

## Selecting Guatemala's Next Attorney General: What's at Stake?

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An effective justice system creates confidence in the rule of law, provides for legal certainty, and diffuses conflicts in society. To be effective, a justice system's personnel must meet multiple criteria including professional competence and professional standards, especially for those with direct responsibility for the functioning of the justice system. Additional important criteria include the independence, impartiality, and autonomy of these public officeholders to ensure that they serve the public interest. Meeting these standards is directly linked to the quality of the selection process for judicial officials. Consequently, the selection process is crucial to the proper functioning of the state.

In Guatemala, the appointment process for the officials who head the judiciary and the Attorney General's Office (*Ministerio Público*) is regulated by the Political Constitution of the Republic.<sup>1</sup> This body of law was enacted in 1985 after the country had undergone several military governments that led to coups d'états, 20 years of internal armed conflict, and a high degree of political instability. The new Constitution ushered in a democratic era that led to peace negotiations, which resulted in accords that brought an end to the civil conflict.<sup>2</sup>

In today's context where new battles are waged on a daily basis to eradicate corruption and reduce violence, the selection of the next Attorney General is a main concern for Guatemalans and the international community. The United States has been an ally in the fight against corruption and has provided financial support to the institutions combatting it. A bipartisan group

<sup>1</sup> In this paper, *Ministerio Público* is translated as the Office of the Attorney General (AG) and *Fiscal General* (who heads the Ministerio Público) is translated as Attorney General. While many of the functions of the Guatemalan AG are similar to those of the United States Attorney General, it should not be assumed that the positions are identical. The office of the *Procurador General* (comparable to that of the U.S. Solicitor General) is a separate institution in Guatemala.

<sup>2</sup> The Agreement on a Firm and Lasting Peace between the Government of Guatemala and Guatemalan National Revolutionary Unity was signed on December 1, 1996, in Guatemala City.

from the United States Congress has expressed its concern over the choice of the next Attorney General.<sup>3</sup>

Current Attorney General Thelma Aldana's term in office is coming to a close. The Attorney General was appointed in May 2014 to a four-year term (2014-2018) and, accordingly, will step down from her position in mid-May 2018. She has played a leading role in prosecuting corruption-related cases. It is essential that her replacement continue the efforts she has led and take decisive action against lawbreakers.

## Background

In an effort to shield Guatemala's Supreme Court magistrates from political influence and the interests of other sectors of society, the 1985 Constituent Assembly proposed the creation of judicial nominating commissions. These commissions would be comprised of professionals from different branches of the legal system. Representatives of the judiciary, the bar association, and law schools would be assigned to screen applicants for offices, such as magistrates of the Supreme Court.

The Constitution of 1985 was amended in 1993 as a result of a political crisis.<sup>4</sup> The subsequent Constituent Assembly amended some parts of the mandate of the commission in charge of appointing the magistrates to the Supreme Court. It also created other nominating commissions for different public offices including a special commission for the selection of the Attorney General, who is in charge of running the Attorney General's Office.

Selecting upstanding, competent, and qualified persons to serve in public office is a challenge for all societies, especially for nascent democracies. According to the first recital of the Nominating Commissions Law:

*The Political Constitution of the Republic institutionalized Nominating Commissions in order to limit the discretionary power of State agencies to make subjective and unqualified appointments of certain public authorities who perform essential duties of the state [that are] material to the consolidation of the legal regime, the strengthening of the rule of law, and participatory and representative democracy.*<sup>5</sup>

Academic institutions were assigned a preponderant role on the Nominating Commission for Attorney General: Article 251 of the Constitution established that the Commission would

3 Willian Cumes. "Congresistas de EE.UU.: Elección de fiscal general de Guatemala debe ser transparente," *Prensa Libre*, November 9, 2017. <http://www.prensalibre.com/guatemala/politica/congresistas-de-eeuu-eleccion-de-fiscal-general-de-guatemala-de-be-ser-transparente>.

4 The crisis was triggered by a self-coup or power grab against the other branches of government, led by the president, Jorge Serrano Elias, who decided to dissolve the Congress and overtly undermine the independence of the Supreme Court of Justice. As a consequence, the Constitutional Court removed him from office and a new Constituent Assembly was convened, which amended the Constitution, including changes to certain aspects of the judicial system.

5 The first recital (*considerando*) to the Nominating Commissions Law, Decree Law No.19/2009. A recital serves as a preamble in a legal document.



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be made up of the Chief Justice (President) of the Supreme Court of Justice, who would also chair the Commission; the president of the Bar and Notaries Association (CANG); the president of the Ethics Tribunal of the CANG; and all of the deans of the schools of law and of legal and social sciences in Guatemalan universities.

When the Commission's composition was originally determined, there were five universities in Guatemala, of which only four had a law school or a school of legal and social sciences. In addition to the University of San Carlos of Guatemala, founded in colonial times, there was Rafael Landívar University, founded in 1961; Mariano Gálvez University, created in 1966; and Francisco Marroquín University, accredited in 1971.

At that time, universities were houses of serious study and deans were recognized for their integrity. Professional associations were also prestigious bodies and the presidency of the bar association was regarded as a position of distinction, as was being president of the association's ethics tribunal. Therefore, the members of the Constituent Assembly trusted the deans and attorneys to conduct a fair assessment of the candidates in the selection processes for judicial officials.

Today, the deans of 12 universities sit on the nominating commissions that select judicial authorities. From 1995 to 2012, the Superior Council of Universities accredited law schools at nine additional universities. Some of those universities have a small number of students enrolled in the law program (fewer than 100) and others have no legal curriculum in place.

In a Commission composed of 12 university deans, two members representing lawyers, and the chief judge of the Judiciary, the academic sector is overrepresented. Clearly, the law school deans will determine the finalists for the position of Attorney General. As a result, the selection of the next Attorney General rests squarely on the shoulders of academia.

## The Office of the Attorney General

Protecting the population and ensuring its safety are essential duties of states, as recognized in the Political Constitution of the Republic of Guatemala and in a host of international treaties that safeguard respect for human rights.

In order to address high crime rates and streamline criminal prosecutions, the criminal prosecution system in Guatemala underwent a sweeping overhaul in 1992. The country transitioned from an inquisitorial to an adversarial system. The new (adversarial) model separated the investigative and prosecutorial functions, which, until then, had fallen under a judge's purview. It also introduced oral proceedings in criminal matters.

In that context, and pursuant to the reform of the Political Constitution of 1993, the Attorney General's Office was assigned specific functions as a branch of public administration and the courts, with certain autonomous responsibilities.<sup>6</sup> Subsequently, the Organic Law of the Attorney General's Office and the Code of Criminal Procedure were approved, specifying how this office was to function.

The Attorney General's Office is the lead investigative agency for criminal offenses during the preliminary stages of criminal proceedings. It also oversees criminal prosecutions. Former Attorney General Claudia Paz y Paz notes that:

*investigating and resolving crimes is the responsibility of both the Attorney General's Office, which directs the Police in the investigation, and the National Civilian Police, who should investigate criminal acts and identify the individuals responsible.*<sup>7</sup>

Another important function of the Attorney General's office is to coordinate activities with the International Commission Against Impunity in Guatemala (CICIG, for its acronym in Spanish). This entity was created by the United Nations at the request of the Guatemalan government, which acknowledged the weakness of its own institutions in confronting the criminal networks embedded in the State. Progress in the fight against corruption in Guatemala has been supported over the past ten years by the CICIG, which works with the Attorney General's Office.

The organizational structure of the Attorney General's Office is hierarchical, and senior management of the Office is delegated to an Attorney General for a four-year term. In order to fulfill its duties, the Office must maintain total autonomy; that is, its role must not be subject to the political vagaries of the moment or beholden to the interests of any particular sector.

<sup>6</sup> Article 251 of the Political Constitution of Guatemala. The Attorney General's Office is an auxiliary institution of the public administration and the courts with autonomous functions, whose principal purpose is to strictly enforce the laws of the country. Its organization and functioning are governed by its organic law.

<sup>7</sup> Claudia Paz y Paz Bailey, "Transforming Justice in Guatemala – Strategies and Challenges Investigating Violent Deaths 2011/2014" (Georgetown University and Open Society Foundations, 2016): 32-33.



## Academia's Role on the Nominating Commissions

The Nominating Commission in charge of screening and assessing applicants for the position of Attorney General is made up of the president of the Supreme Court of Justice; the chairman of the Board of Directors of the Bar and Notaries Association (CANG); the president of the Ethics Tribunal of CANG; and the deans of the schools of law and of legal and social sciences at the country's universities.

This Commission is tasked with drawing up a slate of the six presumably most qualified and capable applicants for the position of Attorney General. At least two-thirds of the Commission members must vote for an applicant in order for him or her to appear on the list of six finalists. As outlined by the Political Constitution of the Republic of Guatemala, the President of the Republic has the legal authority to choose the Attorney General, but the choice is limited to the slate of six candidates provided to him or her by the Nominating Commission.<sup>8</sup>

The formal requirements set forth in the Constitution for the position of Attorney General are:

- **To be an attorney**
- **To be a registered and active member of CANG**
- **To be over 40 years of age**
- **To have served a full term as a magistrate of the Court of Appeals or a collegiate court of the same rank, or to have practiced as an attorney for more than ten years**
- **To be Guatemalan by birth**
- **To be entitled to the enjoyment of all of the rights of a citizen.**

The Commission itself defines the profile of a qualified candidate and establishes a scoring or grading system with a numeric value assigned for each area under evaluation. Prior to this stage, the Commission assesses the applicants' ethical standing, academic and professional merit, and his or her civic engagement (*proyección humana*).

As noted above, the nominating commissions were established as a mechanism to objectively assess candidates based on their merits and propose a shortlist of the most qualified contenders to be chosen by the respective authority (by the Congress, for the members of the Supreme Court; or by the President in the case of the Attorney General). Nevertheless, the role of the different nominating commissions has been harshly criticized because of their failure to demonstrate to the Guatemalan people that they have conducted an objective evaluation based on the candidates' merits.<sup>9</sup>

<sup>8</sup> Article 255 of the Political Constitution of the Republic of Guatemala.

<sup>9</sup> The Due Process of Law Foundation (DPLF), along with the Human Rights Commission of Guatemala, Centro por la Justicia y el Derecho Internacional (CEJIL), Open Society Justice Initiative, and the International Platform against Impunity in Guatemala expressed their concern over inconsistencies and irregularities detected during the selection process for Attorney General in Guatemala in 2014. See <http://www.dplf.org/es/news/comunicado-organizaciones-internacionales-expresan-preocupacion-por-las-irregularidades>.

## The 2018 Selection Process for the Attorney General

The selection process for the Attorney General is established in the Constitution of the Republic of Guatemala and in two statutes: the Nominating Commissions Law (Decree 19-2009), which regulates the selection procedure in detail; and the Organic Law of the Attorney General's Office (Decree 40-94), which establishes the activities and functions of the institution itself.<sup>10</sup>

Internationally accepted standards, such as the United Nations Basic Principles on the Independence of the Judiciary, must also be taken into consideration in the selection process for justice sector authorities.<sup>11</sup> These standards are also applicable to the selection of attorneys general.

## Composition

As established in Article 251 of the Constitution, the Nominating Commission for the selection of the Attorney General and Chief of the Attorney General's Office are chaired by the President of the Supreme Court of Justice and the Judiciary.<sup>12</sup> The other members on the Commission are the president of the Bar and Notaries Association (CANG); the president of the Ethics Tribunal of CANG; and the deans of the country's legally chartered law schools.

The members of the Nominating Commission that will select the Attorney General for the 2018-2022 term in office are:

- **José Antonio Pineda Barales**, President of the Supreme Court of Justice
- **Luis Fernando Ruiz Ramírez**, President of the Bar and Notaries Association (CANG)
- **Julio Enrique Dougherty Liekens**, President of the Ethics Tribunal of CANG
- **Dimas Gustavo Bonilla**, Dean of the School of Law of the University of San Carlos of Guatemala
- **Milton Estuardo Argueta Pinto**, Dean of the School of Law of Francisco Marroquín University
- **Hugo Rolando Escobar Menaldo**, Dean of the School of Law of Rafael Landívar University
- **Ángel Estuardo Barrios Izaguirre**, Dean of the School of Law of the Mesoamerican University
- **Jary Leticia Méndez**, Dean of the School of Law of the University of the Isthmus

<sup>10</sup> Articles 9, 10, and 11, subsections 8, 12, 17, and 19 of the Organic Law of the Office of the Attorney General.

<sup>11</sup> The Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Milan from August 26 to September 6, 1985, and endorsed by the General Assembly in its resolutions 40/32 of November 29, 1985 and 40/146 of December 13 1985.

<sup>12</sup> The Chief of the Attorney General's Office is the formal position title and refers to one person who serves as both Attorney General and Chief of the Attorney General's office.



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- **Mario Raúl García Morales**, Dean of the School of Law of the Rural University of Guatemala
- **Luis Antonio Ruano Castillo**, Dean of the School of Law of Mariano Gálvez University
- **Enrique Fernando Sánchez Usera**, Dean of the School of Law of the Panamerican University
- **Juan Carlos Rodil Quintana**, Dean of the School of Law of Da Vinci University
- **Yuri David Búcaro Chicas**, Dean of the School of Law of Regional University
- **Ana Mercedes Suasnávar Palma**, Dean of the School of Law of University of the West
- **Luis Aragón Solé**, Dean of the School of Law of San Pablo University.

## Principles Governing the Process

Under the Nominating Commissions Law, the State must ensure that appointments of officials are conducted through “public and objective processes, with efficiency, effectiveness, probity, representativeness, and based on effective mechanisms and tools for their designation ...”<sup>13</sup>

Article 2 of the law establishes that the proceedings of the nominating commissions are based on the following principles:

### Transparency

The commissions are obligated to report on their proceedings to the citizenry in a timely, effective, up-to-date, reliable, and accurate manner. Nevertheless, the candidates’ personal

<sup>13</sup> The second recital to the Nominating Commission Law, Decree Law No. 19/ 2009.

information is deemed confidential, unless they give written authorization to release such information to the public.

Additionally, the law requires public and private institutions to make available any information that the commissions request as long as it relates to the requirements that the candidate must fulfill in order to qualify for the selection process.

### **Professional Excellence**

Under the law, the Nominating Commission members are required to write a profile of desired qualifications for the position so that applicants meet the highest standards and are the most accomplished professionals. The ability, specialization, qualifications, honesty, and proven probity of the candidates should be taken into consideration, and the profile must comply with provisions of the Political Constitution of the Republic of Guatemala, laws of constitutional stature, and any other statutory requirements as may be applicable in each case.

### **Objectivity**

The Commission must adhere to objective selection criteria and use concrete and tangible requirements and conditions when assessing the qualifications established for candidates. The law also reiterates that subjective and discretionary requirements and conditions must be eliminated.

### **Public Disclosure**

The law establishes that all meetings held by the Nominating Commission must be open to the public. It also stipulates that interested parties and the general public must be able to attend these meetings as observers.

## **Stages**

The selection process involves several stages. Generally speaking, the Nominating Commission first draws up a list of finalists for Attorney General and Chief of the Attorney General's Office. The President of Guatemala then chooses one of the candidates to hold the position for four years.

The stages of the selection process, based on applicable statutory requirements, are described in greater detail below:

### **Announcement of Commission**

As established under Article 3 of the Law of Nominating Commissions, the Congress of Guatemala must publicly convene the nominating commissions. This announcement must be issued at least four months prior to the completion of the constitutional term of the current officeholder.<sup>14</sup> This means that, if the term of the current Attorney General ends in May,

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<sup>14</sup> The current Attorney General Thelma Aldana's term in office ends on May 17, 2018.



Congress must convene the Commission by January at the latest.<sup>15</sup>

### Seating the Commission

When the Commission has been convened by Congress, the members must be seated. It is the job of the chairman of the Commission to issue a call to the other members to form the commission, as provided in Article 12 of the Organic Law for the Attorney General's Office. Next, the Commission members are sworn in by the Congress of the Republic.<sup>16</sup> At its first meeting, the Commission elects a principal and alternate secretary from among the members, as provided in Article 6 of the Nominating Commissions Law. The role of the secretary is to keep track of candidates' transcripts and formalize the resolutions adopted by the Commission.

### Timetable and Profile

Once the Commission has been seated, the members meet to define their working procedures, establish a timetable or calendar of activities to be carried out by the Commission, and define the profile of qualified candidates. For this purpose, the members should follow the principles governing the selection of public officials, as well as the provisions of Article 12 of the Nominating Commissions Law. This Law establishes that the profile of the ideal candidate must include ethical, academic, and professional qualifications and a commitment to civil engagement.

### Public Call for Applicants

Article 14 of the Nominating Commission Law establishes that, through its secretariat, the Commission must issue a public notice calling on candidates

to submit the relevant documents within a reasonable period of time. The notice must be published in the government's Official Gazette and in two daily newspapers of wide circulation in the country. This Article also requires the call for applicants to identify the Nominating Commission involved; the purpose of the call; the maximum number of candidates who will appear on the shortlist to be submitted to the appropriate decision maker; statutory requirements for application; deadline, place, and hours of the day to submit documentation; and any other information that may be relevant as determined by the Nominating Commission.

**Article 12 of the Nominating Commissions Law establishes that the profile of the ideal candidate must include ethical, academic, and professional qualifications and a commitment to civil engagement.**

### Documentation Intake

This is the period of time when applicants can express interest in applying and submit the required documents, along with their curriculum vitae and an application form, the latter

<sup>15</sup> On January 10, 2018, under Decree 1/2018, the Congress of the Republic announced the members of the Nominating Commission that will be tasked with the selection of the new Attorney General and Chief of the Attorney General's Office.

<sup>16</sup> On January 13, 2018, the Congress swore in 15 members of the Nominating Commission for the selection of the Attorney General.

of which must be drafted by the Commission pursuant to Article 15 of the Nominating Commissions Law.

### **Roster of All Applicants**

According to Article 16 of the Nominating Commission Law, the secretariat must post a roster of all individuals who have submitted their paperwork, including a summary of the relevant information for each candidate.

### **Selection of Applicants**

Article 17 of the Nominating Commissions Law provides that the members of the Commission shall convene to familiarize themselves with the complete roster of participants drawn up by the respective secretariat. Any applicants who do not meet the requirements set forth in the statute and call for applications shall be left off that roster. Disqualification shall be justified and the secretariat shall notify the interested party about disqualification by means of a notice published in the Official Gazette. The applicant shall have three days from the date the disqualification is published to request and submit to the Nominating Commission evidence in his or her defense. This appeal shall not stay the effect of the removal from the list. The Commission shall then draft a revised roster listing only the applicants who meet the requirements set forth in the law and call for applications and who will participate in the selection process.

### **Verification of Background**

The Commission has the legal authority to conduct a background check of all applicants to verify the accuracy of their claims and, in so doing, it must abide by the provisions of Articles 18 and 21 of the Nominating Commission Law, whereby public and private institutions are required to cooperate by providing information requested by the Commission.

### **Revised Roster of Applicants**

Once the background check has been completed to verify that the applicants meet all of the statutory requirements, the Commission draws up a revised roster of applicants. Article 20 of the Nominating Commission Law establishes that the revised roster must be made public in the Official Gazette and in two daily newspapers of wide circulation in the country to enable anyone who may know of any impediment to advise the Commission thereof. Any information about the applicants

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brought to the attention of the Commission must be verified. The Commission is required to notify the applicant by the following day, and the applicant has five days to submit his or her defense or evidence to rebut the claim.



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### **Interviewing and Grading**

Regarding the process of interviewing candidates, the Nominating Commissions Law only provides that the Nominating Commission may conduct any interviews of the applicants it deems pertinent and necessary. Therefore, an interview is not a mandatory requirement; however, in practice, the Commission has usually conducted interviews for the selection of Attorney General.

### **Ranking and Selection**

Once all of the information requested has been received and the commission has the results of the interview process, it grades each applicant and draws up a roster with the names of the candidates in descending order from the highest-scoring applicant to the lowest. This requirement is set forth in Articles 22 and 23 of the Nominating Commissions Law.

### **The Finalists**

Lastly, the Commission holds a vote to determine the six finalists to appear on the list submitted to the President of Guatemala for his or her final selection. The process begins with a vote on the candidate with the highest rating (see “Interviewing and Grading”) and continues with each successive candidate based on their rating. In order to be a finalist, a candidate needs at least a two-thirds vote of Commission members (Articles 22 and 23 of the Nominating Commission Law). That means that when 15 members sit on the Commission, a candidate needs 10 votes. Once the six finalists on the shortlist are determined, there is no further voting.

### **Finalists Submitted to the President**

Once the list of finalists is completed, it must be submitted to the President of the Republic at least 15 days before the acting Attorney General’s final day in office. The President chooses a successor from the six finalists. All documents and records of each nominee must be submitted along with the list. The finalist must be made public simultaneously in the Official Gazette and in two daily newspapers of wide circulation in the country, as set forth in Article 24 of the Nominating Commissions Law.

## President Appoints the Attorney General and Chief of the Attorney General's Office

Article 251 of the Political Constitution of the Republic of Guatemala and Article 12 of the Organic Law of the Attorney General's Office provide that the President of the Republic must choose one candidate for the position of Attorney General.

## Analysis of the Selection Process for Attorney General

As described above, the operation of the Nominating Commission for the selection of the Attorney General and Chief of the Attorney General's Office is extensively regulated in Guatemalan domestic law. However, this does not mean that the process proceeds without any issues.

In general, prior to the nominating commissions, the processes for selecting judicial officials were beset with accusations, legal challenges, and motions. The process for selecting the Attorney General has been no exception.<sup>17</sup> Moreover, in the past, the Constitutional Court annulled the selection of an Attorney General who had already taken office.<sup>18</sup>

In this regard, the Instituto de Estudios Comparados en Ciencias Penales (Guatemalan Institute for Comparative Studies in Penal Sciences) found that: "The selection process for the Attorney General and Chief of the Attorney General's Office 2010-2014 was carried out in a context of legal and political instability, which entailed holding two selection processes."<sup>19</sup>

The weaknesses of the selection process through the nominating commissions have been brought to light by several organizations. According to the Due

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Process of Law Foundation, the system is marred by serious structural problems, rendering the selection process flawed.<sup>20</sup> The organization Guatemala Visible, which has closely monitored the nominating commissions' processes, asserts that the process needs to be revamped to prevent a repeat of improper practices in the selection of the Attorney General.<sup>21</sup>

A brief description follows of some of the major problems identified in the nominating commissions processes for appointing the Attorney General:

17 The daily newspaper *El País* notes that the process of selection of Attorney General in 2014, when Attorney General Thelma Aldana was chosen, was not without criticisms and irregularities. See Ezequiel Vázquez-Ger, "¿Quién elige a los Jueces en Guatemala?" [*Who Chooses Judges in Guatemala?*], *El País*, August 18, 2014, [https://elpais.com/internacional/2014/08/18/actualidad/1408370100\\_428284.html](https://elpais.com/internacional/2014/08/18/actualidad/1408370100_428284.html).

18 Constitutional Court Guatemala. Case File number: 1793-2010. Judgment of September 20, 2010.

19 Gerson Sotomayor, *Comisiones de Postulación – Sistematización de los Procesos 2014-2015* (Guatemala: Instituto de Estudios Comparados en Ciencias Penales, 2015), 8.

20 "Work on Judicial Selection Process in Guatemala," Due Process of Law Foundation, September 10, 2014, <http://www.dplf.org/en/news/dplfs-work-judicial-selection-process-guatemala>.

21 Guatemala Visible. "Recomendaciones lecciones aprendidas aplicación de la Ley de comisiones de postulación en elección de Fiscal General y Jefe del Ministerio Público," January 25, 2018. Document submitted to the Nominating Commission for Attorney General.



### Academia in the Nominating Commission

As was noted above, the organization of the Nominating Commission for Attorney General is set forth in the Political Constitution of the Republic of Guatemala and in the Organic Law of the Attorney General's Office.<sup>22</sup> Pursuant to these legal provisions, academic institutions play a fundamental role in the selection process, through the participation of the deans of law schools. Currently, deans of 12 law schools participate, even though some of their universities do not have or are just beginning to establish a law degree program. Critics maintain that new law schools have sprouted up for the sole purpose of influencing the appointment of judicial officials. As noted by journalists at *Nómada*, five of the universities whose deans participate in the selection process are under 15 years old.<sup>23</sup> In the view of Guatemala Visible: "This has caused the process to be questioned more and more due to the high interference of external actors through the commission members."<sup>24</sup>

### The Politization of the Guatemalan Bar and Notaries Association (CANG)

Another weakness of the Commission is the participation of representatives of the professional association CANG, who themselves are chosen based on political criteria. In order to attain a leadership position in this professional association, elections are held and are subject to influence by political parties and sectorial groups. Guatemala Visible notes that: "For the members of the CANG it is totally normal and valid to have a political preference for certain candidates, as well as an incentive to return favors to those who have helped the representative during his or her professional career."<sup>25</sup> CANG points out that, in the view of its representatives, elections are a political process and not considered negative. Through an investigation, *Nómada* verified the way in which interest groups are able to bring their influence to bear in the elections of CANG representatives through the law schools.<sup>26</sup>

### Insufficient Time for Evaluation

The Nominating Commission Law establishes that the Commission must be formed at least four months prior to the end of the current Attorney General's term.<sup>27</sup> Nonetheless, this deadline has not been met in prior processes because Congress has not issued the call for applications within the required time period. Consequently, there has been insufficient time to assess the applicants adequately. According to the organization Guatemala Visible, this delay is perceived as intentional, as a means of including candidates sympathetic to the interests of pressure groups with questionable motives.<sup>28</sup>

22 Article 251 of the Political Constitution of the Republic of Guatemala and Article 12 of the Organic Law of the Attorney General's Office – Decree Law 40-94, respectively.

23 Martín Rodríguez Pellecer, Andrés Zepeda, and Rodrigo Véliz, "Las 5 claves para entender la disputa por la justicia," *Nómada*, April 22, 2014, <https://nomada.gt/las-claves-para-entender-la-disputa-por-la-justicia-2/>.

24 Guatemala Visible, "Recomendaciones lecciones aprendidas."

25 Ibid.

26 Rodríguez Pellecer, Zepeda, and Véliz, "Las 5 claves para entender la disputa por la justicia."

27 Article 3 of the Nominating Commissions Law – Decree Law 19-2009.

28 Guatemala Visible, "Recomendaciones lecciones aprendidas."



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### How Candidates Are Assessed

The way the Commission conducts its evaluation of the candidates is problematic. Even though the Nominating Commission Law stipulates that appropriate qualifications, a rating system, and rating table must be established for the position, in practice, these tools do not ensure an objective evaluation.<sup>29</sup> Each commission has the legal authority to prepare its own assessment tools. Even though the process may appear to meet some standards of objectivity, subjectivity comes into play when the evaluation parameters are actually used. In the past, the qualification profile was expressly designed to give an edge to candidates whom the commission members wanted to promote. According to Guatemala Visible: “During the monitoring of the nominating commission, serious weaknesses were observed when the instruments were drafted and applied.”<sup>30</sup> It is important to take into account that the commission members are not human resources experts, do not possess the competencies necessary to conduct a proper assessment of candidates, and have some leeway for subjectively favoring certain candidates over others. According to Mirte Postema of the Due Process of Law Foundation, the Commission has taken advantage of its discretionary power to act arbitrarily.<sup>31</sup>

### Challenges

The law establishes a public comment period for citizens to raise objections or file challenges to a candidate applying for the position of Attorney General.<sup>32</sup> During the 2014 process, more than 70 objections were filed against 26 applicants.<sup>33</sup> In prior periods, the nominators have not established any criteria regarding challenges to candidates. Even though the law provides for a stage in the process for candidates to introduce rebuttal evidence to challenges and have the opportunity to make their case on their own behalf, the procedure for the Commission

<sup>29</sup> Article 12 of the Nominating Commissions Law – Decree Law 19-2009.

<sup>30</sup> Guatemala Visible, “Recomendaciones lecciones aprendidas.”

<sup>31</sup> Mirte Postema, “El proceso de selección de la Fiscal General en Guatemala: más regulación no significa menos arbitrariedad” [The Selection of the Attorney General in Guatemala: Increased regulation does not mean less arbitrariness], Due Process of Law Foundation (2014): 1-13, [http://www.dplf.org/sites/default/files/seleccion\\_fg\\_en\\_guatemala\\_mpostema.pdf](http://www.dplf.org/sites/default/files/seleccion_fg_en_guatemala_mpostema.pdf).

<sup>32</sup> Article 20 of the Nominating Commissions Law – Decree Law 19-2009.

<sup>33</sup> Sotomayor, “Comisiones de Postulación – Sistematización de los Procesos 2014-2015,” 21.

to rule on the challenge is not clearly defined.<sup>34</sup> According to the Guatemalan Institute of Comparative Studies in Penal Sciences, the fact that the objections or challenges brought by civil society are not valued stands as proof that determining the list of finalists is subjective and an eminently political act.<sup>35</sup> The lack of a clearly defined method of evaluating objections causes citizens to lose confidence in the ability of the commission to assess candidates' qualifications.

### **Lack of Transparency and Social Auditing**

The Nominating Commissions Law establishes that all proceedings of the Commission must be open to the public.<sup>36</sup> This means that the Commission members are statutorily required to make available to the public the material used by the Commission to assess and score the candidates. However, during the last selection process for Attorney General, the Nominating Commission did not post all of the available information on its webpage, which is in violation of the principle of transparency and public disclosure governing the process.<sup>37</sup> The public's inability to view the documents and decisions in a timely way is an impediment to social auditing and, according to Postema, makes conditions ripe for any arbitrary decisions made by the commission members to go unnoticed.<sup>38</sup>

### **Finalists**

Pursuant to the provisions regulating the selection process, when the candidate assessment stage has concluded, the commission is required to draw up a list of six finalists from which the President of Guatemala is to appoint one candidate to hold the position of Attorney General and Chief of the Attorney General's Office for four years.<sup>39</sup> To be a finalist, the candidate must receive an absolute majority of the votes of the nominating committee members.<sup>40</sup> However, in practice, the top-scoring candidates are not necessarily those who are selected by the Nominating Commission members as finalists to be submitted to the President.<sup>41</sup> This means that assessment scores are not binding during the actual voting stage, so decisions can be based on totally subjective criteria. Consequently, the finalists may be aligned with particular political, economic, or union interests as a result of influence peddling within the Commission.<sup>42</sup> Thus, the commissions system may function as a political process, as opposed to a merit-based, open, public competitive procedure. The

34 Guatemala Visible, "Recomendaciones lecciones aprendidas."

35 Sotomayor, *Comisiones de Postulación*.

36 Article 2 of the Nominating Commission Law – Decree Law 19-2009.

37 Ibid.

38 Guatemala Visible recommends that: "it should be introduced into the regulations that documents, such as meeting minutes and scoring sheets, must be posted within two days, at the latest, since some of that information was posted weeks late in the last process." Guatemala Visible, "Recomendaciones lecciones aprendidas."

39 Article 251 of the Political Constitution of the Republic of Guatemala; Article 24 of the Nominating Commissions Law Decree Law 19-2009.

40 Article 23 of the Nominating Commissions Law Decree Law 19-2009.

41 For example, in the 2014 selection process for Attorney General, former Attorney General Claudia Paz y Paz was one of the top-scoring candidates; nonetheless, only four commission members voted for her and, consequently, she did not appear on the shortlist submitted to the President of Guatemala. Instituto de Estudios Comparados en Ciencias Penales, "Comisiones de Postulación – Sistematización de los Procesos 2014-2015," (2015): 31.

42 "Procesos de Elección de Magistrados en Guatemala y Honduras" [The Selection Processes of Judges in Guatemala and Honduras], Impunity Watch, 2015.

Inter-American Commission held that legislation must establish selection and appointment processes for judicial officials based on merit and professional skill. It highlighted that such processes “should establish objective criteria for selection and appointment, with predictable requirements and procedures for anyone wishing to participate.”<sup>43</sup>

### **Appointment of the Attorney General**

The final appointment of the nominee for Attorney General and Chief of the Attorney General’s Office is the responsibility of the President of Guatemala.<sup>44</sup> The appointment is totally discretionary, inasmuch as the law does not provide any criteria for the President to choose the Attorney General. If the list of finalists is made up of the most competent, honest, and independent candidates, then any choice the President makes will be a qualified person. However, if the list includes incompetent individuals, who made the cut because of political ties or alignment with sectorial interests, then the final choice could be an unsuitable candidate, as was the case in 2010, when the entire selection process for Attorney General was overturned.<sup>45</sup>

## **CONCLUSIONS**

It is the duty of the Attorney General’s Office to investigate all criminal offenses committed anywhere in the country. All criminal offenses, from the most common crimes, such as robbery, extortion, or intra-family violence, to the most complex ones, such as murder, rape, or high-impact crimes and acts of public corruption, must go through the office of the Attorney General. Accordingly, the primary challenge for Guatemala in 2018 is the selection of the Attorney General and Chief of the Attorney General’s Office.

We must not forget that the Office of the Attorney General plays an essential role in criminal prosecution, respect for the rule of law, and security throughout the country. The women who have held the position of Attorney General over the past two terms, Claudia Paz y Paz and Thelma Aldana, have proven their independence in office.

It is important to appoint an Attorney General who is capable of sustaining the autonomy of the institution; is skilled at effectively leading the prosecution of crimes; continues to move forward in the fight against corruption; and acts with absolute independence from de facto power groups. The appointee must also coordinate the necessary activities with the CICIG to dismantle organized crime groups and undertake efforts to strengthen the capacity of the prosecutorial bodies.

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43 Inter-American Commission on Human Rights. “Guarantees for the Independence of Justice Operators – Toward strengthening access to justice and the rule of law in the Americas,” Organization of American States (2013): 108. <https://www.oas.org/es/cidh/defensores/docs/pdf/justice-operators-2013.pdf>.

44 Article 251 of the Political Constitution of the Republic of Guatemala.

45 According to the BBC, Conrado Reyes was selected as Attorney General in 2010 and then removed from the office by the Constitutional Court because of his ties to organized crime. “Guatemala: destituyen a fiscal general” [“Guatemala removes the Attorney General”], BBC, June 11, 2010, [http://www.bbc.com/mundo/america\\_latina/2010/06/100611\\_1752\\_guatemala\\_onu\\_renuncia\\_fiscal\\_reyes\\_gm](http://www.bbc.com/mundo/america_latina/2010/06/100611_1752_guatemala_onu_renuncia_fiscal_reyes_gm).





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In order to avoid past issues, it is essential for the Nominating Commission to act with full transparency in every stage of the selection process of the Attorney General and Chief of the Attorney General's Office. Accordingly, the Commission must ensure the public nature of its proceedings and encourage citizen oversight.

It is the responsibility of the Commission to conduct the process efficiently, to fulfill all applicable requirements, to respect international standards for the selection of justice operators, and to conduct an objective evaluation of the candidates through proper use of the assessment tools.

Merit and honor of the applicants must be given priority in the selection of the Attorney General and Chief of the Attorney General's Office. Skill, experience, and ethical behavior must be sine qua non conditions for any professional to become a finalist and be submitted for the consideration of the President of Guatemala for appointment as the next Attorney General.

The President must act in the best interests of the Guatemalan people. The common good, the pursuit of justice, and the security of citizens must be deciding factors in the final selection. Even though the President is free to choose any of the six candidates submitted by the Nominating Commission, that freedom must be exercised responsibly because the office represents national unity. Confidence in the judicial system is one of the traits of true rule of law, an essential requirement for people to live together in harmony.

Civil society plays an important role in overseeing the selection process for the Attorney General. It must make sure that the process is conducted transparently, and verify that all legal requirements and international standards are fulfilled during the assessment of applicants. It must report any disqualifying elements encountered in a candidate that would render him or her to be incompetent, inept, or unsuitable, as well as any irregularity that may arise in the selection process. It can also help identify any conflicts of interest that may emerge during the selection process.

Through diplomatic missions and multilateral organizations, the international community can help to ensure that the selection process for Attorney General is legitimate. It must observe, monitor, and offer technical support so the commission is able to carry out its job efficiently and comply with its mandate to objectively assess the candidates.

The next Attorney General of Guatemala should be an independent and competent person; someone who is experienced in the justice system and public administration. But, above all, someone who is honest, capable of crafting a strategic plan to investigate criminal acts effectively and of leading the prosecutor's offices to act with due diligence in punishing criminals. Such a person has a chance to make a difference in reducing crime and strengthening judicial institutions.



## APPENDIX

### Criminally Prosecuted Corruption Cases

The primary function of the Attorney General and Chief of the Public Prosecutor's Office is to effectively prosecute cases of criminal offenses committed in the country. Attorney General Thelma Aldana's term in office has been characterized by the prosecution of cases linked to corruption. In many of these cases, high-level public officials of the three branches of government, as well as influential public figures from other sectors of society, are implicated.

#### *La Línea*

One of the most illustrative cases involves customs fraud and is known as *La Línea*. In this case, former President Otto Pérez Molina and former Vice President Ingrid Baldetti Elías stand accused of overseeing a criminal network. Also implicated are two secretary generals of Guatemala's customs agency; the Superintendency of Tax Administration (SAT, for its acronym in Spanish); former heads of several government administration offices and the former secretary general of the union of said institution; the private secretary of the former vice president; and businessmen and private individuals. The case came to light in mid-April of 2015, but the criminal proceedings have moved along at a snail's pace because of the myriad legal motions filed by the parties to fend off actual punishment. On October 27, 2017, the judge ordered 28 individuals, including the former president and vice president, to stand trial.<sup>46</sup>

#### Influence Peddling in Judicial Appointments

Another flagship case was brought against Congressman Godofredo Rivera, a member of the ruling political party Patriota and former President (Speaker) of the National Congress. Former Vice President Roxana Baldetti's legal counsel, Vernon González, has also been implicated. Both are charged with the crimes of influence peddling and bribery. Rivera and González offered to guarantee the reelection of the judges of the 5th Chamber of the Court of Appeals for Civil and Mercantile Matters in exchange for their ruling in favor of Vice President Baldetti. Nonetheless, a member of the court, refusing to agree to blackmail, denounced them.

This matter was directly linked to the process of election of appeals court magistrates and Supreme Court justices for the 2014-2019 term, in which the majority political parties (Líder and Patriota) came to an agreement to divvy up judgeships based on a quota system to elect judicial officials sympathetic to their interests.

#### *Plazas Fantasma*

Godofredo Rivera is not the only President of the Guatemalan Congress to have been charged with corruption. Pedro Maui, also a member of Patriota party, was accused in July 2015 of abuse

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46 CICIG, "Caso la Línea: A juicio expresidente Otto Pérez y exvicepresidenta Roxana Baldetti", press release 076, October 27, 2017, <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=844&cntnt01returnid=67>.

of authority in Congress after hatching a scheme to make it seem as if he were hiring employees in his own office or the party's offices, a practice dubbed "ghost positions" (*plazas fantasmas*). His personal secretary and chief of security were also charged; the proceedings against them moved expeditiously and, consequently, they were convicted and sentenced to prison terms of 17 and 11 years, respectively. As a result of the original investigations, other members of Congress were also implicated and more than 65 members of Congress have been formally charged, including nine members of Congress who held positions on the board of officers of the Congress from 2014-2015. The amounts of money involved in this fraud scheme total approximately 5 million quetzals, the equivalent of \$650,000 US dollars.

Aristides Crespo is another President of Congress who stands accused of over-hiring unqualified staff, as well as pretending to hire employees for non-existent positions (*plazas fantasmas*) in the Congress of the Republic.<sup>47</sup> Deputy Crespo was president of the board of officers of the legislative body for the period of 2014-2015.

### **IGSS–PISA**

A case that exposes corruption at the highest levels of the health sector is that of the board of directors of the Guatemalan Institution of Social Security (IGSS) and executives of the Mexican pharmaceutical company PISA, who were accused of fraud, unlawful association, bribery, and other criminal offenses.

An investigation was opened into irregularities in the procurement of substandard medical services from the Mexican company PISA for people with kidney diseases, which led to the death of several patients because of the deficient treatment provided by the company. In the procurement process, 116 million quetzals (approximately \$15.67 million US dollars) were awarded to the company in exchange for a 15 percent kickback to the members of the board of directors of the institution.

According to the International Commission Against Impunity in Guatemala (CICIG): "in all cases of administrative corruption of the health sector, the defendants have filed multiple appeals for constitutional relief via *amparo*."<sup>48</sup>

### ***Bufete de la Impunidad* (Law Firm of Impunity)**

The justice sector has also been tarnished by accusations, complaints, and allegations of corruption. Several judges and magistrates are being prosecuted for irregular acts. In a landmark case known as *Bufete de la Impunidad* (Law Firm of Impunity), Judge Marta Sierra has been charged with abuse of authority and bribing several attorneys. According to the investigations conducted by the CICIG and MP (Public Prosecutor's Office), the law firm offered to secure favorable treatment for their clients by bribing judges. The clients included some of the people

47 CICIG, "Ligan a proceso al diputado Aristides Crespo por caso plazas fantasmas," press release 011, January 30, 2018, <http://www.cicig.org/index.php?mact=News.cntnt01.detail.0&cntnt01articleid=866&cntnt01returnid=67>.

48 CICIG, "Noveno Informe de Labores de la Comisión Internacional Contra la Impunidad en Guatemala (CICIG)", 2016, [http://www.cicig.org/index.php?page=informes\\_labores](http://www.cicig.org/index.php?page=informes_labores).



implicated in the *La Línea* case, who illegally paid more money than the amounts set as bail and were granted alternatives to incarceration.

Also in the justice sector was the accusation for influence peddling against Magistrate Blanca Stalling. Judge Stalling brazenly pressured a trial court judge to give preferential treatment to her son Otto Molina Stalling, a defendant in the Social Security fraud case, by granting him release on bond instead of holding him in custody.<sup>49</sup>

### **Illegal Campaign Financing**

The financing of political parties in Guatemala has been a priority in the CICIG investigation because, in the view of the Commission, campaign financing is the main cause of the web of corruption that holds the State of Guatemala captive and significantly contributes to the distortion of the democratic model in Guatemala. In August 2017, the Public Prosecutor's Office and the CICIG released to the public details of investigations establishing irregular acts to conceal the origin of funds used in the 2015 political campaigns of three political parties: National Unity of Hope (UNE), Renewed Democratic Liberty (LIDER), and the ruling party National Convergence Front (FCN–Nación). Additionally, motions were introduced to bring proceedings to lift parliamentary immunity against Roberto Villate Villatoro of LIDER and Orlando Joaquín Blanco Lapola of UNE. A motion to lift immunity was also introduced against the President of the Republic Jimmy Morales, who served as Secretary General of the FCN–Nación during the electoral process of 2015. This triggered a veritable political and diplomatic crisis because, as a result of the motion for removal of immunity, President Morales declared CICIG's Commissioner Iván Velásquez as a *persona non grata* and expelled him from the country. The Court of Constitutionality later overturned said expulsion, and the motion to lift impunity against the president was not approved in Congress. Deputies Orlando Blanco and Roberto Villate have been introducing a string of motions to hold up the proceedings to lift immunity against the President.

### **Status of Corruption Cases**

The examples described above represent only a few of the cases prosecuted by Attorney General Aldana; they serve merely to illustrate that corruption has penetrated three branches of government and many sectors of Guatemalan society. These cases spotlight how corrupt individuals skim off taxpayer money, trade in other people's health, and guarantee impunity for their own malfeasance.

The slow pace of prosecution is alarming and is the direct result of the defendants' attorneys using a variety of stalling tactics to keep the proceedings from entering the judgment phase. Most of the above-mentioned cases have not moved beyond the phase of ordering the defendants to stand trial.<sup>50</sup>

49 "Supreme Court Magistrate Blanca Aída Stalling Dávila is accused of having attempted to influence the decisions of the 9th Criminal Sentencing Court, assigned to preside over the trial of the judge's son, Otto Fernando Molina Stalling, a defendant in the IGSS case. The complaint was filed with FECl on January 10, 2017 by Judge Carlos Giovanni Ruano Pineda, who revealed how he was approached by magistrate Stalling, pleading with him about the fate of her son." CICIG, "Décimo Informe Anual de Labores CICIG: '10 años Apoyando a la Justicia Guatemalteca,'" 2017, [http://www.cicig.org/index.php?page=informes\\_labores](http://www.cicig.org/index.php?page=informes_labores).

50 The exception is the case against former president of Congressman Godofredo Rivera and attorney Vernon González, which has completed the trial stage but been held up at the appeals stage for more than a year.

The organization Human Rights Watch conducted an investigation to determine why the criminal proceedings are not moving forward and ascertained that, in the particular cases of corruption reviewed in the study, defense attorneys file appeals or motions such as *amparos* or motions for removal of the judge from the case (*recusación*), for the sole purpose of holding up the proceedings and delaying them.<sup>51</sup>

The public figures implicated in these cases of corruption are members of criminal networks. They have power, financial resources, and a vested interest in the head of the Office of the Attorney General stopping the investigations against them so the cases against them are dismissed. At stake in the election of the Attorney General is whether the State will be under the control of mafias or continue in the battle to rebuild the nation's institutional framework.

51 Human Rights Watch, "Carrera contra el Tiempo – Como el poder judicial pone en riesgo la lucha contra la corrupción" [Running out the Clock: How Guatemalan Courts Could Doom the Fight against Impunity], November 2017, p. 22. <https://www.hrw.org/es/report/2017/11/13/carrera-contra-el-tiempo/como-el-poder-judicial-de-guatemala-pone-en-riesgo-la>.

**Dr. Claudia Escobar** is a former magistrate of the Court of Appeals of Guatemala. She is recognized internationally as a corruption fighter, and has dedicated her life to working for the respect of law and justice. In 2017 she received the "Democracy Award" for her commitment to fighting impunity and corruption and was invited to Georgetown University as a Centennial Fellow in the Walsh School of Foreign Service. She was the first Central American to be awarded a fellowship (2015–2016) at the Radcliffe Institute for Advanced Study of Harvard University. Escobar obtained her doctorate at the Universidad Autónoma de Barcelona, her law degree at the Universidad Francisco Marroquín in Guatemala, and her undergraduate degree at Louisiana State University.



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