentary recess.<sup>147</sup> He ultimately retracted the decree in the face of

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<sup>137</sup> Alvaro Herrero 'Access to information and Transparency in the Judiciary', World Bank Institute Governance Working Paper Series, 2010, 16 [http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency\\_Judiciary.pdf](http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250334206/Transparency_Judiciary.pdf).

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Christopher J Walker, 'Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2006) 4 *Florida Journal of International Law*, 805.

<sup>141</sup> 'Dos de cada Tres Ciudadanos Apoyan a Zaffaroni para la Corte' *La Nación*, 7 July 2003, [www.lanacion.com.ar/509406-dos-de-cada-tres-ciudadanos-apoyan-a-zaffaroni-para-la-corte](http://www.lanacion.com.ar/509406-dos-de-cada-tres-ciudadanos-apoyan-a-zaffaroni-para-la-corte).

<sup>142</sup> Fernando Laborda, 'La Nueva Corte Suprema', *La Nación*, 15 October 2004, [www.lanacion.com.ar/645100-la-nueva-corte-suprema](http://www.lanacion.com.ar/645100-la-nueva-corte-suprema).

<sup>143</sup> Paula Livachky, 'Procesos de cambio en la justicia argentina: hacia un nuevo modelo de Corte Suprema y el futuro del Consejo de la Magistratura' ['Processes of change in the Argentinian justice system: towards a new model for the Supreme Court and the future of the Judicial Council'] CELS, Informe Anual 2006, 122.

<sup>144</sup> Herrero 2010, n137, 16.

<sup>145</sup> 'El oficialismo retiró el pliego de Roberto Carlés y propuso dos nombres nuevos para la Corte Suprema' *La Nación*, 29 October 2015, [www.lanacion.com.ar/1840777-el-oficialismo-retiro-el-pliego-de-roberto-carles-y-propuso-dos-nombres-nuevos-para-la-corte-suprema](http://www.lanacion.com.ar/1840777-el-oficialismo-retiro-el-pliego-de-roberto-carles-y-propuso-dos-nombres-nuevos-para-la-corte-suprema).

<sup>146</sup> Alvaro Herrero, 'LA CORTE SUPREMA TRAS UNA DÉCADA DE ESTABILIDAD INSTITUCIONAL: ¿Hacia un cambio de paradigma?' (2015) *Laboratorio de Políticas Públicas*, 5, <http://todosobrelacorte.com/wp-content/uploads/2015/04/Alvaro-Herrero-La-CS-tras-una-decada-de-estabilidad.pdf>.

<sup>147</sup> Under Constitution art. 99(19) appointments can be made on a temporary basis until the end of the next parliament, giving Justices appointed in this way different security of tenure.

intense public criticism and the granting of an injunction, and has now sent the candidates' files to the Senate for consideration.<sup>148</sup> While President Macri set out to follow the public consultation process to gather information about these candidates in accordance with the 2003 decree, critics pointed out that he had turned the process into a formality, since he had already decided to either appoint these candidates using his recess powers, or (as eventually happened) present them to the Senate.<sup>149</sup> Notably, the public consultation saw over 7,000 submissions from civil society organizations, professional associations, and universities (both candidates receiving more supporting contributions than challenges).<sup>150</sup>

93. A second type of check on the appointment of senior judges by the executive or the legislature is to involve the national judicial council or a similar *ad hoc* body in the nomination of candidates, thereby providing a shortlist of candidates from which the political branches are to make their selections. The constitutions of El Salvador and Paraguay, for instance, require this approach.<sup>151</sup> Transparency measures may further strengthen this safeguard, for example the publication of the names of candidates in national newspapers, as in El Salvador.<sup>152</sup>
94. Guatemala presents an interesting case study for this model. Civil society organizations have long promoted reforms aimed at strengthening the judiciary. For example, in 1999 the Movimiento Pro Justicia called for increased transparency in Supreme Court appointments and resulted in the Law on the Judicial Career.<sup>153</sup> That Law enabled civil society to present objections to candidates before confirmation by an absolute majority vote in Congress.<sup>154</sup>
95. Perhaps the most important change in Guatemala, however, was the establishment of a Nominations Commission to assess potential candidates and submit nominees to Congress. The Commission has an unusual composition. Together, the Deans of Law Schools and the Law Society have significant influence, having approximately two-thirds of the seats on the Commission, with the remaining seats being held by representatives of the Supreme Court.<sup>155</sup> However, the inclusion of the Deans has apparently not had the desired purpose of introducing members who were not representing

**Nomination commissions or similar councils have been used to de-politicise the process of the assessment of candidates and nominations for judicial office.**

**However, in Guatemala, for example, there have been concerns that the processes for the commissions have been politicised and thus the goals undermined.**

<sup>148</sup> CELS and others, 'Una Corte para la democracia: grave retroceso institucional', 15 December 2015; see also José Miguel Vivanco, 'Argentina's Supreme Court Appointments', Human Rights Watch, Dispatches, 18 December 2015, [www.hrw.org/news/2015/12/18/dispatches-argentinas-supreme-court-appointments](http://www.hrw.org/news/2015/12/18/dispatches-argentinas-supreme-court-appointments).

<sup>149</sup> Horacio Verbitsky, 'Yo, el Supremo', Pagina 12, 17 January 2016, [www.pagina12.com.ar/diario/elpais/1-290512-2016-01-17.html](http://www.pagina12.com.ar/diario/elpais/1-290512-2016-01-17.html).

<sup>150</sup> 'Los candidatos a la Corte recibieron más avales que impugnaciones', Infobae, 16 January 2016 [www.infobae.com/2016/01/16/1783466-los-candidatos-la-corte-recibieron-mas-avales-que-impugnaciones](http://www.infobae.com/2016/01/16/1783466-los-candidatos-la-corte-recibieron-mas-avales-que-impugnaciones).

<sup>151</sup> IACHR *Guarantees Report*, 2013, n10, [104].

<sup>152</sup> Ibid.

<sup>153</sup> Carmen Aída Ibarra Moran, 'Ejercicios ciudadanos contra la impunidad y la falta de transparencia en la selección judicial', en *Iniciativas de la Sociedad Civil para la Transparencia en el Sector Judicial*, Washington DC, Fundación para el Debido Proceso Legal, 2002, 18-42.

<sup>154</sup> Law on the Judicial Career, art. 20; 'Tras la idoneidad y la transparencia: Apuntes sobre la aplicación de la Ley de Comisiones de Postulación', Guatemala, Movimiento Pro Justicia, 2012, 20- 21.

<sup>155</sup> Constitution, art. 215.

political interests.<sup>156</sup> Deans from newer privately owned universities said to be close to the government are increasingly involved.<sup>157</sup>

96. Critics claim that the Nominations Commission has not achieved the goal of reducing politicization.<sup>158</sup> Appointments to the Commission are said to have become subject to political infighting, which undermines the initial objective of using committees to ensure a de-politicised process.<sup>159</sup> It has also been suggested that the short duration of membership of the Commission led to members making deals to ensure their re-election.<sup>160</sup> Bowen observes that “the fractured nature of the nomination committee may have actually created more entry points for corruption .... [and according to one source] the influence of corruption and organized crime ... rather easily found its way into the nomination process.”<sup>161</sup>
97. The performance of the Commission in applying criteria and assessing candidates has also been controversial. In 2014, the Constitutional Court ruled unconstitutional and suspended the system under which the Nominations Commission assigned points to candidates for academic, professional, ethical and presentational (“*proyección humana*”) merit.<sup>162</sup> Though the Constitutional Court later lifted its suspension and validated the use of the criteria, it took the opportunity to establish more robust selection procedures including requiring commissioners to research the candidates’ qualifications, interview the candidates, and publicly justify their votes.<sup>163</sup> These were previously discretionary powers of the Commission, but the Court ruled that they should be obligatory. It also emphasized the need for publication of clear criteria “so that each candidate is aware of the attributes he or she must possess in order to be a successful applicant” and the application of these criteria in a uniform manner.<sup>164</sup>
98. Congress’ performance in the 2014 round of Supreme Court appointments also met with significant criticism. According to some reports, Congress elected judges to the Supreme Court before the expiry of the 72-hour period established in the Law on Nominating Committees for challenges to be filed.<sup>165</sup> Civil society organizations complained that the election was based on personal and/or partisan interests without a proper assessment of the suitability of the candidates.<sup>166</sup> The Inter-American Commission’s criticism was equally strong.<sup>167</sup> The final selection

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<sup>156</sup> Monica Leonardo Segura, ‘Ley v. realidad: Independencia y transparencia de la justicia en Centroamérica y Panamá’, Informe de Guatemala, Due Process of Law Foundation/Open Society Foundations (2013), 4. The Open Society Justice Initiative has stated that “new law schools have been formed primarily to participate in and influence the nomination process. Some of these law schools exist only on paper, with their role to appoint ‘deans’ whose sole purpose is to be part of the nominating commissions and vote on judge and attorney general nominations”: ‘Guatemala Justice Update’, January 2014, [www.ijmonitor.org/2014/01/guatemala-justice-update-january-2014/](http://www.ijmonitor.org/2014/01/guatemala-justice-update-january-2014/).

<sup>157</sup> Martín Rodríguez Pellecer, ‘Las 5 claves para entender la disputa por la justicia’, 22 April 2014, <https://nomada.gt/las-claves-para-entender-la-disputa-por-la-justicia-2/>.

<sup>158</sup> Carlos Melgar Peña, ‘Judicial corruption and the military legacy in Guatemala’ in Transparency International *Global Corruption Report 2007: Corruption in Judicial Systems*, Cambridge University Press, 2007, 213.

<sup>159</sup> Steven Dudley, ‘La Justicia y la creación de un Estado Mafioso en Guatemala’, Insight Crime, 18 September 2014, <http://es.insightcrime.org/investigaciones/justicia-y-creacion-estado-mafioso-guatemala/>.

<sup>160</sup> Rivillas and Lejarra, 2005, n26, 70.

<sup>161</sup> Bowen 2013, n26, 838.

<sup>162</sup> Corte de Constitucionalidad, Expediente 2143–2014, [www.cc.gob.gt/DocumentosCC/ResolucionesIntPub/Exp2143-2014.pdf](http://www.cc.gob.gt/DocumentosCC/ResolucionesIntPub/Exp2143-2014.pdf).

<sup>163</sup> Ibid; Due Process of Law Foundation, ‘Corte de Constitucionalidad de Guatemala robustece normas para selección judicial’, 7 July 2014, <http://dplfblog.com/2014/07/07/corte-de-constitucionalidad-de-guatemala-robustece-normas-para-seleccion-judicial/>; [‘Constitutional Court of Guatemala strengthens judicial selection rules’, <https://dplfblog.files.wordpress.com/2014/07/blog-post-cc-2143-2014-english.pdf>].

<sup>164</sup> See Due Process of Law Foundation, n160.

<sup>165</sup> ‘IACHR Reiterates its Concern about the Processes to Select and Appoint Judges to Guatemala’s Appeals Court and Supreme Court’, IACHR Press Release, 27 September 2014, [www.oas.org/en/iachr/media\\_center/preleases/2014/108.asp](http://www.oas.org/en/iachr/media_center/preleases/2014/108.asp).

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

of senior judges was temporarily suspended by the Constitutional Court in November.<sup>168</sup> However, the appointments were subsequently validated, in a decision which drew significant criticism for breaches of domestic legislation and international standards by the Nominations Commission and the Congress.<sup>169</sup>

99. These recent events in Guatemala provide confirmation at least that the composition of nominating bodies, transparency, the rigorous assessment of candidates are all matters of intense public interest, which is unsurprising given their effect on judicial independence.
100. In Honduras, a much smaller Nominations Board plays a similar role in proposing candidates for Supreme Court to Congress, where they require a two-thirds majority for appointment.<sup>170</sup> The seven-member Board has one representative from each of the Supreme Court (elected by a two-thirds majority of Supreme Court members), the College of Lawyers (elected by the General Assembly), the Human Rights commission, the National Business Council, the Workers' Confederations, civil society organizations and the law faculty of a university.<sup>171</sup>
101. Party politics seem to have continued to play a significant role in Supreme Court appointments after the introduction of this body.<sup>172</sup> The International Commission of Jurists found in 2003 that Congress continued to elect judges on partisan considerations rather than recognized ability, integrity and experience of the candidates proposed by the Nominations Board, and that the appointment process was therefore not "depoliticized".<sup>173</sup> Civil society organizations have criticised the lack of transparency, because the scores assigned to candidates under the criteria for judicial office were not published.<sup>174</sup>
102. In 2008 the Nominations Board adopted a regulation for its work including processes for accrediting the merit of the candidates, additional criteria for analyzing suitability, and a procedure for objections to be presented and for public hearings. This was seen as a positive step increasing transparency to its work. However, the regulation was approved only for that occasion, with uncertainty about future procedures.<sup>175</sup> The 2009 appointments round showed the traditional division of positions between the main political parties, as had happened before the Nominations Board reform, with eight judges "responding" to one political party and seven to the other.<sup>176</sup>
103. Finally, a few countries provide for a third kind of safeguard, which is to involve the Supreme Court itself in the selection of new Supreme Court Justices.

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<sup>168</sup> Open Society Foundations, 'Judicial Independence Under Threat in Guatemala', 11 November 2014, [www.opensocietyfoundations.org/voices/judicial-independence-under-threat-guatemala](http://www.opensocietyfoundations.org/voices/judicial-independence-under-threat-guatemala).

<sup>169</sup> 'CEJIL expresses its regret over the decision made by the Constitutional Court of Guatemala on the processes of judicial elections', CEJIL Press Release, 25 November 2014, [www.cejil.org/en/cejil-expresses-its-regret-over-decision-made-constitutional-court-guatemala-processes-judicial](http://www.cejil.org/en/cejil-expresses-its-regret-over-decision-made-constitutional-court-guatemala-processes-judicial).

<sup>170</sup> Constitution art. 205 (9).

<sup>171</sup> Constitution art. 311.

<sup>172</sup> Rivillas and Lejarraga, 2005, n26.

<sup>173</sup> International Commission of Jurists, *La independencia del Poder Judicial en Honduras (2004 – 2013)* (2014), 24, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Honduras-Informe-final-en-PDF.pdf>; see also Fundación para el Debido Proceso [Due Process of Law Foundation], 'Las Reformas a la Administración de Justicia en Honduras y Bolivia', Washington, 2008, 51.

<sup>174</sup> CEJIL, 'Llamamiento a la transparencia y rendición de cuentas en la elección de Magistrados y Magistradas a la Corte Suprema de Justicia en Honduras', 8 January 2016, [www.cejil.org/sites/default/files/2016\\_01\\_08\\_hn\\_proceso\\_de\\_seleccion\\_final.pdf](http://www.cejil.org/sites/default/files/2016_01_08_hn_proceso_de_seleccion_final.pdf).

<sup>175</sup> International Commission of Jurists 2014, n173, 25.

<sup>176</sup> *Ibid*, 27.

104. In Chile, the Supreme Court draws up a list of five people it considers appointable and the President proposes an appointment from the list. The Senate must agree to the proposal in a session especially dedicated to that purpose and with two-thirds of its members present. If the Senate does not approve the proposal, the Supreme Court adds a new name to the list in replacement of the one that was rejected and the procedure is to be repeated until an appointment is made.<sup>177</sup>
105. In Brazil, four-fifths of the seats on the Supremo Tribunal de Justiça (STJ) are filled from lists provided by the President of the Republic from a list provided by the STJ itself, after their nomination has been approved by an absolute majority of the Federal Senate; the remaining one-fifth of the seats are filled by judges who are selected by the President and confirmed by the Federal Senate in the same way from a list compiled by the national bar association and national prosecutors association.<sup>178</sup>
106. In Costa Rica, the judges of all Chambers of the Supreme Court are elected by the Legislative Assembly.<sup>179</sup> To appoint a candidate two thirds of the votes cast (ie a qualified majority) are needed. A "nominations committee" is responsible for proposing a list of the best qualified candidates according to objective criteria.<sup>180</sup> However, members of the legislature are not required to elect any of the candidates proposed by the nominations committee.<sup>181</sup>
107. Most remarkably, in Colombia, the Supreme Court chooses its own members from lists sent by the Higher Judicial Council.<sup>182</sup> It is unusual for Supreme Court justices to be selected without the explicit intervention of the executive branch or the president's party in Congress.<sup>183</sup> However, the membership of the Higher Judicial Council was reformed in 2015 to reduce the judicial domination of the Council committee responsible for judicial elections, so the situation is currently in flux.<sup>184</sup>

### C. Appointments to other courts

108. Unlike appointments to Latin America's highest courts, which remain largely in the hands of the political branches of government, appointments to other courts in the hierarchy have in many jurisdictions been transferred to judicial councils. This is broadly in line with the shift in international principle in favour of the use of such appointment bodies. However, as we saw in section A of this chapter, international principles also require genuine independence, transparency and a rigorous assessment of candidates against published criteria for judicial office. The record of Latin American judicial councils in these respects varies enormously from jurisdiction to jurisdiction.
109. Hammergren notes that the spread of judicial councils started in the late 1980s and early 1990s. At that point, "with judicial reforms under way in a majority of countries, the council model became a popular addition to the programs, heralded as a means of depoliticizing appointments, guaranteeing the selection of better judges, and in many cases also advancing judicial independence" through other functions including the administration of the courts and the discipline and removal of judges; judicial councils existed in a majority of Latin American jurisdictions by the

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<sup>177</sup> Constitution, art. 78.

<sup>178</sup> Constitution, arts. 94, 104.

<sup>179</sup> Standing Orders of the Legislative Assembly of Costa Rica, art. 84.

<sup>180</sup> These include references, interviews and other evidence.

<sup>181</sup> Constitution, art. 231.

<sup>182</sup> Constitution, art. 231.

<sup>183</sup> Pérez-Liñán and Castagnola, n125, 93.

<sup>184</sup> Constitution art. 255 modified by Legislative Act 2/2015.

end of the 1990s.<sup>185</sup> Hammergren adds that “[d]espite the reliance on the model of judicial councils which already existed in many European countries, the *status quo ante* was quite different in Latin America, as were the specific problems the councils were intended to resolve.”<sup>186</sup> For one thing, and in contrast to the position in Europe, the powers transferred to the councils had in most cases been exercised by supreme courts.<sup>187</sup> As such, their establishment did not necessarily mean that new powers were being transferred to the judiciary, but rather the contrary.

110. Today, councils have yet to be established in some Latin American jurisdictions. For example, Chile has continued to entrust the main role in appointments to the Supreme Court, which in the case of a vacancy in one of the Courts of Appeal supplies the President with a slate of three persons.<sup>188</sup> In the case of lower courts, the relevant Court of Appeal is in turn responsible for supplying the President with a slate of three persons to fill vacancies that arise.<sup>189</sup>
111. Among the jurisdictions which have established councils, Costa Rica keeps closest to the tradition of appointment of judges by the Supreme Court. Costa Rica’s Superior Council is subordinate to the Supreme Court and responsible for the administration, selection and appointment of judges and administrative staff and discipline with the purpose of ensuring independence and efficiency.<sup>190</sup> Its membership of five consists of the Chief Justice, two judges, an administrator and an outside lawyer.<sup>191</sup> Members other than the Chief Justice are appointed for a term of six years, which is not renewable unless three-quarters of the Supreme Court approve.<sup>192</sup>
112. The assessment of candidates is undertaken on behalf of the Superior Council by a five-member Judicial Council including one Justice of the Supreme Court, one member of the Superior Council, one member of the Judicial School Board and two appellate Judges. The members are appointed by the Supreme Court for a renewable term of two years.<sup>193</sup> Ultimately, the Supreme Court selects judges from shortlists of the candidates with the highest scores sent by the Judicial Council.<sup>194</sup>
113. Costa Rica has been described as an extreme example of an autonomous/corporatist model which leaves appointments, discipline, and removal of lower court judges in the hands of the judiciary without the intervention of the other branches.<sup>195</sup> In a comparative study of judicial councils, Hammergren argues that judicial selection is generally more suited to an external council in which different groups and interests are represented, with safeguards against the effects of partisan and vested interests, than the internal councils created in Costa Rica. However, she also notes that Costa Rica’s judicial councils and the judiciary more broadly do appear to be “attuned to the need to address external demands”.<sup>196</sup>
114. The presence of a majority of judges among the members of a judicial council does not guarantee its independence, however. This is illustrated by the situation in Guatemala and Honduras.

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<sup>185</sup> Hammergren 2002, n59, 3.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.* For a more detailed account of the composition of judicial councils in Latin America and the influence of national supreme courts, see Andrea Pozas-Loyo and Julio Ríos-Figueroa, ‘The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils’ (2011) 89 *Texas Law Review*, 1830.

<sup>188</sup> Constitution, art. 78.

<sup>189</sup> Constitution, art. 78.

<sup>190</sup> Organic Law on the Judicial Branch, Law no. 7333 (1993), art. 67.

<sup>191</sup> Organic Law on the Judicial Branch, Law no. 7333 (1993), art. 69.

<sup>192</sup> Organic Law on the Judicial Branch, Law no. 7333 (1993), art. 70.

<sup>193</sup> Law on the Judicial Career No. 7338, art. 71.

<sup>194</sup> Law on the Judicial Career No. 7338, art. 77.

<sup>195</sup> Luis Salas, ‘Carrera Judicial en Latino America’ *Centro para la Administración de la Justicia*, San Jose, 11 September 2006, 7.

<sup>196</sup> Hammergren 2002, n59, 36.

Although the Supreme Court supplies three of the five members of the Guatemalan Judicial Council, the Council has been criticized for unfairness in the assessment of candidates in a challenge brought to the Constitutional Courts by candidates who were not selected despite gaining the highest marks in qualifying exams.<sup>197</sup>

115. In Honduras, the Judicial Council is made up of five members: the President of the Supreme Court, two members elected by judges' associations, one by the College of Lawyers and a representative of the National Association of Employees and Officials of the Judicial Branch. The names of candidates selected by the Council are sent to Congress for approval (through majority vote).<sup>198</sup> A High Level Mission by the International Commission of Jurists in 2012 observed the process of election for the Judicial Council and concluded that although the creation of the council was a positive step, the election of members and functioning of the council were not in line with international standards: the number of members was too low, the selection procedure did not ensure members of recognized integrity and legal experience and was riven with problems of partisanship and other irregularities, and the dominance of the Supreme Court through the Chief Justice chairing the Council was not an effective guarantee of its independence.<sup>199</sup>
116. In Argentina, there have been protracted battles over the composition of the federal Judicial Council almost from the day that the body was first established in 1994, with various commentators noting that Argentina provides a case study of the gradual politicisation of a judicial council.<sup>200</sup> Demand for the creation of a judicial council arose as a result of Argentina's long history of a politicized, opaque appointment process.<sup>201</sup> In recognition of the need to overhaul that process, Argentine civil society groups and multilateral lending agencies took part in the struggle for legislation to create a federal judicial council.<sup>202</sup>
117. Despite formal improvements in selection procedures for lower court judges (public procedures, fair competitions, clear selection criteria, simplified disciplinary procedures) early assessments claimed that the behaviour of the council's members meant that in practice the council failed to solve some of the problems it was aimed to address in relation to judicial independence and corporatism.<sup>203</sup> The council's early work was characterised by inefficiency and delays in the appointment process with different factions on council sometimes creating deadlock.<sup>204</sup>
118. In 2006, the shortcomings listed formed part of the government's case to garner support for proposal to streamline the Judicial Council reducing its members from 20 to 13.<sup>205</sup> These reforms shifted the balance in favour of elected branches of government.<sup>206</sup> The council already had a relatively high number of legislators as members compared to European models, and a relatively

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<sup>197</sup> Rivillas and Lejarraga 2005, n26, 71.

<sup>198</sup> Law on the Judicial Council and Judicial Career 2011, art. 4.

<sup>199</sup> Pronunciamiento de la Comisión Internacional de Juristas en ocasión de finalizar la Misión de Alto Nivel con el objeto de observar la elección del Consejo de la Judicatura en Honduras, 31 de agosto de 2012; see also Asamblea General de la ONU, Informe del Relator Especial sobre la independencia de los magistrados y abogados, Leandro Dspouy, A/HGRC/11/41, 24 de marzo de 2009, [28]; International Commission of Jurists 2014, n173, 90.

<sup>200</sup> Emilio J Cárdenas and Héctor M Chayer, 'Corruption, accountability and the discipline of judges in Latin America' in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007), 46.

<sup>201</sup> Rebecca Bill Chavez, 'The Appointment and Removal Process for judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence' (2007) 49 (2) *Latin American Politics and Society*, 36.

<sup>202</sup> *Ibid.*

<sup>203</sup> Laura C Roth, 'Acerca de la Independencia Judicial en Argentina: La Creación Del Consejo de la Magistratura y su Desempeño entre 1994 y 2006' (2007) 47 (186) *Desarrollo Economico*, 315.

<sup>204</sup> Hammergren 2002, n59, 8.

<sup>205</sup> Law 26.080 sanctioned 22 February 2006, art. 1.

<sup>206</sup> Chavez 2007, n201, 41.

low proportion of judges.<sup>207</sup> The reforms gave political representatives seven of the 13 seats (where previously they had held nine of the 20 seats on the former Council) and thus the majority to veto candidates for appointment, and also to block the removal of judges when the Council sat for disciplinary proceedings. The UN Human Rights Committee was critical of these changes, expressing its concern that ‘representatives of political organs close to the executive branch predominate at the expense of judges and lawyers’ and recommending that Argentina take measures to ensure a more balanced composition.<sup>208</sup>

119. In 2013, Congress sought to add one lawyer and five representatives from the “academia or scientific field” to the existing body, to be nominated by political parties and selected by popular vote during presidential elections.<sup>209</sup> Under the new system, eight out of the expanded 19-member Judicial Council would be nominated in a list created by political parties and appointed automatically, according to whichever party wins the majority of votes in the presidential elections. The President would then appoint a representative of the executive and four of the six representatives from Congress would be chosen by the ruling party. Critics were quick to point out that under the proposed system whoever won the presidency of Argentina would immediately have a majority of seats at the council.<sup>210</sup> The UN Special Rapporteur issued a strongly critical statement, observing that “[b]y providing the opportunity for political parties to propose and organize the election of the directors, the independence of the Magistrates Council is put at risk, which seriously compromises the principles of separation of powers and independence of the judiciary.”<sup>211</sup> In the event, the reforms were struck down by the Supreme Court, which ruled that the parts of the reform involving popular election and the new composition of the Judicial Council were unconstitutional and threatened judicial independence due to lack of balance.<sup>212</sup>
120. In November 2015, the Federal Administrative Appeals Court issued a further ruling, in which it held that the 2006 reform reducing the Judicial Council from 20 to 13 members is unconstitutional for the same reason as led the Supreme Court to strike down aspects of the 2006 reforms.<sup>213</sup> This ruling suggests that the tide may have turned against the politicization of the Judicial Council in Argentina.
121. Like the disputes over the assessment practices of Guatemala’s Judicial Council and the lack of transparency of the Judicial Council in Honduras, the contestation over the composition of Argentina’s Judicial Council is revealing in itself. It strongly indicates that parties wishing to influence the composition of the judiciary see that the judicial council is a potential obstacle to their doing so, which in a sense confirms the value of these institutions as bulwarks of judicial independence.

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<sup>207</sup> Nuno Garoupa and Tom Ginsburg ‘Guarding the Guardians: Judicial Councils and Judicial Independence’ (John M Olin Program in Law and Economics Working Paper No 444) 37,

[http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1221&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1221&context=law_and_economics).

<sup>208</sup> UN Human Rights Committee, Final Observations on Argentina, CCPR/C/ARG/CO/4 31 March 2010, [10].

<sup>209</sup> Law 26.855 sanctioned 8 May 2013, art. 2.

<sup>210</sup> International Bar Association, ‘Argentina’s controversial judicial reform of great concern to IBAHRI’, 18 June 2013, [www.ibanet.org/Article/Detail.aspx?ArticleUId=fc38cc3e-9897-46e7-b754-03820effbb33](http://www.ibanet.org/Article/Detail.aspx?ArticleUId=fc38cc3e-9897-46e7-b754-03820effbb33); Human Rights Watch ‘Argentina: Reject Interference with Judicial Independence’, 24 April 2014, [www.hrw.org/news/2013/04/24/argentina-reject-interference-judicial-independence](http://www.hrw.org/news/2013/04/24/argentina-reject-interference-judicial-independence).

<sup>211</sup> OHCHR, ‘UN expert calls for guarantees and respect for the independence of the judiciary’, 30 April 2013, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13275&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13275&LangID=E).

<sup>212</sup> Rizzo, Jorge Gabriel (apoderado lista 3 Gente de Derecho) s/acción de amparo c/Poder Ejecutivo Nacional, ley 26.855, medida cautelar (Expte. Nº3034/13), sentencia del 18/05/13.

<sup>213</sup> ‘Declaran inconstitucional la actual integración de 13 miembros del Consejo de la Magistratura’ [Current composition of 13 members of the Judicial Council declared unconstitutional], *La Nación*, 20 November 2015. [www.lanacion.com.ar/1846912-declaran-inconstitucional-la-actual-integracion-de-13-miembros-del-consejo-de-la-magistratura](http://www.lanacion.com.ar/1846912-declaran-inconstitucional-la-actual-integracion-de-13-miembros-del-consejo-de-la-magistratura).

## 5. CONCLUSIONS

122. The ever-increasing body of international principles in treaties, declarations and reports of official bodies leaves no room for doubt about the importance of judicial tenure and appointments processes for supporting judicial independence and underpinning the rule of law. Both types of safeguards contribute to actual independence, in the sense of judges adjudicating without fear or favour, and also to perceived independence, the situation in which the public has confidence in the courts and is preparing to submit disputes to judicial resolution.
123. Judicial tenure illustrates these connections well. By appointing judges permanently, which is the emerging international standard, they are given the job stability which is conducive to adjudicating cases with actual independence. At the same time, permanent appointments send a signal to the public that judges are not exposed to conflicts of interest in the way that fixed-term judges are, and this strengthens their perceived independence.
124. Similarly, appointment processes have the potential to increase the actual independence of judges who are appointed, through fair and rigorous assessment of candidates and a transparent process that attracts as many applicants as possible. Perceived as well as actual independence can be improved if the appointment process is depoliticized and conducted by a more trustworthy body such as a suitably composed judicial council, and if transparency is sufficient to enable civil society to scrutinize the workings of the process and sound the alarm about unsuitable candidates.
125. Latin American jurisdictions take a wide range of approaches to judicial tenure and appointment processes, as this report has shown. In the area of tenure, there appears to be conscious resistance in many countries to the international support for permanent appointments, and a preference to retain fixed-term appointments. Instead, a range of innovative responses have been developed to address the increasingly acknowledged dangers of politicization. These range from automatic renewal to restrictions on reappointment.
126. In the area of appointment processes, similarly, there is resistance to transferring the responsibility for appointing judges to an independent body, particularly at the level of the supreme court or constitutional court. Instead, increasingly elaborate means have been developed to ensure that these appointments cannot simply be made by the executive government acting alone. Supermajority requirements and the introduction of a screening role for judicial councils are among the responses that have been tried. Experience suggests that such changes are at their most effective when combined with other reforms to the appointment process, such as a more rigorous system for assessing candidates against the criteria for judicial office, and making the process more transparent to the public.
127. In many of the Latin American jurisdictions examined in this report, issues of judicial tenure and appointment are hotly contested, and have given rise to litigation or even public protests. This

suggests a situation that is in flux, in which fundamental questions of judicial independence are being debated and in which there is the possibility of shifting public opinion to bring about legal changes that improve safeguards.

128. Looking to the future, if there are changes to judicial tenure and appointment processes, it is important that these are pursued in tandem. Each raises the stakes for the other. If judicial tenure becomes permanent, it will be more important than ever that the appointment process should select the best candidates, since a judge cannot then be removed on the basis of poor performance unless they commit a disciplinary offence. The same is true in reverse: if a rigorous appointments process exists, then the legal system must use it to fill its vacancies, and not rely on temporary judges who are appointed by less demanding routes and denied security of tenure. Both judicial tenure and the process by which judges are appointed have the ability to strengthen the independence of the judiciary, and their full potential for bolstering the rule of law remains to be explored.



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