

JUDICIAL INDEPENDENCE IN LATIN AMERICA

The Implications of Tenure and Appointment Processes

Executive Summary

This report examines some of the main ways legal systems can support and maintain judicial independence, a vital element of the rule of law. It considers the approach of Latin American jurisdictions in light of international principles.

Judicial independence

The rule of law depends on judicial independence in at least three senses: the actual independence of judges who adjudicate without fear or favour to anyone, including the government; the perceived independence that gives members of the public the confidence to submit their disputes to judicial resolution; and legal safeguards which support both actual and perceived independence. This report focuses on two principal types of legal safeguards, those relating to tenure and appointment processes.

Tenure

Since the *UN Basic Principles on the Independence of the Judiciary* (1985) it has been recognised as an international norm that judges are entitled to “guaranteed tenure” for their “term of office”. This contemplates both fixed-term and permanent appointments but international opinion has become increasingly critical of the lack of job stability and conflicts of interest to which fixed-term appointments give rise, particularly if they are renewable.

Judicial tenure in Latin America has attracted both concern and innovative responses:

- Permanent appointments are rare at the highest level. There are no permanent appointments to constitutional courts and only Argentina, Brazil and Chile appoint Supreme Court judges permanently.
- One response is to provide for automatic renewal of Supreme Court appointments, as in Costa Rica. Another, more common response is to delay or prohibit reappointment.
- Judges in other courts also report insecurity of tenure as one of their leading concerns. The practice of appointing a large proportion of temporary or provisional judges is particularly troubling as it undermines tenure protections and thus judicial independence.

Appointment processes

International norms on the appointment of judges are undergoing rapid development. Currently, these require: detailed criteria to promote selection on merit and judicial diversity; an independent appointment body such as a judicial council to depoliticise appointments; rigorous and fair assessment of candidates against published criteria; and transparency to both prospective candidates and the general public.

Judicial appointment processes vary widely across Latin America:

- Appointments to the highest courts (supreme and constitutional) are still mostly in the hands of the political branches of government, with some safeguards.
- Requiring a legislative supermajority to confirm candidates can be an effective measure to reduce the influence of partisan politics when combined with greater transparency, as seen in Argentina’s Supreme Court.
- Some judicial councils assess candidates for the highest court, but their performance has been criticised in some cases, notably for political interference and lack of transparency in Guatemala and Honduras.
- Appointments to other courts are now made by judicial councils in many countries. Their composition varies widely, from Costa Rica, where the Supreme Court remains dominant, to Argentina, where there have been multiple attempts to increase the number of political representatives on the judicial council. Judicial councils are expected to conduct open competitions in which eligible candidates are assessed against the criteria for judicial office, and efforts to improve their objectivity and transparency have been seen in many jurisdictions.

Judicial tenure and appointments processes are areas of intense contestation in many Latin American states. Areas in which a number of jurisdictions depart from international norms, such as the continuation of fixed-term rather than permanent appointments and the limited role of judicial councils in making senior appointments, are coming under increasing scrutiny. This presents an opportunity to re-examine and strengthen safeguards that provide crucial support for judicial independence in practice.