



POLICY BRIEF

Judicial Nominations in Guatemala Pockets of Resistance in a Closing Space

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A lot is at stake with the ongoing judicial nominations in Guatemala considering so much ground has already been lost for the rule of law.

Guatemala's Congress was slated to elect an entirely new judiciary in mid-October of this year. The judicial elections are occurring in the shadows of the United Nations-backed International Commission against Impunity in Guatemala (CICIG) being forced to leave and in the middle of rapid rule of law backsliding. Nevertheless, Guatemala's Constitutional Court has pushed back and proven to be a "pocket of resistance" in a closing space for civil society and the justice sector. This brief examines the judicial nominations process and makes recommendations for more fair and impartial judicial nominations and elections.



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A new bench amidst an attack on the rule of law

In the not too distant past Guatemala was poised to become a regional example of combating corruption and organised crime, and strengthening the rule of law. These expectations were supported by CICIG. Guatemala is now, like many other states, moving away from democratic standards towards autocratisation,¹ resulting in a rapidly closing space for civil society and the justice sector. In Guatemala, this trend is most evident by the executive's relentless attacks on CICIG in an attempt to safeguard its power. The onslaught reached its pinnacle in early 2019 when incumbent President Jimmy Morales unilaterally decided to prematurely close CICIG. Guatemala's Constitutional Court ruled that decision unconstitutional, but Mr Morales nevertheless did not extend CICIG's mandate and on September 3, its doors closed.

Guatemala's Congress has followed in the executive's footsteps by attempting to impeach and lift the immunity of the Constitutional Court magistrates who ruled in favour of CICIG. That attempt was thwarted when the Constitutional Court issued an injunction against the Supreme Court's decision to accept the request from Congress. In another legal battle, the Constitutional Court is pushing back over Guatemala's conflict legacy. In July 2019, the Court granted a provisional injunction filed by human rights activists to suspend congressional deliberation of a bill that would provide amnesty for those convicted of human rights abuses from the internal armed conflict. Congress members have still continued to push for a third reading of the bill. They have also filed another motion with the Supreme Court to impeach the Constitutional Court magistrates who voted in favour of the injunction. That motion is currently pending before the Supreme Court.

The shuttering of CICIG and the attacks on the independence and integrity of the Constitutional Court by what are objectively legal means are worrying for the rule of law in Guatemala, which already ranks 96th of the 126 countries included in the World Justice Project's 2019 Rule of Law Index. This is especially true since Guatemala is in the midst of electing an entirely new judiciary. The judicial nominating commissions should be comprised of independent experts evaluating the technical abilities of the judicial candidates and in theory the overall process is in accordance with international standards. Yet, it is a cumbersome process in practice which has created space for politicisation and corruption.

Key Points

- ¶ In the middle of electing a new judiciary there is a lot at stake for the rule of law in Guatemala.
- ¶ There is a difference between the judicial nominations by the books and in practice.
- ¶ The Constitutional Court has ruled that the judicial nominations did not comply with the law and ordered reinitiation of the nominations.
- ¶ The Constitutional Court's recent decision provides hope and a second chance for the nominations to be made right.

Judicial nominations according to the law

Constitutional reforms in 1993 mandated Guatemala's Congress to select justices for the Supreme Court and magistrates for the Court of Appeals from a short list of candidates provided by nominating commissions. In 1999, the Law on the Nominations Commissions was adopted to further define the responsibilities of the Nominations Commissions and the selection of commission members, along with providing that the process must be transparent, professional and objective.

In this year's election cycle, the Supreme Court and Court of Appeals Nominations Commissions are comprised of 37 members. The Nominations Commission for the Supreme Court includes: one representative elected from the rectors of Guatemala's universities to preside over the commission; the dean from each of the 12 law faculties in Guatemala; 12 representatives elected from the Guatemalan Bar Association; and 12 magistrates elected from the Court of Appeals. That Nominations Commission will propose 26 candidates to Congress, of which 13 are elected as justices to the Supreme Court to serve a term of five years. The Court of Appeals Nominations Commission is comprised of members with the same profiles except that it includes 12 justices elected from the Supreme Court instead of the Court of Appeals. It nominates 540 candidates (double the number of magistrates elected by Congress) to also serve five-year terms.

Too much to do, too little time

Congress must convene to form both Nominations Commissions four months before the terms of the sitting judges end. Once in place, both Nominations Commissions must complete the following steps in just over three months:

- (a) set the criteria for the judicial candidates,
- (b) establish a grading scale with a point system of 1 to 100 to grade and rank the candidates,
- (c) publish the selection process and candidate requirements in the official newspaper, as well as in two other widely circulated papers,
- (d) prepare an application form for candidates,
- (e) prepare a list and brief description of all applicants and exclude any candidates who do not meet legal requirements and commission criteria,
- (f) prepare a new list of remaining candidates,
- (g) run background checks on the remaining candidates and review any professional ethics violations,
- (h) conduct discretionary interviews,
- (i) publish a list of qualified candidates in the official newspaper, as well as in two other widely circulated papers, so that the public may submit complaints or challenge a candidate,
- (j) grade and rank candidates on the 1 to 100 scale,
- (k) at least two-thirds of each Nominations Commission must vote on the candidates in ranked order and
- (l) the final lists of candidates must be sent to Congress for elections, along with the supporting documents, at least 20 calendar days before the end of sitting judges' terms. The lists of candidates must also be published in the official newspaper, plus two other widely circulated papers.

The Judicial Career Law adopted in 2016 also applies for the first time in the current judicial nominations. The Law states that the Council of the Judicial Career, an autonomous body within the judiciary in charge of supervising, evaluating and disciplining judges and judicial functionaries, should evaluate the judicial candidates. The Council should then provide the Nominations Commissions with those evaluations for consideration early on in the vetting process.

Formalities and defined procedures are usually a good thing in a process like this, but the formalities in this instance have not proven enough to offset what is already a skewed process from the start to favour the will of the government. In fact, what is an overly formalistic process for a resource-limited system, which also must be completed in a short period of time, is part of the problem as it creates space for politicisation and corruption.

Judicial nominations in practice

Since the adoption of the Law on the Nominations Commissions the number of law faculties has increased from four to over ten. It is believed that these so-called “phantom law faculties” were created and funded with the sole purpose of positioning law faculty deans to influence the election of judges.² Similarly, explicit conflicts of interest have plagued the process in the past. Most notably, members of the Supreme Court Nominations Commission may apply as candidates for the Court of Appeals and vice versa, resulting in “I vote for you, you vote for me”. Cases like the “Tennis Shoe King,” a wealthy businessman who used his clout and wealth to gain control over the Guatemalan Bar Association and ensure those loyal to him were elected to the Supreme Court and Court of Appeals during the 2014 elections, also loom over this year’s judicial nominations. Moreover, without CICIG’s presence during the ongoing nominations, there are no independent investigators to deter those attempting to influence the bench. There are additional concerns that several outgoing members of Congress subject to investigations by CICIG may use this process to elect judges willing to nullify the Commission’s legacy. In a recent report, CICIG stated the judicial nominations process is used to seize those spaces of power instead of promoting judicial independence.³

Given the history of politicisation and corruption, along with the incumbent executive’s attempts to safeguard his power and no CICIG presence, it is not particularly surprising that the 2019 Nominations Commissions have failed to be accountable from the get go.

Not off to a good start

In early August, Guatemala’s Congress swore in 37 members to both Nominations Commissions. Shortly after, members of civil society filed two “amparos” (an order of protection against acts by authorities) against the selection of commissioners to the Supreme Court Nominations Commission. By late August, the Supreme Court and Court of Appeals Nominations Commissions had received the initial applications, 259 and 1,032 applications, respectively.

On 10 September, a list of the remaining candidates after the first round of vetting was publicly published – 222 candidates remained for the 13 seats on the Supreme Court and 878 candidates remained for the 270 seats on the Court of Appeals. The decision by the Supreme Court Nominations Commission to exclude candidates for formal technicalities at this stage was seen as a controversial move. Most markedly was the exclusion of Miguel Angel Galvez and Erika Aifan, two judges known for their independence and impartiality and the subjects of previous threats and intimidation resulting from presiding over high-risk corruption cases. Miguel Angel Galvez was excluded for failing to present a certified copy of his national identification because he submitted the copy and the certification in two separate documents. Erika Aifan had apparently failed to include the required phrase “sindical” (trade union) in one of her affidavits relating to any possible impediments to sitting on the Supreme Court. Although she corrected the error and claimed it was not relevant to her candidacy, not a single commission member permitted her to remain eligible.

This year, both Nominations Commissions did not interview any of the candidates due to time constraints. Although interviews are discretionary according to the Law on the Nominations Commissions, the decision to not conduct any interviews goes against recommendations by the Organization of American States (OAS) and Cyrus R. Vance Center for International Justice.⁴ Upon publication of the list of remaining candidates, civil society was also only given a mere 48 hours to submit comments or challenges to the remaining candidates.

Grade inflation

The Nominations Commissions then began grading the candidates on a scale of 1 to 100. Without much deliberation, the Supreme Court Nominations Commission determined that candidates only remained eligible if they had a grade of at least 73, and the Court of Appeals Nominations Commission determined a grade of 65 or higher was required.

As in the past, this year's grading scales continue to assign too many points for purely quantitative criteria. The grading scales established by both Nominations Commissions automatically assign 70 points if a candidate has served as magistrate, judge or law practitioner for a certain length of time, 20 years for the Supreme Court and 15 years for the Court of Appeals. The scales do designate 25 points to qualitative criteria, but they only consider overly general professional experiences such as academic degrees, teaching positions, published legal articles, participation in academic events and university work experience. The remaining 5 points are reserved for "human projection", meaning work to promote and defend human rights, community service and leadership etc. Most questionable though is that neither of the Nominations Commissions allocated points for good ethical conduct or deducted points for past ethical violations.

The Constitutional Court – gatekeeper of accountability

After the Supreme Court Nominations Commission completed the task of grading and ranking, 122 candidates remained. On 16 September, before the Court of Appeals Nominations Commission had completed ranking candidates, the Constitutional Court issued its ruling on the two amparos filed by civil society.

The Constitutional Court found that the selection of commissioners to the Supreme Court Nominations Commission was hastily conducted and did not comply with all of the legal requirements. This included a finding that the selection of commission members for the Supreme Court Nominations Commission was flawed and did not comply with the principle of proportional representation because only one list with 12 magistrates from the Court of Appeals was proposed. The Court also found that both Nominations Commissions did not include a review of the evaluations by the Council of the Judicial Career, albeit because the Council had failed to prepare the evaluations in time. The Court ordered the dissolution of the current Supreme Court Nominations Commission and that the process begin again with the selection of commission members. As for the Court of Appeals Nominations Commission, the Court ordered it to start again at receiving candidates' applications. This decision will allow for a second attempt at including a review of the evaluations by the Council of the Judicial Career.

Despite the attempts to lift the immunity of Constitutional Court magistrates, the Court's recent ruling is a sign that the magistrates have maintained their impartiality and integrity in spite of the attacks on their independence. The ruling is also potentially an opportunity to depoliticise the judicial elections since it is unlikely that neither of the Nominations Commissions will have sufficient time to present the current Congress with a final list of judicial candidates before the Congressional term ends on 13 January 2020. This means that the term of incumbent Congress members subject to investigations by CICIG will have ended and they will be prevented from casting revenge votes. The newly elected Congress is also more politically balanced, with 19 different political parties represented, so the election of judges will require consensus voting.

Conclusion

It is too early to tell whether the Constitutional Court's recent ruling will make for more accountable judicial nominations this time around. It is not a promising outlook considering the formalities and past and continued manipulation of judicial nominations. At least the Constitutional Court provides hope and a second chance for the nominations to be made right.

In light of the Court's ruling, we make the below recommendations to ensure a fair and impartial selection of commissioners to the Supreme Court Nominations Commission and nomination and election of a new judiciary.

Policy Recommendations

- ¶ The new commissioners for the Supreme Court Nominations Commission and all judicial candidates should be vetted for conflicts of interest and any candidates with substantiated conflicts should be excluded.
- ¶ Both Nominations Commissions should clearly explain and make public their reasons for excluding judicial candidates during the first round of vetting.
- ¶ Civil society should be given more than 48 hours to submit comments or challenges to the remaining candidates.
- ¶ In accordance with the recommendations by the Cyrus R. Vance Center for International Justice, the Supreme Court Nominations Commission should establish a new grading scale and designate more points to specific qualitative criteria, such as judicial independence, impartiality and integrity.
- ¶ Congress members should hold a public hearing on the final list of candidates and provide their reasons for voting for each candidate.
- ¶ The international community should follow the judicial nominations and elections to ensure the most qualified and impartial judicial candidates are selected.
- ¶ The international community should denounce the politisation of justice in Guatemala to avoid further rule of law backsliding after CICIG's departure.

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