

POLICY BRIEF

A pandemic is not the time for reforming judicial nominations in Guatemala

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As is the case in many countries across the globe, the COVID-19 pandemic has further undermined the rule of law in Guatemala due to the use of emergency measures to limit fundamental freedoms and blur the separation of powers. Simultaneously, the ongoing judicial nominations and elections process in Guatemala has been plagued with technical failures and high-level corruption scandals, casting a shadow over the legitimacy of the judiciary and highlighting that reforming the process is vital for the rule of law. Although the judicial nominations process is in sore need of reform, the executive's recent proposals to do so amidst the COVID-19 pandemic does not allow for the open and transparent process which is needed to bring back legitimacy to and trust in Guatemala's judiciary.



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A troubled ongoing elections process does not properly set the scene for reforms

The current judicial nominations process in Guatemala is procedurally complicated and overseen by Nominations Commissions – one to nominate magistrates to the Supreme Court and one for the Court of Appeals – which are widely known for failing to be objective and transparent. In September 2019, a decision by Guatemala’s Constitutional Court to suspend the nominations process displayed these issues. In that decision, the Constitutional Court found that certain representatives to the Nominations Commission for the Supreme Court had to be reselected in order to ensure transparency and eliminate undue influence. The Constitutional Court also found that failing to comply with the legal technical requirements when ranking judicial candidates was used to disqualify certain candidates without cause.

In mid-February 2020, the Nominations Commissions provided Congress with their list of nominees, although the list submitted by the Commissions to Congress was nearly identical to those nominated before the Constitutional Court’s ruling. Additionally, the criteria used to nominate the candidates was not made public, important background information on the candidates was missing and no public hearings related to the selection process were held. By the time Congress received the “new” list, 120 days had passed since the newly elected Supreme Court and Court of Appeals magistrates should have taken the bench – the elections should have been completed in mid-October 2019.

Then, on the heels of Congress receiving the nominees and as COVID-19 began to cause a health crisis, the Special Prosecutor’s Office Against Impunity (FECI by its acronym in Spanish) announced that it had begun an investigation into a case of corruption related to the judicial nominations process called, “Parallel Commissions 2020: political and judicial control in the hands of a prisoner”. The case centres around Gustavo Alejos, a powerful politician previously accused in several other

Key Points

- ¶ The ongoing judicial nominations and elections in Guatemala have again shown that the process must be reformed to bring back legitimacy to and trust in Guatemala’s judiciary.
- ¶ The reform process initiated by the executive has failed to include civil society and members of the judiciary.
- ¶ The COVID-19 pandemic does not allow for the participatory and transparent processes needed in reforming judicial nominations.
- ¶ When reforms are finalised, Supreme Court and Court of Appeals magistrates should have lifetime tenure to strengthen judicial independence.

corruption cases. Gustavo Alejos, while sitting out his pretrial detention in a private hospital after convincing a judge to grant him permission to do so, allegedly used his hospital room to facilitate meetings with politicians, commissioners and even potential judicial candidates to influence the selection of magistrates. These types of corruption scandals are common in the nomination and election of magistrates in Guatemala, as seen with the case of the “Tennis Shoe King” in the 2014 judicial nominations and elections. On the other hand, and even after the closure of the International Commission against Impunity in Guatemala (CICIG), it is a positive sign for the rule of law that FECCI continues to root out these instances of corruption.

As a result of the new corruption allegations, on 24 February, Guatemala’s Attorney General requested that the Constitutional Court again suspend the process as there was an imminent threat that Congress would elect magistrates who do not satisfy the constitutional requirements of “capacity, suitability and honesty”. In its 6 May ruling on the request, the Constitutional Court once again showed that it is a pocket of resistance in a closing space for the justice sector and has been a defender of the rule of law in Guatemala since the attacks began against CICIG and to date. The Constitutional Court ordered that the Attorney General provide Congress with a detailed report indicating which judicial nominees have connections to criminal proceedings or ongoing investigations to determine whether certain candidates do not meet the constitutional requirements of “suitability” and “honourability”. The Court also urged Congress to reform the judicial nominations process to guarantee that magistrates satisfy the constitutional requirements.

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Urging Congress to reform the nominations process is inherently problematic because it gives a Congress that is rife with its own corruption scandals and subject to undue influence the final say in electing the new judiciary. Making the extent of this problem crystal clear, the recent Attorney General’s report provided to Congress on 18 June even implicated congress members on the legislative branch’s steering committee as those connected to criminal proceedings or ongoing investigations. As worrisome for the rule of law is the fact that Congress has also defied the Constitutional Court order by not holding elections within the twenty-day window period from receiving the Attorney General’s report, as set out in the Constitutional Court’s order. The elections should have occurred by 20 June, but to date Congress has only agreed upon the process for holding elections.

Even before the latest corruption scandal and the Attorney General’s report, it was already accepted that the judicial nominations process is flawed both in theory and in practice. Calls for constitutional and legal reforms to establish judicial tenure and fight corruption in the election process have echoed amongst justice sector actors in Guatemala for quite some time. The recent affirmation by the Constitutional Court reiterates that constitutional reforms are vital to preserve the credibility of the judiciary. Yet, the recently announced proposal for reforms by Guatemala’s executive in the midst of a pandemic does not appear to resolve the existing challenges.

A pandemic hinders meaningful reform

In February, President Giammattei announced that the executive branch, upon consulting constitutional lawyers, would initiate considering how to reform the judicial nominations process. This resulted in President Giammattei privately meeting with representatives from the Association for Research and Social Studies (Asíes), the University of Rafael Landívar and the University of San Carlos, who all worked on previous constitutional reform proposals that were never adopted due to a lack of support. At a press conference on 2 June, President Giammattei provided that three days later he would announce a proposal for constitutionally reforming the judicial nominations process that would include eliminating the problematic Nominations Commissions.

On 5 June, President Giammattei presented the proposals, gathering members of the business community, religious leaders, civil society representatives and government officials, including Jordán Rodas, the Ombudsman for Human Rights, who was invited but alleged that he was not permitted to enter. President Giammattei announced at the gathering that the proposals would be presented to the Supreme Court and that he would create an additional committee to advise on the constitutional reform process. He has, however, postponed the presentation to the Supreme Court, citing confirmed cases of COVID-19 amongst his staff. It also remains unclear who will participate in the committee and it is important to note that no judges have been known to participate in advising on the reforms to date. Even more problematic is that no official written document outlining the proposed reforms has yet been made available to the public. Over the last several weeks, a written proposal has circulated on social media networks. The validity of that version remains in question, but corresponds with the proposals presented by the executive.

There has been long-term consensus within the legal community and civil society that the judicial nominations process is in need of reforming. However, the fact that the ongoing reform process was initiated by private meetings with only a small handful of justice sector actors chosen by the executive does not instill confidence from the start. Additionally, the handful of actors included in the private discussions were unable to gain support for their proposed judicial reforms in 2016 and are unlikely to do so now as the justice sector has only become more polarised since the attacks on and the closing of CICIG. Although a wider selection of justice sector actors should have been included early on, it is still possible to salvage the process by taking a cross-sector approach and including a variety of justice sector actors in the next steps to reach consensus and depolarise the nomination and election of judges to the extent possible.

As organisations like Acción Ciudadana have reiterated, the state of emergency due to COVID-19, along with the social distancing and curfew rules currently in place in Guatemala, do not set the preconditions in which to initiate a reform process that should include open, transparent and inclusive cross-sector discussions and debates. The health and economic crises caused by COVID-19 have also redirected resources and the focus of the government and other key actors to address those matters, leaving little time and energy to properly engage in reforming the judicial nominations process.

There is also some confusion as to why the government is simultaneously attempting to reform the process while the current elections have been plagued

with so many problems and are still pending. As Alianza por las Reformas has emphasised, the election and reforms process should be kept separate and apart.

The presented proposals are unlikely to root out the existing problems

There are also substantive issues arising from the presented proposals. Above all, the proposals should include lifetime tenure for Supreme Court and Court of Appeals magistrates as it is a well-accepted principle that tenure is essential to guaranteeing judicial independence. Instead, the proposal includes that both Supreme Court and Court of Appeals magistratse would serve ten-year terms (although it is an increase compared to their current five-year terms). The presented proposals also include that three-fourths of the Court of Appeals magistrates be appointed from within the pool of judges already sitting on the bench, with the remaining fourth from outside the judiciary after going through a competitive process before appointment. The Supreme Court would appoint the Court of Appeals magistrates from a short list produced by the Judicial Career Council, which is a body that manages the judiciary by overseeing appointments, transfers, removals, code of conduct matters, disciplinary matters etc.

As for the Supreme Court, the presented proposals provide that it would increase in size from thirteen magistrates to fifteen. Eliminating the Nominations Commissions, five different entities would each appoint three Supreme Court magistrates. The proposed appointing bodies are: (1) the President with the advice of the council of ministers; (2) Congress; (3) Guatemala's Bar Association; (4) law school deans; and (5) a selection of judges from the Court of Appeals. While the Nominations Commissions have been controversial since their creation, these five proposed appointing bodies are likely to be just as problematic for a myriad of reasons. First, the executive should not have the power to independently appoint magistrates without oversight from the legislative branch. Second, Guatemala's Bar Association has been subject to undue influence in the past. Most recently, in 2014, in the case of the "Tennis Shoe King", a businessman and lawyer used his clout and wealth to gain control over the Guatemalan Bar Association in nominating Supreme Court and Court of Appeals magistrates who would be loyal to him. The law school deans also would maintain the power to appoint magistrates when it is well-known that since the adoption of the Nominations Commissions several "phantom law schools" were created and funded with the sole purpose of positioning law school deans to influence the election of judges.

Further, the current reform process has not included any suggestions for the appointment of Constitutional Court magistrates. Currently, there are five Constitutional Court magistrates who serve five-year terms, with one each appointed by Congress, the Superior University Council of the University of San Carlos de Guatemala, Guatemala's Bar Association, the Supreme Court of Justice and the President and Council of Ministers. Any future reforms should include the Constitutional Court, especially as the existing appointment process has resulted in a highly politicised bench. Moreover, the politicised Constitutional Court should be a sign that proposing a similar process for the Supreme Court will also likely yield the same result.

Conclusion

The COVID-19 pandemic has only exacerbated a rule of law already under duress in Guatemala. It also impairs any meaningful attempts to conduct a participatory and transparent reform process of the judicial nominations process. While reforming the process is paramount to strengthening the rule of law in Guatemala, now is not the time. In light of the fact that there is no official document outlining the substantive proposed reforms, the following policy recommendations focus on the procedural aspects of the reform process to ensure a participatory and transparent process.

Policy Recommendations

- ¶ Postpone the reform process until after the COVID-19 pandemic subsides to allow for the proper allocation of resources and the inclusion and participation of the justice sector actors needed to reach consensus.
- ¶ Include a wider variety of justice sector actors in discussing, debating and drafting the reforms, including representatives from civil society and the judiciary, along with involving citizens by holding public hearings.
- ¶ Ensure that the proper time is allocated to fully and openly discuss and debate the reforms.
- ¶ Maintain the current election of magistrates separate from any ongoing reform process.
- ¶ Include experts from the Latin America region who have similarly reformed their judicial nominations process, such as Mexico, Colombia or Peru, in the reform process to draw on best practices and lessons learned.

References

1. For an in-depth discussion on how the Nominations Committees are formed and the technical procedures governing the judicial nominations process, see [Judicial Nominations in Guatemala: Pockets of Resistance in a Closing Space](#), ILAC's Policy Brief (Oct. 2019), pgs. 3-4.
2. For a full discussion on the need for reforming the process and recommendations for doing so, see Cyrus R. Vance Center for International Justice, *Acompañamiento del Lawyers Council for Civil and Economic Rights a Guatemala para el proceso de nombramiento de Magistrados de la Corte Suprema de Justicia y Cortes de Apelaciones*, (2019).
3. See Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/31 of 29 November 1985 and 40/146 of 13 December 1985.

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A similar text in Spanish, titled *Seguimiento al Proceso de Nombramiento de Magistrados de la Corte Suprema de Justicia y Corte de Apelaciones en Guatemala*, published by the Lawyers Council for Civil and Economic Rights of the Vance Center, is available [here](#).

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