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Loyalty and Willpower: Strategic Designing of Judicial Appointments in Constitutional Courts. The Case of the Dominican Republic and Guatemala

Lealtad y fuerza de voluntad: Diseño estratégico de designaciones judiciales en las Cortes Constitucionales. El caso de la República Dominicana y Guatemala

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ABSTRACT What are the implications of establishing a judicial appointment mechanism for a separate constitutional justice? We look at the cases of Guatemala and the Dominican Republic. We study the contexts, processes, and reasons of constitutional reforms in both scenarios. We conclude that constitutional assemblies choose mechanisms that represent their composition, as the theory of Brinks and Blass suggests. Moreover, we see that the length of tenure and separating the appointments in stages is something that the Dominican Republic has done better than Guatemala, but Guatemala deserves attention for achieving high independence and supremacy in a short period of its history.

KEYWORDS Constitutional court, judicial appointments, judicial independence, separation of power, power constraints.

RESUMEN ¿Cuáles son las implicaciones de establecer un mecanismo de designación judicial en una justicia constitucional separada? Para responder a nuestra interrogante observamos los casos de Guatemala y República Dominicana, y estudiamos los contextos, procesos y razones de las reformas constitucionales en ambos escenarios. Concluimos que las asambleas constituyentes eligen mecanismos que representan su composición, como sugiere la teoría de Brinks and Blass. Por demás, observamos que la duración en el cargo y la separación de las designaciones en etapas es algo que República Dominicana ha hecho mejor que Guatemala, pero Guatemala merece atención por haber alcanzado una alta independencia judicial en un corto periodo de tiempo en su historia.

PALABRAS CLAVE Corte Constitucional, designaciones judiciales, independencia judicial, separación de poderes, limitación del poder.

Why are Guatemala and the Dominican Republic the exceptions in Central America and the Caribbean?

Reasons that make these countries similar to each other

In order to know why Guatemala and the Dominican Republic are the only countries that have created a specialized constitutional court, it is important to start exploring what makes these two countries similar in Central America and the Caribbean. These explanations will be vital to understand why these two countries are the subjects of this study, which will be achieved through the acknowledgment of what common grounds are shared by them that could implicate or reinforce the justification of the presence of a constitutional court on their respective territories, and, therefore, this will bring guidance to understand the judicial appointment mechanisms they apply when selecting constitutional justices.

One prominent argument arises from a simple overview of Central America and the Caribbean: Guatemala and the Dominican Republic have recently been the largest (in terms of population) democracies in the area. This means that they are the leading countries on this aspect of each one of those spaces: Guatemala in Central America, and the Dominican Republic in the Caribbean. This conclusion is facing a crucial point of history in Guatemala, considered a hybrid regime, where judicial independence is decreasing as we show later. In the case of the Dominican Republic, there is a more-or-less stability in the last decade on the categorization as a flawed democracy,¹ and rising judicial independence as only seen once before (*Varieties of Democracy*, 2022).

Furthermore, the comparison between these two countries brings an interesting time perspective since it analyses the oldest and the newest constitutional courts of Latin America: Guatemala being the pioneer (as explained later), and the Dominican Republic being the latest (constitutionally established in 2010). In this way, this comparative study will help to understand how time and experience have impacted (or not) in the crafting of the judicial appointment of both courts and their relevance concerning judicial independence.

It should also be noted that both countries are part of a similar set of norms under international law in relation to judicial independence. In this way, Guatemala and the Dominican Republic have ratified the American Convention on Human Rights (which dictates judicial impartiality as a part of the right to access to justice). Also, both countries have somehow interacted with the Iberoamerican Code of Judicial Ethics and the Bangalore Principles of Judicial Conduct, making these instruments important parameters on judicial independence from the international perspective.

The arguments presented have to deal with an important counter-argument: the creation of constitutional courts in Guatemala and the Dominican Republic was pro-

1. The Economist Intelligence Unit, «Democracy Index 2022: Frontline Democracy and the Battle for Ukraine», *The Economist*, available at <https://bit.ly/3uvmXDm>.

duced in different contexts. In this way, Guatemala created a post-conflict Constitutional Court, and the Dominican Republic created a modern post-peaceful period Constitutional Court. Nevertheless, the purpose in both cases was similar: establish a judicial institution separated from the traditional branches of government in order to protect the Constitution.

Reasons that make them different from other countries

As established at the beginning of this investigation, Guatemala and the Dominican Republic are the only countries located in Central America, and the Caribbean that hosts a specialized and separate court that rules on constitutional matters. In order to understand what makes Guatemala and the Dominican Republic different from those other countries, it will be explained how the review constitutionality of laws (which is not always judicial) varies in form, reach, and relevance in the subregion. It is important to note that this comparison will be established with Spanish-speaking countries considering their approachability to the Guatemalan and Dominican realities, taking into account that the other countries are even more different due to their distinct colonization and independence processes. Therefore, Costa Rica, Cuba, El Salvador, Honduras, Nicaragua, Panama, and Puerto Rico will be examined.

It is possible to create four different categories on the review of the constitutionality of laws in these countries, which will demonstrate how heterogeneous Central America and the Caribbean are on this matter. The first scenario, a review performed by the legislative authority, can only be found in Cuba. Some authors consider this scheme as a «nonfunctional typology» of constitutional review since it is the same entity that will come again to revisit the norm it enacted previously (Villabella, 2019: 108). Nevertheless, this system finds its justification in the illiberal constitutionalism present in Cuba, following the one-party system. The reasons why Guatemala and the Dominican Republic have not followed this example are exuberant, but they can be synthesized to the fact that separation of power is a core part of the constitutional structure of both countries, where the review of constitutionality of laws is performed by an institution not belonging to the Legislature.

The second scenario, a review performed by the Supreme Court, but only through a diffuse control of constitutionality² that can be examined by an external court, can be found in Puerto Rico. This means that no court on that island is entitled to apply a

2. The term «diffuse» as an adjective for judicial review, will be used in this paper as a way to define that type of judicial review on the constitutionality of laws that is performed in the context of a particular judicial procedure, in which a party claims that a norm should not be applied to them in that individual case because it violates the Constitution. By contrast, the term «concentrated» will be used to refer to the type of judicial review on the constitutionality of laws that is performed independently from a particular judicial case and that usually implies the possibility of expulsion of the norm reviewed from the legal framework.

concentrated control on the constitutionality of laws; which does not impede judicial decisions by the Supreme Tribunal to become legal precedent.³

The decisions issued by the abovementioned Supreme Tribunal can be reviewed by the Supreme Court of the United States when they regard an American constitutional provision. This is because Puerto Rico could be categorized as a «constitutional singularity» (Canosa, 2001: 635), taking into account that it is under a state system called «Free Associated State» to the United States of America. Once again, it is clear why Guatemala and the Dominican Republic have not assumed a similar system: i) these countries have incorporated a concentrated control of constitutionality and ii) they are both sovereign States, whose judicial decisions can not be reviewed by a domestic court of a foreign country.

The third scenario, a review performed by the Supreme Court (as a whole), applying a concentrated control of constitutionality, can be found in Panamá (Mejía, 2019: 84). It can be argued that the judicial review in a concentrated model is so important that it requires a larger number of Justices to reach better decisions, but one can not guarantee it simply by putting more Justices to vote. The Dominican Republic, before the creation of its Constitutional Tribunal, had assumed this model (Acosta, 2010: 226), but it was replaced considering the several benefits of having a specialized judicial entity on constitutional matters, such as the fight against the delays in the emission of decisions. Regarding Guatemala, before the 1985 Constitution, the judicial review was diffuse and held by the Supreme Court.

Finally, the fourth scenario, a review performed by a specific chamber of the Supreme Court, applying a concentrated control of constitutionality, is the most popular in Central America, since it is applied by Costa Rica, El Salvador, Honduras, and Nicaragua. These countries opted for this system to answer the matters of constitutionality by a group of specific Justices, but that stayed on the branch of the Judiciary. Guatemala is the big exception in Central America since it created the first specialized body on constitutional review in the Americas (García, 2004: 7). The Constitutional Court of the Dominican Republic, on the other side, was a more recent creation, and the establishment of a specialized chamber inside the Supreme Court of Justice was rejected on the Constitutional reform process that ended with the 2010 Constitution;⁴ but the debate between opting for a specialized chamber and a specialized court was deep and prolonged. It is important to note that some countries, like El Salvador⁵ have been exploring the idea of creating a Constitutional Court based on having a tribunal that has the sole mission of defending the Constitution.

3. Conferencia Iberoamericana de Justicia Constitucional, «Tribunales y Cortes Constitucionales Iberoamericanos», *Conferencia Iberoamericana de Justicia Constitucional*, 2017, available at <https://bit.ly/47A5J5U>.

4. National Revisioning Assembly of the Dominican Republic, 2009: 86.

5. Gobierno de El Salvador, «Un Tribunal Constitucional cumpliría las funciones de defensa de la Carta Magna y señalar inconstitucionalidades», September 30, 2022, available at <https://bit.ly/3sKofGP>.

Creation of the Constitutional Courts of Guatemala and the Dominican Republic and their judicial appointment process: The exceptions of Central America and the Caribbean

Constitutional Court of Guatemala

Establishment and particularities of the court

The Constitutional Court of Guatemala is the first of its kind in the region. Before the Constitution of 1985, the control of judicial review was diffuse and held by the Supreme Court. Throughout most of the first hundred years of independence, the country struggled with its form of government. Throughout the XIX Century, diffuse control was the norm. In the liberal reform, the attempts to build a modern and secular system ended in military regimes, which lasted until the revolution of 1944 (Mahoney, 2001: 208). In the Constitution of 1944, the Supreme Court had the power of judicial review. The Supreme Court was one of the main spaces in which the famous agrarian reform of Jacobo Arbenz⁶ was contested, and tensions between the Executive and Judiciary arose. After the coup in 1954, democracy had a long hiatus until 1985. This makes it hard to conceive constitutional control during that period beyond mere legal writings with little relevant enforcement. In the 1965 Constitution, the judicial review was granted to a temporary Constitutional Court, which would be called when denounces of constitutional compliance were presented to the Supreme Court. This Constitutional Court would have twelve Justices, five from the Supreme Court (including its President) and seven randomly selected from the Court of Appeals. This was the first appearance of the Constitutional Court in Guatemala, but it had little relevance and was still a body inside the Judiciary.⁷

In 1984 the Constitutional Convention created a special commission to write the drafts of many bodies of the State to later be discussed by the whole Convention. This special Commission was the «Commission of the Thirty» and was integrated by a plural group of experts from different ideologies. This Commission designed the judicial appointments of all the high courts and created the new Constitutional Court. This time, the Constitutional Court was permanent, pluralistic, and specialized. As Brinks and Blass point out, this Court resembled the body of the Constitutional Convention. It represented different sectors, and provided spaces for contestation and division of power. The Constitutional Court of Guatemala gained broader autonomy than the prior

6. Jacobo Arbenz's «Decreto 900» was an agrarian reform that would expropriate idle land. The new land would be state-owned but given to landless peasants to work and generate an income. This reform was blocked by the Supreme Court, leading to a clash in which Arbenz unsuccessfully tried to remove the judges. Eventually, the Army, sponsored by the United Fruit Company and the CIA overthrew Arbenz and military rule came back to Guatemala for another 30 years.

7. Although we might consider all courts part of the Judiciary, in Guatemala, the Electoral Tribunal and the current Constitutional Court (1985) are considered part of the Judicial Power but out of the Judiciary Branch (*Organismo Judicial*).

Supreme Court. The 1985 Constitution was more extensive in general and introduced new social and collective rights, provided guidelines for economic planning, etcetera. This immediately gave more power to the Constitutional Court to intervene in different matters. Likewise, one of the most important attributes of the new Constitution was that the figures of *amparo* and direct actions of unconstitutionality were open to all citizens. Before 1985, *amparos* were available only in specific circumstances and courts, and direct actions of unconstitutionality could only be presented by the branches of government, the National Bar, or individuals who were directly affected by the challenged legal norm. With the 1985 Constitution, the *amparo* became accessible to anybody and it could be presented in any tribunal, including the Constitutional Court itself. The constitutional regulation on the Guatemalan *amparo* has been broad since its creation, allowing the intervention of the Constitutional Court on several scenarios involving human rights and a wider reach to the population.⁸ Since 1985, the Constitutional Court has been renewed periodically and on time with few exceptions of delays. These last delays and non-compliances occurred in the last four years, and they resemble the weakening and obsolescence of the appointment model and the democratic deterioration of the Guatemalan system.⁹

The Guatemalan Constitutional Court is characterized by: i) a short number of judges, in comparison to other Latin American constitutional courts, with a total of five permanent and five substitutes (each substitute is assigned to one permanent); ii) an absolute majority needed to take any decision on judicial cases (needing at least three concurring votes);¹⁰ iii) a financial and administrative autonomy that favors its independence from other public and private institutions, and iv) that any citizen can present an *amparo* to the Court (there is no area excluded from *amparo*).

The main cases that this court can hear and decide are: i) direct actions of unconstitutionality against the general or partial character of laws or provisions; ii) actions of *amparo* against Congress, the Supreme Court of Justice, or the president and/or the vice-president of the Republic; iii) appeals against rulings deciding actions of *amparos* by ordinary courts; iv) appeals of all the challenges against the laws objected for unconstitutionality in specific cases, in any trial, in cassation, or the cases contemplated

8. Carlos Rodríguez-Cerna (2012). «El amparo guatemalteco y el sistema interamericano de protección de derechos humanos». *Anuario de Derecho Constitucional Latinoamericano*, 18: 93-114, available at <https://bit.ly/48agvAm>.

9. Consuelo Porras was appointed as a substitute for the Constitutional Court by the Supreme Court in 2016. In 2018 she was appointed as Attorney General by President Morales and her seat remained empty. In 2021, The Justice appointed by the Supreme Court, Nefaly Aldana, fell ill and was incapable of continuing in office. Therefore, both of the chairs for appointment by the Supreme Court were empty and replaced in 2020. Moreover, in 2021 the court's term ended and the new appointments took place, another non-compliance example occurred this time when Congress refused to swear in Gloria Porras's reappointment.

10. In cases of dispute of unconstitutionality against the president Congress, or the Supreme Court, the number rises to seven judges and the needed majority to four, with the other two magistrates being selected from a random drawing among the substitutes (article 269).

by the law; v) opinions regarding the constitutionality of treaties, agreements, and bills of law at the request of any of the organs of the State; and vi) resolution of issues concerning any conflict of jurisdiction in matters of constitutionality.

Highlights of the judicial appointment process

In Guatemala, the Constitutional Court resembles the pluralistic form of the Constituent Assembly, seeking different opinions and visions from politics, academia, and practicing lawyers. As said before, five justices rule on the Constitutional Court, and each one has a substitute. Each justice is appointed directly by these five actors: The President of the Republic, Congress, the Supreme Court, the National Bar —the guild of lawyers—, and the Public Autonomous University —there is only one in the country—.

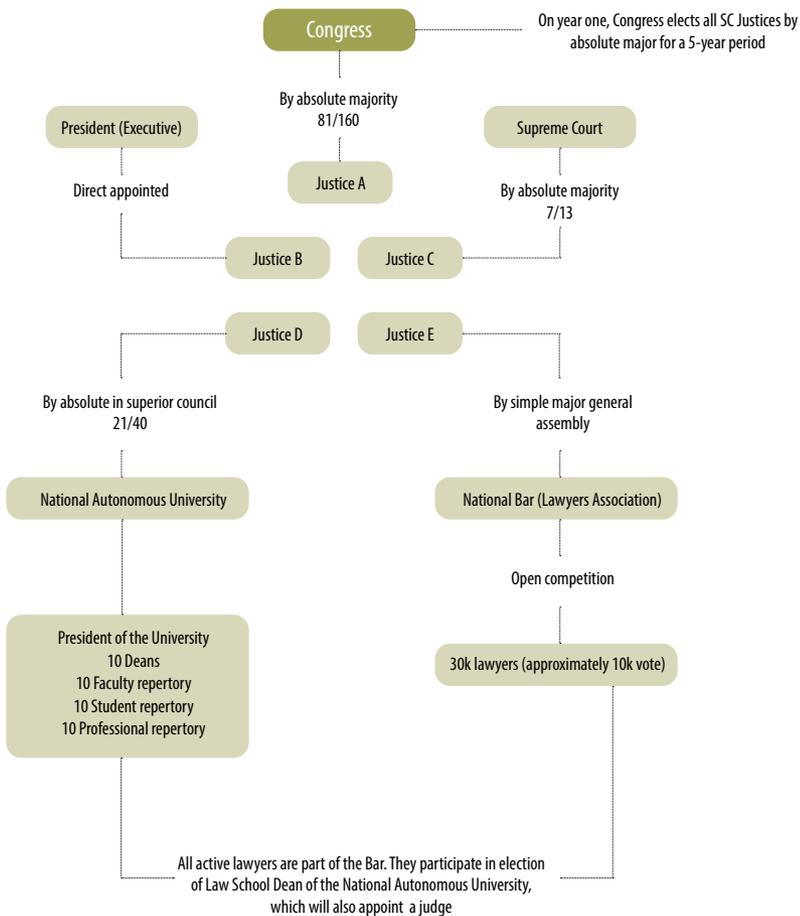


Figure 1. Guatemalan system on judicial appointment to its Constitutional Court. Source: Authors' diagram.

The Guatemalan model for integrating the Constitutional Court looks very fragmented and pluralist. Generally, it is hard for one party or actor to reach a majority (three out of five) in the Guatemalan Constitutional Court. Usually, the president and Congress can appoint similar justices with similar views and interests. Both the president and Congress are elected for four-year terms, and elections take place at the same time. Therefore, the president usually has a majority in Congress; if they do not, it is easy to build one through negotiations and exchange of benefits (Cheibub and Limongi, 2002). However, there is little they can do to influence the three remaining appointments, and it takes much effort and moral hazard to achieve a majority by influencing the other three. Although the Supreme Court is also elected by Congress, the terms of the Supreme Court are five years. Therefore, the Supreme Court appointing the Constitutional Court usually reflects the previous government or coalition.

This model has a plurality of interests, but rather than a pluralist is a corporatist one. Corporatism is present in a variety of institutions in Guatemala. In most of them, wherever there is a representation of the Public University, there is also the presence of the private sector. Although not explicitly, these two are meant to balance out each other as opposite forces.¹¹ This corporatist view is the one that determines the composition of the Constitutional Court, in which forces are fragmented but can align when needed. As a guide for **figure 1**, the abbreviations stand for the absolute majority or simple majority needed to appoint a justice. All the collegiate elections require an absolute majority, except for the Bar Association, in which a second round or ballotage is done if no candidate won the absolute majority in the first round, which has always been the case.

As described by Brinks and Blass (2018), the Constitutional Court of Guatemala is the key example of a right-wing coalition that felt confident about ruling in the near future and therefore conceded narrow authority because they preferred to define most of the laws through ordinary politics. In terms of autonomy, the examination of Guatemala must be very careful. For Brinks and Blass, the *ex ante* autonomy of the Guatemalan Court is high, especially when comparing it with the prior versions of appointments of the country. However, the *ex post* autonomy is much lower, mainly because of the short duration of the Justices' terms and for the fact that they can be reelected, which makes them persuade reelection by pleasing the same or other appointers. Longer terms are related to less accountability (Padovano and others, 2003), but accountability in the Judiciary has a direct trade-off with independence because judges are less likely to be independent if they are easy to challenge and remove.

11. Luisa Rodríguez and Enrique Naveda, «Empresarios con poder: Al menos 58 instancias del Estado en las que las cámaras tienen voto o voz», *Plaza Pública*, January 30, 2018, available at <https://bit.ly/3SL7MzU>.

Constitutional Court of the Dominican Republic

Establishment and particularities of the court

In the case of the Dominican Republic, the need for a specialized court on constitutional matters is not new. One of the first ideas was proposed in the 1980s by national jurists, who referred to the problems of overlapping functions with the Supreme Court and how the most similar model of control of constitutionality in 1924 created a clog in the court because of the ease of access of presenting direct actions of unconstitutionality (Brea, 2019: 426). Then Senator and jurist Salvador Jorge Blanco proposed the first need and request for a «Court of Constitutional Warrants» but the lack of monitoring and follow-up killed the proposal (Brea, 2019: 425).

Anyway, the idea of a concentrated control of constitutionality prevailed, in order to restore the system of checks and balances that was affected during the several presidential terms that Joaquín Balaguer remained in power. This is why the National Revisioning Assembly (composed of both Congress and Senate) enacted a constitutional reform in 1994 that created a new model, assigning the concentrated control of constitutionality to the Supreme Court, but coexisting with the diffuse model for other tribunals, which means it was a mixed model (Acosta, 2010: 226). This constitutional reform also created the National Council of the Magistrature to replace the old model in which the Senate elected all the judges (Vega, 2022: 429). Given this new responsibility, the National Revisioning Assembly reformed the judicial appointments, implying it was both crafting a new scope of authority and a new constitutional governing coalition. This National Council of the Magistrature was initially awarded only with the responsibility of judicial appointments to the Supreme Court, but after the 2010 constitutional reform, it also holds the power of appointing judges to the two judicial bodies (which are outside the Judiciary Branch) created by that reform, the Constitutional Court and the Superior Electoral Tribunal.

The Supreme Court retained the power to decide on the constitutionality of laws directly, through the concentrated model of constitutional justice, until the constitutional reform of 2010 (after intense debates and several back-and-forths) created the Constitutional Court of the Dominican Republic as a specialized body specifically established for these cases. This creation was motivated in response to the claims for a deep and structural reform to the Dominican Constitution after three decades of public debate and the requirement for the democratization of the country (Fundación Institucionalidad y Justicia, 2015: 387). Furthermore, the members of the Assembly that supported the creation of a Constitutional Court presented important arguments, such as the great workload of the Supreme Court and the necessity of a specialized court (outside the traditional government branches) whose mission was to supervise the exercise of power of the Executive, the Legislative and the Judiciary (National Revisioning Assembly of the Dominican Republic, 2009: 56) The Constitutional Court was set in motion in 2012, when the Supreme Court was deprived of the above-mentioned power and

could only analyze the constitutionality of laws in a diffuse and non-binding way *erga omnes*. This new court was an innovation in Central America and the Caribbean, besides, obviously, from Guatemala.

It is characterized by, among other things: i) a large number of judges, in comparison to other Latin-American constitutional courts, with a total of thirteen; ii) a strong supermajority needed in order to take any decision on judicial cases (needing at least nine concurring votes); iii) a financial and administrative autonomy that favors its independence from other public and private institutions; and iv) the power to make bidding decisions whose interpretation automatically becomes part of the constitution itself.

There are four main cases that this court can hear and decide, as established in article 185 of the Dominican Constitution and complementary legislation: i) direct actions of unconstitutionality, which allows the direct attack of laws and other normative acts of government; ii) preventive control of international treaties, the sole *ex ante* process that is available in this jurisdiction; iii) competences control, a process meant to resolve conflicts between public institutions that have a dispute on a certain competence; and iv) the constitutional revision of judicial rulings, which is a very detailed procedure to decide whether some specific judicial decisions have been issued respecting the Constitution.

Highlights of the judicial appointment process

As mentioned before, judicial appointments to the Constitutional Court of the Dominican Republic are carried out by the National Council of the Magistrature, which was established in the 1994 constitutional reform. The originating coalition for this reform was composed of two majoritarian parties, Joaquín Balaguer's Social Christian Reformist Party and the Dominican Liberation Party. Together, these two parties concentrated 70% of the House of Representatives and 93% of the Senate. These two chambers went into a session together, integrating the Assembly, meaning that the coalition had 75% of the constitution-making body (Nohlen, 2005).

Although the Constitutional Court was not yet created by this moment, the constitutional governing coalition already existed in the Supreme Court. In 1994, the institution for appointing judges, the National Council of the Magistrature, was composed of: The President of the Republic, the President of Congress, the President of the Senate, the leader of the second majority of the Senate, the leader of the second majority of the House of Representatives, the President of the Supreme Court, and a second Supreme Court Justice elected by their equals. This created a less politicized committee (compared to the previous model where Justices were elected by the Senate) by reducing the influence of political parties and incorporating two Justices, also by balancing the differences of power because it would place the government party and the opposition at a same table, unlike as it could be when one of them has an outstanding majority in Congress. Nevertheless, the normative inclusion of a representative from the «second

majority» of each legislative chamber has not necessarily meant a factual reservation of two seats for the opposition in the National Council of the Magistrature, mainly because of the lack of precision of the term «second majority» which has allowed various interpretations from different political parties, therefore permitting the use of the seat reserved for an opposition Senator by a person politically affiliated to a party different from the one of the Presidency of the Senate, but with which it formed a political coalition for the elections.¹²

In 2010, a constitutional reform introduced a new member to the National Council of the Magistrature, the Attorney General, who is directly appointed by the President for an undefined term, usually meaning «as long as the president wants». This inclusion comes at the same time that the Constitutional Court was created, therefore guaranteeing the coalition in the constitutional convention, in this case, the governing of the Dominican Liberation Party, the greatest force inside the National Council of the Magistrature when carrying out the first judicial appointments of that high court. After the above-mentioned reform took place, the composition of the National Council of the Magistrature was defined in **figure 2**.

Therefore, in the new body in charge of picking Justices the presidential forces have great probability of controlling half of the votes, considering the historical tendency of the same party to winning the presidency and an important portion of Congressional seats; meaning they cannot directly appoint Justices without having members of the National Council of the Magistrature from the opposition or the Supreme Court (who are meant to be independent, since they are also elected by the National Council of the

12. This has probably been one of the most discussed topics regarding the composition of the National Council of the Magistrature, mainly because of the imprecision of the term «second majority» and its lack of clarification through legislation (Fundación Institucionalidad y Justicia, 2015: 372) that has allowed various constitutional interpretations in the Senate (an institution six times smaller than the House of Representatives, therefore more susceptible to changes on the proportions of each political bloc). There have been two important arguments in this regard: i) whether «second majority» means the second political party that has had more elected senators or the second political party that has more senators that self-declare themselves as members of a certain party. This first scenario occurred in the 2020 composition of the National Council of the Magistrature, since many senators originally elected under the nomination of the Dominican Liberation Party, changed their party affiliation to the Fuerza del Pueblo Party, resulting in this last party taking that seat of the second majority in the Senate on the National Council of the Magistrature, rather than the Dominican Liberation Party. This was challenged on the Constitutional Court, but it was declared inadmissible on the basis of that designation not being one of the acts that can be directly challenged on the court (see Ruling number TC/0216/22); ii) and whether that «second majority» can be held by a Senator whose candidacy was proposed simultaneously of a political coalition composed by the party holding the Presidency of the Senate and another party. This second scenario occurred in the 2010 composition of the National Council of the Magistrature when a Senator elected by a coalition including the party holding the Presidency of the Senate (the Dominican Liberation Party) was awarded the seat of the second majority in the Senate on the National Council of the Magistrature. This was challenged on the Constitutional Court, but it was also declared inadmissible on the basis of that designation not being one of the acts that can be directly challenged on the court (see Ruling number TC/0566/20).

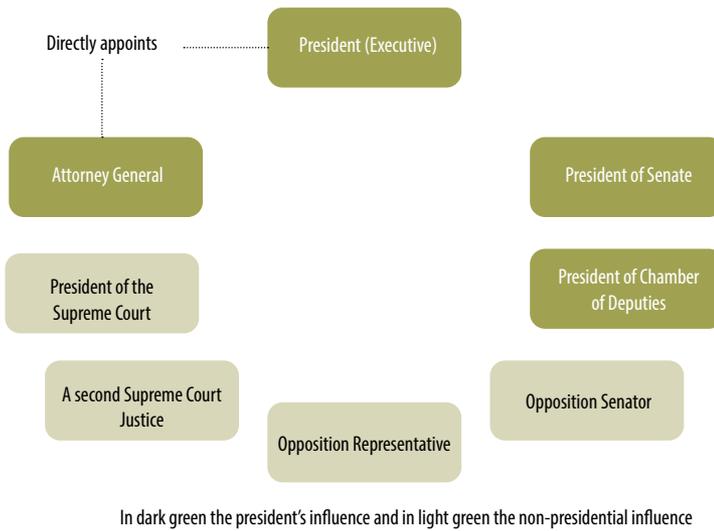


Figure 2. Dominican National Council of the Magistrature after 2010. Source: Authors' diagram.

Magistrature) joining them. However, they (the ruling party) can veto any candidate they do not want. This is why some sectors of political life critiqued the addition of the Attorney General since it affects the balance between the several political actors and branches of government involved in the judicial appointment process. Furthermore, the current government led by the National Revolutionary Party has even proposed to take out the Attorney General through a constitutional reform in order to guarantee judicial independence.¹³

As a final note, it is important to mention that the members of the Constitutional Court are appointed gradually, which means that every three years one-third of the court's composition is renewed. This system was structured in this way in order to stabilize *stare decisis* and avoid the loss of the advancement of debates on ongoing cases. Also, the members of the court cannot be reelected to their function, which means they can only exercise a period of nine years, even though some exceptions are applied on the first composition. This prohibition of reelection is supposed to avoid the desire for continuity and power by appointed Justices (Fundación Institucionalidad y Justicia, 2015: 409).

13. Melbin Gómez, «Gobierno propone excluir al procurador general del CNM y pasaría a llamarse fiscal general», *Diario Libre*, September 15, 2021, available at <https://bit.ly/3u0ofzL>.

Comparison between the judicial appointment process in Guatemala and the Dominican Republic: Same goal, different means?

Expectations: The definition and actors of the process

Expectations in the constitution-making process

The judicial appointment process of constitutional Justices has a common background in Guatemala and the Dominican Republic, which is the fact a new system of appointment was crafted in order to disrupt a previous conflictive past. In the case of Guatemala, the conflict was deeper, and involved serious and violent actions from different private and public actors; while in the Dominican Republic, the conflict was more one of an authoritarian regime coming to an end. Turning the page to a more democratic chapter in both countries implied a modernization of the Judiciary, including a series of mechanisms that were meant to avoid the intromission of external actors on judicial decisions; in other words: the depoliticization of justice.

When the Dominican Republic reformed its Constitution in 1994, the National Revisioning Assembly set in motion the National Council of the Magistrature in order to look after the depoliticization of justice (Vega, 2022: 432). In fact, after three years, the whole Supreme Court's Composition (that at that moment held the concentrated control of the constitutionality of laws) was renewed, resulting in an increase in judicial independence (see **figure 3**). An argument that could be used to sustain this result is that the heterogeneous composition of the National Council of the Magistrature (in comparison to the historically more-or-less homogenous composition of the Dominican Senate), makes more room for the appointment of independent Justices.

Nevertheless, as stated before, the 2010 Constitutional reform added the Attorney General to the National Council of the Magistrature, reinforcing the influence and presence of the Executive in judicial appointments to high courts (Fundación Institucionalidad y Justicia, 2015: 372). Those arguing in favor of this addition exposed that «It would equilibrate proportionally the representation of the branches of government in such an important institution» (National Revisioning Assembly of the Dominican Republic, 2009: 57) referring to the fact that the Executive only held one position previously while the Legislative held four and the Judiciary, two. Even though this decision certainly equilibrated the participation of the branches of Government, it technically implied conceding to a ruling party the power of vetoing any candidate they do not like; affecting the goal that was meant to be achieved by the heterogeneous composition of the National Council of the Magistrature as designed in the 1994 Constitution.

The Guatemalan case, different in its method, is similar regarding its goals. The designing of a new judicial appointment process was also meant to achieve autonomy in the elected Justices (Brinks and Blass, 2018: 223). This is why a pluralistic system was established so that the inclusion of the Executive, the Legislative, the Judiciary, the academy and the Bar, would fulfill the expectation of the constitutional convention in 1984: that the Constitutional Court would remain independent by putting interests

against each other. The addition of the Academia, and the Bar was particularly important since they are non-governmental actors and their inclusion was meant to avoid an absolute influence from the public actors on the appointments. The Bar was originally seen as the representation of the private sector, and the Public University as its opposing end, balancing the power.

This expectation, however, had to face other methodological aspects of the Guatemalan design of judicial appointments for high courts. In other words, it has not been enough to have a pluralistic system of judicial appointments, since the system can fail at other stages. In this way, the «short renewable terms», the Presidential influence on Congress, as well as other factors, resulted in a system that protects autonomy but does not guarantee it, since the most challenging judges will be easy to remove (Brinks and Blass, 2018: 223).

Guatemalan and Dominican members of Congress that enacted their respective Constitutional reform had in mind a functioning system that guaranteed judicial independence just by the fact of having heterogeneous and/or pluralist institutions of nomination/election of Justices to their high courts. Nevertheless, two lessons arise from the reality: i) when designing a judicial appointment body, not only the representation of the branches of Government must be taken into account, but also how the political forces gain their place through the members of the electing board; and ii) the mere design of judicial appointments is not enough, it must be reinforced by mechanisms that protect judicial independence from attacks from the Executive and the Legislative.

Comparison between the organic structures that appoint constitutional Justices

The organic structures of judicial appointments differ in Guatemala and the Dominican Republic in several aspects. A first aspect to take into account is the composition of each appointing institution, since the Guatemalan system incorporates a direct decision power on private actors (the Academy and the Bar), while the Dominican system exclusively relies on public actors. In the initial 2010 constitutional reform proposition, the Dominican National Council of the Magistrature was meant to be composed of eleven members, including a lawyer elected from the Dominican Bar and a representative from Dominican Law Schools, elected by its equals; but this proposal did not succeed debates and was rejected.¹⁴ One must not forget, anyway, that even in that proposal the Dominican Republic never considered a direct power for private actors, but an inclusion in a collegiate body.

A second aspect, also on the composition of the courts, is that the Dominican system is composed of one specially designated body, different from traditional branches of government (but composed by members of them), which makes all of these judicial appointments; while the Guatemalan system includes five different institutions, each

14. Manuel Vásquez Perrotta, «Del Consejo Nacional de la Magistratura: por una composición sin compromisos políticos», *vLex*, 2009, available at <https://bit.ly/3Gb1PVj>.

one working separately from the others. One of the main impacts of having several separate institutions working on the same task is that their criteria and processes can vary from each other.¹⁵

A last aspect to consider is the duration of the terms. Different to Guatemala, constitutional Justices from the Dominican Republic cannot be reappointed, and their term lasts nine years. Likewise, instead of renovating all the Justices in one turn, there is a partial renewal, every time a group of four or five judges finishes its period, a new group is elected for the other nine years, so the rotation is done third by a third (**table 1**).

Table 1. Comparison between key criteria on judicial appointments between Guatemala and the DR. Source: Authors' table.

Criteria	Guatemala	Dominican Republic
Tenure per judge (years)	5	9
Reappointment allowed	Yes	No
The court is swiped and renewed every cycle	Yes	No

Source: Own elaboration.

This has implications for the autonomy of constitutional Justices. As Brinks and Blass demonstrated in the case of Guatemala, the reappointment possibility creates loyalty bonds and might make the justices less independent in finding reelection. However, the prohibition of reappointment can also undermine autonomy because they might look for a job or patron after retirement. This is also contrasted with the length of the term. The shorter the term, the less autonomy; but the longer the term, the less accountability.

Beyond the appointment mechanisms and the length of the terms, the debate on judicial independence has agreed that many other elements determine judges' independent behavior. However, drawing from these general descriptions, we can note that the Constitutional Court of Guatemala is more diverse than the one in the Dominican Republic. In the case of the Dominican Republic, plurality might be achieved if the alternation of power is frequent and if it is represented in both the Executive and the Legislative, but if a Party rules for two consecutive terms, it will have greater power than expected in a plural court, because the control of the party of the Supreme Court over time, would secure to the party the presence of two allies in the National Council of the Magistrature. Even when a party rules only one term (four years), there can also be a possibility that it designates two-thirds of the court's composition (nine of thirteen judges, which might happen under the current Government) since the gradual replacement happens every three years, therefore making it closer to the supermajority needed to decide cases.

15. Impunity Watch, «Anomalías en el proceso de elección de la Corte de Constitucionalidad», 2021, available at <https://bit.ly/3SRaBPO>.

Theoretically, the Guatemalan court is more plural. However, the fact that the decision depends on different actors does not mean they cannot be aligned with each other. Therefore, while a single party cannot always control Congress, it can bargain and usually the majority in Congress favors the Executive. To achieve real pluralism, probably a combination of the Guatemalan and the Dominican cases would improve both, giving decision power to a broader group, but making terms longer and at different times, allowing different visions and interests to coexist and balance each other. In terms of autonomy, the ex post pressures that the judges can be subject to are greater in Guatemala, as demonstrated in the latest cases. Therefore, this analysis can characterize that the Dominican Republic has a more autonomous and less pluralist court than Guatemala.

There are three main takeaways from this subsection: i) the inclusion of private actors is a relevant feature of the Guatemalan system, but it raises some concerns on how much that means an anti-democratic privilege and how it exposes non-political institutions to be politicized; ii) the due process is not entirely enforced and this undermines credibility; however, strengthening and constraining regulation would not necessarily improve the process as Guatemala has experienced on its Supreme Court Appointments and other countries show similar data (Voigt, 2020: 61); and iii) the tenure of constitutional Justices, and the respective election of new ones, should be crafted in a way that does not imply a complete and/or major swipe of the previous composition by a same ruling party, allowing pluralism and contestation of power rather than just validation of political decisions.

The aftermath: Independence and influence of constitutional Justices

Expansion on the influence based on case law study

Once constitutional Justices have been elected, the way they decide the cases brought to them can be a criterion to determine the level of their judicial independence. In other words: if a Justice stays loyal to those who elected him during the judicial appointment process, then it can be said that they lack independence within their jurisdictional functions. In order to understand if this situation happens in Guatemala and/or the Dominican Republic, a brief review of the landmark cases of both countries will be done. It is hard however, to see the Latin-American courts with the same perspective as in the United States or European Democracies, because the emergence of new parties with very broad ideologies overlapping with each other does not allow us to see the conventional conservative-liberal or conservative-progressive divides.

In the case of Guatemala, constitutional Justices make decisions from very narrow and similar perspectives. Radical disagreements between judges are not common in the court. As explained by Lemus, the judges of the Constitutional Court behave strategically, favoring each other in their proposals and not paying too much attention to the ruling party. It is still important to highlight that most of the quantitative studies overlook the high-impact cases. The high-impact cases are just a few of the many that reach

the court, but the ones that get most of the attention. This is specific to the Guatemalan Court because the *amparo* is open to any citizen, which creates enormous amounts of people bringing up cases to the court. The number of filings in the Constitutional Court has grown from less than five hundred in the eighties to more than seven thousand in 2019.¹⁶

In the period of the highest independence of the court, many actors related to the conservative parties and economic elites criticized the court for being activist.¹⁷ Many of these arguments referred to cases brought to the court by non-governmental organizations advocating for extensive visions of human rights. Regardless of the more extensive views and the activist labels, it is clear that the cases brought to the court increased constantly since 1986. In 1986 the court received less than a thousand; by 2006 it received more than six thousand per term, and in 2016, it had almost fourteen thousand.¹⁸ In 2020, the filing to the court was still high, but with fewer petitions. The decrease in petitions might mean that the court became less trusted. Likewise, judicial independence dropped in 2020 and has been in constant deterioration (see **figure 3**). This connection of events has to be analyzed carefully, but with enough attention and detail, one can notice that after rapid spikes in judicial independence, the system attacks back to gain control of the court, leading to a deterioration by appointing allies of the regime.

In the case of the Dominican Republic, during the short period of time that the Constitutional Court has existed, a little more than a decade, it is not possible to establish with certainty that its judicial independence has been relevantly tested, based on the cases that have been decided by the Court. There are various reasons that support this hypothesis. First, this is a young court that has not engaged in a deeply extensive vision of human rights and/or has ruled against a governing party on major policy issues. Furthermore, no particular political agenda can be inferred from relevant rulings; a position that is defended by its current president who has stated that the Court «does not receive orders from anyone, only from the Constitution and the laws, and from their own intellect consciences».¹⁹

Nevertheless, it can be argued that the court has been particularly emphatic on women's rights, and effective judicial protection; to the point of striking down some legal texts limiting these rights as can be seen in the following rulings (cited in order

16. Jonatán Lemus, «Magistrados estratégicos, Corte activista: ¿Por qué cambió el comportamiento de la Corte de Constitucionalidad en casos tributarios a partir del 2014?», *Centro de Estudios Económicos y Sociales*, 2018, available at <https://bit.ly/3RaiONH>.

17. It is hard to compile all of the evidence but op-eds are good examples of this response from conservative think tanks.

18. Jonatán Lemus, «Magistrados estratégicos, Corte activista: ¿Por qué cambió el comportamiento de la Corte de Constitucionalidad en casos tributarios a partir del 2014?», *Centro de Estudios Económicos y Sociales*, 2018, available at <https://bit.ly/3RaiONH>.

19. Constitutional Court of the Dominican Republic, «Magistrado Ray Guevara afirmó TC ha demostrado absoluta independencia del poder estatal y los poderes fácticos», *Tribunal Constitucional*, August 30, 2019, available at <https://bit.ly/4oSFwoo>.

of the mentioned rights): Ruling number TC/0070/15, and Ruling number TC/0281/19. The court has also taken a strong position on the definition of the Dominican nationality (for example Ruling number TC/0168/13) and the national sovereignty with regards to international actors (for example Ruling number TC/0256/14).

Second, one must keep in mind that the supermajority inside the court serves as an imposition to reach high levels of consensus between constitutional Justices to take any decision, creating a more difficult context for decisions to be radical on any side of the political spectrum. Third, and last, the Dominican Constitutional Court has coexisted with the one ruling party for a long time, a situation that lasted the first eight years of the Court with the Dominican Liberation Party in power (the same political party that controlled the majority in the National Council of the Magistrature when electing the first members of the Court and the first four replacing members). The best way to test partisanship in the Court will require looking for a more divided court after the National Council of the Magistrature led by President Luis Abinader has made enough replacements and, possibly, changed the balance within the court. Since in the Dominican Republic, the terms are longer, and re-appointment is not possible, this case will become an interesting example to see: i) if judges will be loyal to their appointer, and ii) if the plurality creates higher contestation of policies. However, it will be harder to notice than in Guatemala if the Dominican court does not engage with high-impact political cases.

The Guatemalan experience differs from the Dominican since in the first case it is possible to find stronger proofs of judicial activism, but in the latter this task seems more difficult. This could be justified by the age of each court, considering that an older court is more likely to have had more time to settle, to reach more legitimation within society and public actors, as well as to create a better understanding of constitutionalism. However, each court has had some specific areas that show a particular ideology tendency, which has logically implied some relevant decisions leaning on the direction of the ideas held by the majority (in the case of Guatemala) or by the supermajority (in the case of the Dominican Republic).

Judicial independence, is it related to the appointments?

In the Guatemalan Court, judicial independence grew significantly in 2013 and reached its peak in 2018. In 2013, the Constitutional Court was composed of judges appointed by the Center-Left Unidad Nacional de la Esperanza party. This independence is noticeable as an example of pluralism: a court-appointed by party A will challenge and restrain party B as they represent different visions and interests. This high independence is explicit after President Colom's (Unidad Nacional de la Esperanza party) term, being very restrictive of President Perez Molina's (Partido Patriota party) government. Molina was not lucky, and he and his Congress did not get the coincidence in their term to reappoint the court. After Molina was ousted and charged with corruption cases, Jimmy Morales started in 2016 with an alliance with Unidad Nacional de la

Esperanza, and reappointed some judges and appointed new ones, some with extensive and progressive visions again, most of whom were part of the previous court, with the sole exception of Ochoa. He was Morales's appointee, chosen by the president with no further confirmation required beyond his cabinet. Not surprisingly, Morales's choice was closer to his personal constituents and coalition (a conservative party with military leaders as candidates, Morales, a conservative evangelical himself, and with the support of economic elites).²⁰

Ochoa started to be the conservative dissident in a progressive court. However, the first majority he built in Congress was with the support of *Unidad Nacional de la Esperanza*, and his first cabinet was seen as reformist, slightly progressive, and technocratic, including characters such as Lucrecia Hernández (later member of the opposition party *Semilla*). When Morales broke his alliance with *Unidad Nacional de la Esperanza*, he faced restraint from the court, but they were already appointed. Thus, independence kept growing as an example of opposing interests and views. It is clear, however, that after the period of high independence, the government of Giammattei, who made alliances with the same parties that supported Morales's conservative government, started a clean-up of the high courts and brought judicial independence to its lowest score in the history of Guatemala's modern democracy.

The quick fall of judicial independence can be explained in a two-fold argument. On the one hand, the high levels of judicialization of the executive during Morales's time and the first months of Giammattei caused a backlash, with the result of a total capture of the judiciary by the ones affected by it. On the other hand, we must keep in mind that the high levels of judicial independence seen before are more an expression of the tensions arising rather than pure or static independence. It is hard to see judicial independence in the absence of conflict when we do not have a reference point. Therefore, we must be aware of the potential endogeneity in this explanation. What is remarkable is that the levels of judicial independence that Guatemala experienced before for most of its democratic history were never as low as they are after Giammattei's sweeping. The unprecedented levels of an independent court without protection for the long term made the next ruler secure a supportive court with the smallest possible risks of defection.

It should also be noted that international institutions related to human rights have emphasized the «escalation in interference with the judicial independence, the weakening of human rights institutions and increasingly evident setbacks in the fight against

20. Adam Isacson, «Un retroceso severo para las relaciones civiles y militares de Guatemala», *WOLA*, September 24, 2018, available at <https://bit.ly/49MxcmC>; BBC Mundo, «Jimmy Morales, el comediante conservador que podría ser presidente de Guatemala», September 7, 2015, available at <https://bbc.in/47pjpkw>; CICIG, «Comunicado de Prensa 053», *Comisión Internacional Contra la Impunidad en Guatemala*, May 15, 2018, available at <https://bit.ly/3GbLWOt>, and Daniel Villatoro, «Los militares que financian a Jimmy Morales», *Plaza Pública*, May 13, 2015, available at <https://bit.ly/47B4raO>.

corruption and impunity».²¹ Even in the cases that these reports do not directly address the Constitutional Court, they can be used as a useful tool to understand the Guatemalan *status quo* on judicial independence. Furthermore, the Mediation Mission of the OAS criticized the latest action of the Constitutional Court intervening in politics such as ordering the dismissal of the Minister of Interior and ordering the new Minister to release facilities of the Attorney General's Office where protestors gathered.²²

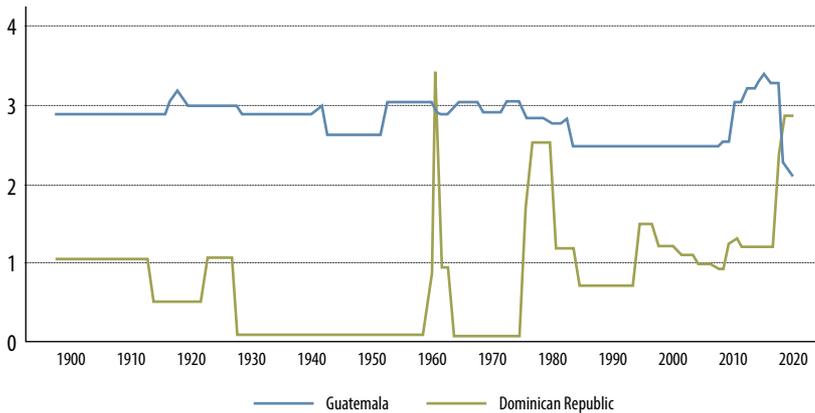


Figure 3. Comparison on high court independence between Guatemala and the Dominican Republic. Source: Extracted from V-Dem.

This of course is part of the broader picture of the undermining of the State in the 2020-2023 period. Giammattei made an alliance with multiple parties in Congress and external actors that were part of the ruling coalition with the latter part of Morales's government. As much Morales's coalition was agglutinated with the common purpose of canceling the Internacional Commission against the Impunity in Guatemala's mandate, Giammattei inherited that coalition —or better said inserted himself into it— allowing them to have access to greater power. This was only possible by building a large majority in Congress which enabled him to sweep the Constitutional Court, reappoint the Attorney General, change the Ombudsman or People's Defender, and retain most of the checkpoint institutions.

The peak of this undermining occurred in the 2023 election. With the surprising victory of Semilla, one of the strongest opposers to the coalition, the Attorney General's office started a persecution against Semilla. The Electoral Court (Tribunal Supremo Electoral) did not align itself with the coalition and thus became persecuted too. As of the moment we write this paper, the Constitutional Court has given nuanced responses

21. Inter-American Commission of Human Rights, «Informe anual 2022», available at <https://bit.ly/3ST98sl>.

22. OAS, «Statement from the Mediation Mission of the OAS General Secretariat in Guatemala», *Organization of American States*, October 18, 2023, available at <https://bit.ly/3ursI4M>.

to both the electoral court and the Attorney General, favoring the latter over the former. This poses an interesting question in understanding why the Electoral Court did not align with the regime. Not having ex-post controls evidence, all we can see is that the qualified majority required to appoint the Electoral Court Justices of two-thirds of Congress seems to have worked in the sense that they resemble a much broader consensus among more plural elites. This resonates with Brinks and Blass's argument on why the Argentine Constitutional Assembly decided to require the same majority to appoint constitutional Justices: «If the constitution is what the Justices say it is, each time we name a judge of the Court we initiate a partial and everyday process of reform of the constitution» (Brinks and Blass, 2018: 135).

While it is not clear what caused judicial independence in general or what specifically caused the Guatemalan Court to become more independent for a period of time, it is clear that the process of appointing judges undermined it. In the Guatemalan case, since the whole court is appointed in the same process and the Justices serve altogether for the same period of time, the appointment can also be seen as a removal. It is also important to note that many of the Justices appointed by Jimmy Morales and Alejandro Giammattei served before in the Constitutional Court, demonstrating loyalty to their parties and securing re-appointment. This is also to be said of previous Justices, who are seen as more independent, but still sought re-appointments by serving progressive causes and seeking the vote of progressive appointers, such as Gloria Porras did, from being appointed by President Álvaro Colom, to find reelection from a Congress controlled by the same party when Álvaro Colom was no longer president, and ultimately, gaining the appointment from Public University in 2021, which was blocked by the Supreme Court and Congress already controlled by Alejandro Giammattei.

In the Dominican Court, the 2010 recomposition of the National Council of the Magistrature implied a brief decrease in judicial independence considering the increased appointment power that it implied for the party holding the Presidency in the first-ever elections of constitutional Justices. Nevertheless, the following years show a discrete augmentation of judicial independence with a major increase in 2020 (the second highest peak in its history after the post-dictatorship Juan Bosch's Government of 1963). This last increase can be justified by two main factors: i) the four spots usually held by the ruling party in the National Council of the Magistrature were more-or-less flexibility, since the President of the Senate does not come from the ruling party but from an allied party, and because the Attorney General, even though she was named by the President, is largely recognized as an independent political figure, and ii) the four constitutional judges elected that year was previously in the Judiciary, meaning that they are supposed to be independent figures from the political spectrum (at least in comparison to other public servants).

On this point, it is interesting to note that, from the 21 Justices that have been appointed so far by the National Council of the Magistrature, almost half of them had previously occupied a non-elective public post within the Executive and/or the Legislative, while a very few of them (three) had occupied an elective congressional

position. Also, at least a quarter of them had publicly been part of a political party. This information sheds light on the fact that some of the elected constitutional Justices had a politically active life that could affect their independence once elected considering their political affiliation. However, this data is merely informative and does not mean that a previous political affiliation necessarily implies a later lack of independence.

The Guatemalan and the Dominican recent scenarios, even when discrepant, show a similar feature: the political will is decisive on the level of judicial independence. In this way, when a ruling party has the power to coerce the institution(s) that decide the judicial appointments, then it can control who is appointed and those judges might show loyalty to their proponents. On the other hand, when a ruling party is willing to give away some of its power on judicial appointments, it might result in an increase in judicial independence. In sum, it is important to structure a system that, even when it remains interactive with the political institutions, does not entirely depend on them.

Conclusion

Even when the establishment of their constitutional courts was carried out in different contexts, Guatemala and the Dominican Republic remained the pioneers of specialized constitutional justice in Central America and the Caribbean, a situation that differentiates them from the other countries of the region that follow several other methods of judicial review on the constitutionality of laws. Nevertheless, Guatemala and the Dominican Republic have followed different mechanisms of judicial appointment of the judges that sit on their respective courts, with a central common feature: the desire for a heterogeneous composition of the appointees.

In this way, the Guatemalan system has opted for a pluralistic mechanism where five different institutions, from both the public and private spheres, choose one constitutional Justice each; while the Dominican system has designated a special body composed of eight members coming from the three traditional branches of Government, which appoints all constitutional Justices. This paper has explained that neither of these systems has guaranteed authentic judicial independence, mainly because they are not accompanied by other relevant features such as a gradual replacement of the judges (used in the Dominican Republic, but lacking in Guatemala) and a more inclusive society and nonpublic actors (existing in Guatemala, but lacking in the Dominican Republic). This situation has had a major consequence: the political will is decisive on the level of judicial independence.

Certainly, the high expectations of the representatives who enacted the constitutional reforms that created both constitutional courts have not been met, but future reforms must take into consideration the factual distribution of power beyond a nominal one, and the reinforcement of mechanisms that protect judicial independence from attacks from the Executive and the Legislative. Furthermore, both the Guatemalan and the Dominican experiences have shown that judicial activism is a way to demonstrate

judicial independence, but this has been more true in the case of Guatemala than in the Dominican Republic, considering the difference in age between both courts.

To narrow down some of the major implications of each system, we can conclude that broader constitutional assemblies will create broader pluralistic constitutional courts. Moreover, the process of appointing Justices for a court altogether is itself a process of removal, which undermines judicial independence, a scenario in which the Dominican Republic has done better than Guatemala. The possibility of reelection deserves more cautious testing, the Dominican case needs more time to shed light in this respect. The Guatemalan court has shown both perks and perils of having re-appointments available since they improve accountability but also undermine the general independence of future courts. Probably, the truth lies somewhere in between, slightly favoring longer terms without removal and without reelection. As long as there are no real mechanisms of accountability and the quality of democracy does not significantly improve (people feel themselves represented by their politicians), all legal mechanisms of accountability are much more likely to be captured by those in power than used by the citizens themselves.

One short conclusion is that including the Bar Association as in the case of Guatemala (and something the Dominican Republic rejected) has not proven to be helpful, in creating an entrepreneurial space for groups dedicated to running campaigns and offering favorable decisions in exchange. Another conclusion is that the power given to the public university, although helpful for the Court more often than not, has done much more harm to the University itself by making an attractive source of power to be captured with students and society carrying the cost. Including more universities could be helpful, as long as there are filters that prevent the participation of «cardboard universities». Some of these criteria could require specific longevity, making it unattractive to start up a university project with the purpose of influencing the judiciary. This, combined with longer and staggered appointments would also protect the universities from being politicized in long-term efforts.

Guatemala has less to teach from theory than from experience in the Dominican Republic. One key insight, although not largely discussed here, is that the abuse of legalisms and formal concepts can be very harmful. In that sense, just as the concepts of who is honorable and who is not have been misused in Guatemala, the debate on who is the «opposition» in the Dominican Republic could happen at some point. This should be considered in case the Dominican Republic suffers a change in its party system because the concept of opposition can be challenged when more parties are present. The Dominican Republic has to be very aware of these potential changes, as it is one of the countries with the easiest paths to amend its constitution, and the one with the most reforms in Latin America.²³ Moreover, the idea of including academia and non-political actors does not seem necessary for the Dominican Republic yet, as long as democratic

23. Fernando Ferrán, Shyam Fernández and Alejandra Valerio, «Coloquio constitucional», 2017, available at <https://bit.ly/3R9TAiC>.

quality persists. However, adding the academia and intellectuals can help prevent the politicization of the court.

In sum, being pioneers in constitutional justice in the region should not be the only merit held by Guatemala and the Dominican Republic, both countries must learn from each other in order to be an example to follow for other countries that want to create a specialized constitutional court in Central America and the Caribbean.

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