





**Fundación para el Debido Proceso  
Due Process of Law Foundation**

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A properly functioning justice system is a prerequisite for a genuine democracy; one that ensures respect for the rule of law and the separation of powers. The supreme court is a major pillar of the justice system: not only is the court the final authority on the interpretation of the law, but, in several countries of the region, it is also responsible for the internal administration of the judicial system - which often includes the internal disciplinary system. It is therefore **critical that only the most qualified candidates are appointed** to the highest courts. This can only be ensured through a transparent selection process that is based on the merits of the candidates, rather than on their association or sympathy with the government in office or powerful special interests.

This document contains recommendations on the necessary elements in the selection process of high-level judges and in the candidates' profiles, in order to ensure that only the most qualified professionals are selected to occupy such important positions. As regards members of constitutional courts and tribunals, DPLF considers that the personal characteristics assessed in the profile must be the same as those for supreme court judges.

These recommendations have been elaborated on the basis of international comparative experiences in judicial selection processes. They gather norms and standards developed by the United Nations and the Inter-American Human Rights System. In some cases, these criteria differ from current practices in selection processes in the Americas. However, DPLF considers that the following principles should guide the selection processes in the region. It is important to stress that these recommendations are guiding principles that each country may incorporate into (and respecting) their own national framework and context.

## Minimum principles that should govern selection processes:

### ■ The entities responsible for shortlisting the candidates must be autonomous.

The main problem in the selection process of high courts in the Americas is considered to be their politicization, which makes political criteria prevail in the selection of members of those courts. In order to address this problem, DPLF believes that the body responsible for the shortlisting of candidates should be an independent entity that is not subject to direct or indirect influence of other powerful sectors in the country. When the entity charged with shortlisting the candidates is made up of representatives from different sectors and national associations, there should be guarantees that such representation does **not become a channel of influences** and that their decisions are based solely on the merits of the candidates. This autonomy increases the potential for better decisions based on previously established criteria

rather than on political or economic considerations. The independence of the selection bodies gives more legitimacy to the selection and appointment process.

### ■ The appointment of justices must be guided by clear and previously established criteria.

These criteria should identify the professional and personal characteristics that are considered essential to be a member of the court. It is essential that these requirements are sufficiently detailed and that they are established and published in advance, so that all candidates clearly understand the requirements for a successful application. The existence of such **detailed and previously established description of qualifications** is also an important tool to guide the work of selection bodies and help prevent any arbitrary decisions by these entities. Citizens could also use the criteria to corroborate the candidates' qualifications. (An analysis of the required qualifications for justices is established in more detail below.)

■ **The appointment process, as well as the responsibilities of all actors engaged in the process, must be clearly established.**

The existence of a pre-established road map for the appointment process and a description of the role of all entities are essential in verifying whether, in practice, the actors involved in the process are fulfilling their functions adequately. There should be a **detailed plan for determining to what extent candidates comply with the established profile**, to thus avoid decisions that are arbitrary, or taken without proper consideration. Moreover, this process should be guided by the principles of **transparency and publicity** at all stages.

In this respect, **the following information should be made public in each stage of the process:**

- What process will be followed?
- What is the role of the entities engaged in the process?
- What are the required qualifications for justices?
- Who are the candidates?
- How will the skills of the candidates be assessed in practice? (How is every aspect of their personal and professional skills and experience weighed?)

■ **The selection bodies must offer opportunities for different sectors of society to provide input on the candidates, which should be investigated.**

As expected, through their CVs, candidates will present the highlights of their careers. Chances are they will not mention issues that could be considered a barrier to designation. Hence, there needs to be a mechanism for third parties that are not involved in the selection process to submit any information about a candidate's history they consider important disqualifications. Due to the sensitivity and seriousness of such allegations, it is recommended that anonymous reports not be accepted.

When an allegation is made that could affect the eligibility of a candidate, an investigation becomes imperative. The **process** that such an investigation should follow should be **previously established**. In order to ensure the **legitimacy** of the investigation, it is highly advisable to entrust the examination of the case to an autonomous body, such as a prosecutor's office.

■ **Public hearings must be held with the candidates to assess their qualifications.**

When well planned and developed, such hearings are highly effective tools to learn what the candidates think

about the law and the role of the judiciary and the court in society. Some important aspects of candidates' qualifications, such as their **commitment to the judiciary as a public institution and the role that, they believe, the judiciary should play in society**, will be hard to assess without this type of analysis. During a public interview, candidates could, for example, be asked to discuss their career and their personal and professional affiliations, as well as some relevant facts of their career that could be incompatible with the work of a judge.<sup>1</sup>

Conducting public hearings enhances the **legitimacy** of the appointment process and, at the same time, serves a significant oversight function. They also help to inform the public about the relevance of these processes, which, in turn, encourages the civic engagement of the population.

■ **Efforts should be made to ensure diversity in the composition of the court.**

It is important for a court's optimal performance that its composition reflects the society's **diversity**, both in terms of gender and minority groups. To this end, designations should be made under conditions of **equality**: there should be no space for direct or indirect discrimination in the process.

To ensure this happens, it is necessary to determine obstacles to the participation of minorities and to try to eliminate them from both the application process and the workplace. Similarly, it is advisable to replace sexist language in the materials used in the selection process with neutral language.

■ **The entity in charge of the (pre-)selection process should motivate its final decision.**

To conclude a transparent and merit-based selection process, it is important that the body in charge motivates its decision and explains **on the basis of which considerations** it decided to nominate or select certain candidates. This information serves to verify that the selection

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<sup>1</sup> In this regard, the questions posed during public interviews to candidates to the supreme courts of Argentina and the United States of America, prove interesting. See, for example: [http://www.cels.org.ar/common/documentos/audiencia\\_designacion\\_zaffaroni.pdf](http://www.cels.org.ar/common/documentos/audiencia_designacion_zaffaroni.pdf) (in Spanish) for a transcript of the public interview on the occasion of the nomination of justice Zaffaroni to the Argentine Supreme Court, and <http://www.judiciary.senate.gov/nominations/Materials11thCongress.cfm> for the transcripts of the public interviews with justices Kagan and Sotomayor of the U.S. Supreme Court.

body has followed its own evaluation guidelines, thus limiting the possibility of arbitrary decisions or those taken without appropriate consideration.

## **DPLF believes that, in order to guarantee that the most capable justices are selected, a successful candidate should have the following required qualifications:**

### ■ **Independence and impartiality**

The foundation for a successfully functioning judiciary—and the correct behavior of its members—is the impartiality and independence of its judges. In other words, interests beyond the law should not influence judges, so that their decisions are based solely on legal considerations. Given the crucial importance of judicial independence and impartiality, several international instruments recognize this condition as a fundamental right of citizens (for instance, Art. 14 of the ICCPR and Art. 8 of the IACHR).

Other international standards, such as the Basic Principles on the Independence of the Judiciary of the United Nations, describe in further detail specific aspects of the guarantee of judicial independence. The standards provide that judges should not only *be* independent but should also *be seen* to be independent. Therefore, candidates should not have any political or economic affiliations which may suggest that they lack this quality.

It is recommended that, in order to evaluate their personal background, all candidates furnish a **sworn statement**<sup>2</sup> containing a comprehensive list of clients, contractors, former work and professional colleagues, as well as business and professional entities in which they have a stake or have been involved with, in the past. At the **public interview**, such background and its potential impact in the post a person is applying to should be assessed thoroughly. While it can be uncomfortable to discuss such issues publicly, DPLF considers that addressing them would be an important step towards greater transparency.

<sup>2</sup> In determining the content of such declaration, it is interesting to examine the questionnaires that judicial nominees in the United States that are subject to Senate confirmation have to complete. See: <http://www.judiciary.senate.gov/nominations/judicial.cfm> ('Nomination materials').

### ■ **Reputable conduct and spotless record of integrity**

The integrity and spotless conduct of justices are other additional factors for proving their legitimacy. Conduct deemed morally wrong, in addition to discrediting a justice's personal reputation and the judiciary in general, could render a judge more vulnerable to undue pressures.

In order to assess the probity of candidates and their record of integrity, their **professional references should be checked thoroughly**: considering a person who has been sanctioned by a labor court or an ethics committee a good candidate, would be paradoxical. The **public interview** may examine these issues, as well as any potential observations made by citizens, which should be investigated and taken into account when assessing a candidate's honorability.

### ■ **Outstanding knowledge of the law**

Another fundamental characteristic of a supreme court justice should be his or her extraordinary legal knowledge: because of the importance and complexity of cases coming before high-level courts, its justices should have an excellent understanding of legal issues. While supreme courts in the Americas do not hold judges' specialization as a formal requirement, it would be advisable to look for lawyers who possess an outstanding knowledge either as 'generalists' or 'specialists' in an area of the law. The type of candidate's profile (generalist or specialist) and the specific thematic specialization in an area(s) of law should depend on the type of vacancy and on the legal knowledge needed in the supreme court at the time of the vacancy.

A candidate's knowledge may be assessed by looking at **different factors**, such as:

- the academic education of the candidate;
- his or her participation in specialized courses; and
- the publication of legal articles or books.

### ■ **Excellent oral and written communication skills and analytical competency**

Because of the type of work undertaken by a supreme or constitutional court, justices must be capable of properly analyzing the substance of an issue that is brought before the court. Likewise, they should be able to communicate their ideas clearly. This means that candidates should possess advanced legal reasoning and analysis skills, both orally and written, and should be able to express their opinions clearly and properly to an educated audience, as well as to society in general.

To assess their oral and written skills, it is important to **review any briefs and documents** prepared by the candidates during their professional career. If the candidate for the court is a judge, one could look at their past judgments. In the case of candidates who are legal scholars, an analysis of their books or academic articles should be conducted. For candidates from the private sector, special attention should be given to their contributions to their field of expertise (such as legal briefs submitted to the courts). The **public interview** will also provide valuable insight on such skills.

■ **Commitment to the judiciary as a public institution**

The supreme court is not only the highest court in the country, but it is also at the top of the hierarchy of the judicial branch and thus plays a fundamental role in the administration and organization of the judiciary. Therefore, candidates should demonstrate an understanding of their **responsibility** and their commitment to the judiciary as a public institution and a counterbalance to the powers of the other two branches of government.

To prove this commitment, candidates could refer to **briefs, presentations and/or other actions** taken supporting this belief. Such information should be corroborated during the **public interview**.

■ **Demonstrated commitment to the protection of human rights, democratic values and transparency**

Human rights are at the heart of modern democracies, and have been codified in several international instruments. Given the importance of these principles, candidates should prove their commitment to such values. This commitment could be demonstrated through past **written documents and public statements**, and the activities of the candidates, which should be discussed in depth during the **public interview**.

■ **Ability to understand the social and legal consequences of one's decisions**

As part of their work, high-level courts deal with important cases that may have great impact on the social and legal context of a country. Justices should be aware of this **responsibility** and act accordingly.

If the candidate is a judge, the selection body could look at their past **judgments** to establish such ability. Any written material and public statements by the candidates may also be examined. Candidates should be evaluated on this issue during the **public hearing**.

■ **Ability to strike a sound balance between a high level of productivity, the quality of judicial decisions and a careful consideration of cases**

The work of a supreme or constitutional court, in addition to being crucially important for the country, is extremely demanding. It is advisable that in the revision of a candidate's **professional history**, and its discussion during the public interview, special attention is focused on a candidate's ability to work in a high-pressure environment, both in terms of workload and the quality of output.

Moreover, the nature of the work of such courts makes it advisable to take into consideration —although these issues could be hard to evaluate— the **problem-solving capabilities** of candidates, as well as their capacity to seek and obtain consensus and to take other positions into account. These characteristics should be addressed in detail during the **interview**.