



**Problems of Form and Substance:
Reflections on the recent nomination of candidates for Attorney General and Chief of the
Public Prosecutor’ Office**

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This document is directed to representatives of the international community with a presence in Guatemala. The organizations and networks to which we are close members and observers, are witness to the recent process of nomination of six candidates, from which the President of the Republic of Guatemala will elect the next Attorney General and Chief of the Public Prosecutor’s Office. The responsibility of the first phase of the process fell to the a nomination commission made up of 11 deans from an equal number of universities that currently offer law studies, the President of the Supreme Court of Justice, the President of the National Association of Guatemalan Lawyers and Notaries (CANG by its Spanish acronym), and the President of the Honor Tribunal of that same association.

The process was marked by a series of public accusations of various types of interference that called the attention of the press, including a threat against the life of one of the commissioners, alleged interventions by operators of political and economic groups, and the publication –the morning before the nomination list was voted- of a list,¹ supposedly agreed upon previously and secretly, including 5 of the 6 selected candidates by the commission later on that day.

A series of inconsistencies in the application of criteria in the grading by the commission, which can be corroborated in the recording of the last sessions, have call our attention and we share the surprised expressed through the press by many congressmen and organizations of civil society, when the majority of the commissioners decided in the session of April 29 -without giving a single argument or explanation- not include in the final list the candidate who was ranked second by the very commission.

¹ From, <http://elperiodico.com.gt/es/20140429/elpeladero/246476/> , last visited on May 1, 2014

In light of the occurred, we call attention, succinctly, to the technical and substantive issues made apparent in this process, by providing a few examples, concerns and suggestions for the short and medium terms, with the objective of contributing to the strengthening of justice and a rule of law in Guatemala, as can be glimpsed in the future. For more detailed information, our partner organizations will soon share reports on some of the specific issues mentioned herein.

Improvisation, formalism, lack of motivation and on arguments

Even though, in some ways, the nomination commission gave signs of a will to comply with the Law on Nomination Commissions and some of the guidelines presented by the Human Rights Ombudsman and civil society, it became clear that this formalism did not constitute a sufficient guarantee against political will nor the temporary nature of the commissioner's charge, six of whom already had experience in previous nomination commissions (2009 and 2010 processes). The process demonstrated to us how transparency is not limited to public access and press to observe sessions if there are not open debates that allow public knowledge of the arguments of those making the decisions. In this section we include only a few examples to demonstrate the weaknesses of the commission observed during the process.

Preliminary Stage: There was not an exhaustive revision of the documentation required to apply to the position of Attorney General, to the point that, in the last session of the commission, commissioners discovered that one of the candidates² had not attached any documentary proof to his CV.

Evaluation of Impugnations and Counter-Evidence Stage: No criteria was established prior to evaluation of the impugnations presented by society against the candidates and consequently, there were many inconsistencies in deciding whether to admit or reject the impugnations.³ It was not and remains unclear to any public knowledge when, where and how the commissioners reviewed, verified⁴ and judged the counter-evidence presented by the candidates. The only information that is known is that at the moment of voting on the requirement of "recognized honorability," each of the commissioners recited out loud, in little variation, the same line: *"I do not know the candidate (or I am not related to him, those with the same surname) and based in the criteria of Constitutional Court, the candidate's file, and the counter-evidence to the impugnations, I have no reason to doubt the candidate's honorability and therefore find (candidate's name) worthy of recognized honorability..."* En virtue, one must assume that the counter-evidence were analyzed and accepted.

Public Interviews Stage: Before beginning the interviews, the commission failed to discuss the parameters to be used in the evaluation. In general, the commission did not take advantage of the interviews as an instrument of an integral analysis of the candidates: Not all the candidates were given the opportunity to elaborate on information proportioned by civil society, the CICIG and other institutions. To this point, the interviews were so under utilized that it left doubt as to how well the Commission duly considered and analyzed the impugnations. Likewise, neither the quality of work, independence (even though many of the candidates were or had been functionaries of the current government), compromise and experience in human rights, dedication to democracy and the strengthening of the justice system. Finally, the interviews were not taken into account publicly to evaluate the candidates along the grading system of key indicators.

² Eliseo Francisco Quiñonez, who at that moment had pasted through every stage, including the interviews.

³ For example, in some cases impugnations were accepted when press articles were presented as supporting evidence and in other cases not.

⁴ Verification of the impugnations is an obligation of the commission as established by Article 18 of the Law of Nomination Commissions

Application Grading and Evaluation Stage: It was positive to have a grading rubric with indicators to evaluate the candidate's applications, nevertheless, again at this stage, there was no prior discussion to process which was to be followed, nor the manner in which information was to be verified, therefore, criteria were developed off the cuff during the process, varying from candidate to candidate. Furthermore, the full applications were only available to those who had been voted by the Commission to be secretary and stand-in secretary (the Mesoamerican University and Rural University, respectively). It was observed that for some candidates the Commission searched with determination for documentation to give points for a parameter being evaluated, where in other cases this effort was not made.

Evaluating Recognized Honorability: "Recognized honorability" is one of the conditions established by the Political Constitution of the Republic of Guatemala for all those who seek the post of Attorney General, among other high-level State functions. In this respect the Constitutional Court in case file 249-2010, has interpreted this requirement, in reference to the nomination commissions, indicating that, "*in case of establishing the required profile for professionals who aspire to the respective nomination, among others, the ethical aspect should be taken into consideration, including that relating to proven moral, honorability, rectitude, independence and impartiality*"⁵; and it also refers to previous interpretations to orient consideration of certain elements, such as, accreditations, social criteria, and repercussions of actions. It has already been mentioned that almost all the commissioners repeated the same line for each of the candidates. These elements were neither discussed nor argued duly.

The Final Vote for the Nomination of Six: With the absence of one of the commissioners⁶, the rest formally complied with the law by beginning the voting with the candidate with the highest score down to the lowest. At this moment, without establishing reasoning or arguments nor considering the right of the petition presented by almost seven thousand citizens,⁷ the commissioners simply lifted their hands in vote for the candidates that each one preferred. To this moment, any explanation for the inclusion or exclusion of any of the candidates is unknown- particularly the exclusion of candidate with the second best score.⁸ The selection by the Commission left the President of the Republic with a nomination with an average score of 52.33/100 points; this reflects that the process did not seek excellence, even by their own established criteria, as a requirement for those who aspire to be Attorney General.⁹

Signs of an Exhausted Model

Problems of form, like those described in the previous section, have also occurred in the past. Civil society organizations and coalitions, international NGOs, the International Commission against Impunity in Guatemala (CICIG), the Office of the United Nations High Commissioner on Human Rights, the Rapporteur on the Independent of Judges and Lawyers, and the United Nations Development Program have all established, at some point in the past years, diverse initiatives to collaborate in the bettering of

⁵ Constitutional Court of Guatemala, case file 249-2010, as cited by the Due Process of Law Foundation in "The Evaluation of 'Recognized Honorability' in the Process of Selecting Public Offices," unedited, p5.

⁶ Dean of Law at Mariano Gálvez University

⁷ Thursday, April 24, 2014, representatives of the Convergence for Human Rights presented to the Commission a petition signed by 6,980 citizens, based on Article 12 of the Organic Law of the Public Prosecutor's Office (Ley Organica del Ministerio Público), soliciting the Commission to include the current Attorney General, Dr. Claudia Paz y Paz, in the list of six and recognizing her as honorable.

⁸ The current Attorney General of the Republic, Dr. Claudia Paz y Paz

⁹ According to Congresswoman Nineth Montenegro, "to not include the Attorney General is to judge on ideological grounds and not the merits of the applicants." From:

<http://www.lahora.com.gt/index.php/nacional/guatemala/actualidad/195015-diputados-postuladora-califico-las-ideologias->, seen May 1, 2014.

the nomination commissions, including, studies, criteria, instruments and even personnel evaluations, and even though some elements of form have improved, the work done by the commissions to elect the highest authorities of the Guatemalan justice system continue to be deficient and subject to an array of pressures.¹⁰

In its report on the election of judges to the Supreme Court of Justice and appellate courts in 2009, the CICIG made reference to 2004 likening it to the experience in 2009, stating that *“the lobbying work to make up the nomination commissions and list of respective candidates from the Lawyers Association, the Judicial Organism, and the universities, began well before the date on which the Congress ordered the installation of the Nomination Commission.”*¹¹ In this sense, the CICIG made public how these commissions are subject to interference and relative control by a few interest groups, stating that, *“this is how few lawyers, jurists, and businessmen begin to control from the political arena as intermediaries the work of others for their interests. The processes of election, as has been demonstrated, have inevitably this mark since the creation of the Nomination Commissions.”*¹²

The nomination commission of 2014 to elect the nomination of candidates to Attorney General of the Republic has not escaped this pattern. Various sources of information, investigations and reports by the press published this year,¹³ mention groups and persons involved in attempting to control de composition of the commission with the goal of achieving a favorable nomination for their interests. In our opinion, while the selection of the highest authorities of the Guatemalan justice system remains in the hands of nomination commissions, civil society will need creativity to augment the controls and oversight of the commission’s actions. However, the problem of substance will continue: this model has been exhausted and should be changed. This has already been signaled before by specialized organizations of civil society, the CICIG, the UN High Commissioner on Human Rights’ Office, and the Rapporteur for Judicial Independence. Even so, the model persists.

Conclusion

All the incongruences in the actions of the Nomination Commission during this last process for the nomination of candidates to Attorney General, to the extreme of leaving out highly qualified, internationally recognized candidates without justification, has contributed to the evidence that for some time has been discussed: the current model of nomination of judicial authorities in Guatemala must be revised and substituted by a system of a judicial and public prosecution career, which allows for the assent by merit and sanction when necessary. This requires that the State of Guatemala can rely upon accountable organs with the sufficient capacity and honesty to select the best profiles that will contribute to the strengthening of justice, such as the best plan to control crime, the respect for human rights and preservation of a Rule of law.

In 2011, there was ample discussion on the contents of a constitutional reform that would allow for the advancement of a career system for prosecutors and judges, and even several propositions for legislation for these. All of the proposals have been presented to the Congress of the Republic and remain “on the shelf.” In the meantime, the same model of commissions continues to be used, which will be applied

¹⁰ Remember that in 2010 the poor execution by the Nomination Commission for Attorney General of the Republic at the end of May, arrived to a point so extreme that it was necessary to repeat the entire process, under conditions of hard criticism of the commissioners and increased social auditing.

¹¹ The International Commission against Impunity in Guatemala (CICIG), *The 2009 Election Process of Supreme Court and Appeals Court Justices and other Professional Tribunals of the Same Category*, Guatemala: 2009: 8.

¹² Ibid

¹³ For example see Martín Rodríguez Pellecer, Andrés Zepeda and Rodrigo Véliz, “Key Aspects to Understand the Bid for Justice,” <http://nomada.gt/las-claves-para-entender-la-justicia/#.U2JLwVwWnfY>

likewise to the electoral process of justices in the second semester of 2014, submitting state institutions to a new waste of credibility and demanding a new creativity and efforts by national organizations and international organisms to observe the next processes which will be even more complicated and difficult to monitor given that there will be an estimated two thousand applications for a couple hundred posts.

The path until now has demonstrated that technical proposals can reduce some issues, but they are no substitute for the urgent necessity for political measures that permit the transformation of the actual nomination system of judicial authorities.

Recommendations

We understand the implication that accompany the statement of exhaustion of this model of nomination commissions precisely in the moment of naming a new Attorney General and when the next processes of selecting judges to the Supreme Court and appellate courts are beginning. A profound change that responds to the problems of content cannot be achieved in the next few months. Notwithstanding, we consider that it is relevant to take charge of the principle deficiencies observed in this past process and their possible consequences, with the goal of promoting that lessons be learned and taken into account in the next processes. For this reason, in continuation we lay out a few proposals for consideration immediately in hopes of responding to the current reality, though not to lose sight of the need to advance in the medium run the priority of an integral reform.

Recommendations in relation to the approaching nominations of authorities to the Supreme Court and Court of Appeals:

- 1) Demand that the approaching processes meet international standards for the selection of judges
- 2) Support the development and implementation of guidelines that allow for a better evaluation of candidate profiles, verification of penal and other records, evaluation with the highest possible care and objectivity impugnations and counter-evidence
- 3) Assure that all votes, from the beginning to the end of the process are done through reasoning out loud by each of the commissioners
- 4) Establish mechanisms to denounce open interference on or secrecy by the nomination commissions

Recommendations in relation to the Public Prosecutor's Office:

- 1) To express the importance that the weaknesses observed in this process do not undermine the freedom to act and independence of the new authorities in the protection of justice and the rule of law.
- 2) To make known in detail the team and work plan of the new authorities with the object of opening discussions to what support the international community can give.
- 3) To encourage the person who will assume the charge of Attorney General to guarantee the continuation of the advances achieved by the current administration and the relevant processes for justice in Guatemala, with special attention to the following:
 - a. The advanced cases in the Special Cases from the Internal Armed Conflict Unit
 - b. The strengthening of the decentralization of the Prosecution Office for Human Right Offensives
 - c. The strengthening of the Witness Protection Program
 - d. The strengthening of the Special Investigation Methods Unit
 - e. The strengthening of the Analysis Unit

- f. The strengthening of the SICOMP and transparency in all the action and management of the Public Prosecutor's Office
 - g. A focus on strategic criminal prosecution
 - h. The fight against corruption and inefficiency within the Public Prosecutor's Office and the recognition of those who produce consistent results
- 4) To give special attention to the security of prosecutors whose work puts them in high risk situations, including those in the Special Cases from the Internal Armed Conflict Unit
 - 5) To promote a meeting between the Attorney General, the CICIG and international community that supports it, to establish parameters that will guide the relation between the CICIG and Public Prosecutor's Office in the future with the goal of achieving the best possible results
 - 6) To encourage the new Attorney General to take part in the active promotion of a prosecutorial career, with goals that allow for, in a reasonable time table, the elimination of need for nomination commissions, but for an institutional mechanism
 - 7) The formation of the Public Prosecutor's Council should also be a goal of dialogue, with emphasis on the importance of contributing to the continued advancement with results to combat impunity
 - 8) Financial and technical cooperation by the international community to the Public Prosecutor's Office should be subject to the indications of certain results, including the creation of the career system

Recommendations to the State of Guatemala:

- 1) To dialogue with the Executive Organism on the importance of respecting and guaranteeing the independence of the Public Prosecutor's Office, as one of the institutions that safeguards the rule of law.
- 2) To dialogue with the Legislative Organism on the state of the reforms to the Organic Law of the Public Prosecutor's Office and the proposals from 2011 for a constitutional reform that will contribute to the strengthening of the justice system.

In the Long Run:

The previously expressed recommendations should be read from the perspective of contributing, in the long run, to the establishment of basis of a solid justice system in Guatemala with independent and capable functionaries in the exercise of their mission in serve to the Guatemalan people and contribution to the founding and strengthening of a democratic rule of law. The undersigned organizations of this bulletin are open to contributing to this objective with analysis, investigations, proposals and other forms of cooperation.

The International Platform against Impunity
 The Forum of International NGOs in Guatemala (FONGI)
 The Copenhagen Initiative for Central America and Mexico (CIFCA)
 Washington Office on Latin America (WOLA)
 The Due Process of Law Foundation (DPLF)