

Executive Summary

ELECCIÓN DE AUTORIDADES DEL ÓRGANO JUDICIAL Y DEL TRIBUNAL CONSTITUCIONAL PLURINACIONAL

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Judicial Elections in Bolivia: An Unprecedented Event

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In Bolivia, as in nearly every Latin American country, the power to appoint judges has historically been held by the executive branch of government. In the exercise of that constitutionally and legally recognized authority lies the nexus between those who hold political power and those who must make decisions concerning the freedom and property of citizens. The Bolivian justice system has historically been plagued by inefficiency, corruption, and political interference, according to various scholars. These deficiencies of the justice system appear to be causally linked to its dependence on political power holders, especially through the mechanism for the appointment of judges.

It is these shortcomings of the judicial system, bound up with the impunity and violation of rights that have deeply affected the life of the country, that the Constitution of 2009 was supposed to remedy. A key component of this reform was the popular election of the members of the highest bodies of the judicial system, linking the independence and impartiality of those institutions to the democratic selection of their authorities.

In several countries, justices of the peace or their equivalents are elected; such is the case in Peru, Colombia, and Venezuela, as well as some municipalities within France. In Japan, citizens vote to approve or reject the appointment of Supreme Court justices. Judges are elected in the United States and in Switzerland, but in both cases the highest-ranking judicial authorities are not elected. Bolivia is the only country where—in one election so far, held in 2011—the members of the highest courts of justice (the Supreme Court of Justice, the Agro-Environmental Court, and the Plurinational Constitutional Court), as well as the members of the governing body that oversees judicial training (the Judicial Council), have been elected.

As popular election of high-ranking judicial authorities in Bolivia constitutes a unique situation, there is considerable interest in examining this experience and its outcome. The report summarized below was drafted on the basis of documentary analysis and fieldwork conducted in La Paz and Sucre in June 2014. Researchers conducted 32 interviews, including interviews with six elected justices, as well as gathering published material and unpublished reports.

I. THE REGULATORY DESIGN

A review of the minutes of the Judicial Committee of the Constitutional Convention does not shed much light on the discussions surrounding the appointment of the highest-ranking members of the judiciary, except as regards the need to include indigenous persons, which was supported by representatives of the majority. The respective weight to be assigned to an indigenous background and to the merits of the candidate was the main issue of concern to the constituent assembly.

In the end, the Constitution of 2009 provided for popular election of the justices of the high courts and the members of the Judicial Council. Notably, however, the pre-selection of candidates was reserved to the Plurinational Legislative Assembly, which was constitutionally required to “evaluate the merits” of the candidates. The participation of the legislators, critics have observed, ensured the continuing intervention of the political authorities in the process of appointing justices.

It was established by regulation that the status of “native indigenous peasant” would be attested by the individual candidate through “personal self-identification or membership in a native indigenous peasant nation or people, without the need for any additional evidence.” It was also stipulated that the evaluation of merits must take account of three factors: academic training, intellectual achievements, and experience.

The Constitution prohibited judicial election campaigns. The law and the regulations broadened the prohibitions applicable to both candidates and the media with respect to advertising, interviews, opinions, and surveys, to the point that the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights called certain aspects into question. The dissemination of information remained limited to what was produced by the Electoral Body.

II. THE ELECTION PROCESS

On May 15, 2011, the Legislative Assembly publicly announced a call for candidates to the 56 elected positions in the four entities. There were 581 registered applicants (393 men and 188 women): 78 were candidates to the Plurinational Constitutional Court, 82 to the Agro-Environmental Court, 222 to the Supreme Court, and 199 to the Judicial Council.

The Legislative Assembly undertook the task of pre-selecting the candidates for the judicial elections. This was done in two phases. The first phase was conducted by two Assembly committees and consisted of (i) verifying that the candidates met the stated requirements, (ii) performing the “evaluation of merits,” which included interviewing the candidates, and (iii) submitting a merit evaluation report together with the interview to the full session of the Assembly. In the second phase, the full Assembly selected, from the list forwarded by the committees, the candidates whose applications would be up for popular vote on October 11, 2011.

Certain problems arose during this process that were perhaps the most significant ones to come up in the judicial elections. With respect to compliance with the requirements, as well as the resolution of challenges, there were disparate opinions that resulted in the rendering of decisions according to different criteria. Various sources consulted agreed that the quality exhibited by the candidates in the interviews was poor. The work of the committees lacked guidelines and order, so that no real merit evaluation was produced; as a result, specific candidates were chosen and others ruled out at the discretion

of the members of the respective committee. The committees declared 348 candidates (234 men and 114 women) to be qualified, and the list of names was forwarded to the full Assembly.

On July 12, 2011, the day after the list was received, the full Assembly voted to select the candidates. Opposition members of the Assembly challenged the procedure that had been used. Following the vote, 118 individuals were named as candidates—that is, approximately twice as many as the number of positions to be filled at the highest levels of the judiciary. Those selected were evenly divided between men and women, and 22 in all had self-identified as “native indigenous peasant.”

This selection was subject to numerous challenges alleging that the committees had failed to properly evaluate the candidates and that the Assembly members therefore lacked adequate information at the time of their decision. Several authors maintain that the selection of candidates was politically motivated and was imposed by the vote of the Assembly’s pro-government majority. Some of the justices selected, who were interviewed for this report, dismissed such accusations.

The election did not generate much enthusiasm among the electorate. Prominent pro-government and opposition political figures participated actively in the campaign—the former to get out the vote for the candidates chosen by the Legislative Assembly, and the latter to encourage people to cast blank or void ballots. As a result, the election process led to extreme political polarization, to the point where President Evo Morales likened the election to a popular referendum on his administration.

III. ASSESSMENT OF THE JUDICIAL ELECTIONS AND THEIR OUTCOME

Government and opposition sources agree that the information available to voters was insufficient. Differences of opinion arise, however, regarding the reasons why there was so little information. While critics maintain that the prohibitions imposed by the government gave rise to disinformation and disinterest, government actors assert that the challenge of disseminating information equitably, given the country’s conditions, was formidable.

Notwithstanding accusations of voter inducement, the judicial elections were held on October 16, 2011. Voter abstention was just under 21%, on par with that of the general elections held in recent years. However, blank or void ballots—which Bolivian law considers “invalid”—accounted for some 60% of all votes cast. The 56 individuals elected—who included a significant number of candidates who had self-identified as “native indigenous peasant”—are, in the opinion of different critics, individuals with limited experience or insufficient professional qualifications.

The consequences of the election have been subject to very different assessments. Some observers have emphasized that the transformation of the appointment process has granted a popular mandate to the justices. Others have pointed to the illegitimacy of individuals politically pre-selected and then elected by a minority of voters, alleging that their qualifications are insufficient for the positions in question. *e votantes, que no reúnen méritos suficientes para los cargos a desempeñar.*

IV. THE WORK OF THE ELECTED OFFICIALS

There are no rigorous, empirically based analyses that have addressed the performance of the elected judicial authorities in Bolivia. However, given the available evidence, some general comments can be made about the work of the Judicial Council and the Plurinational Constitutional Court.

The Judicial Council has acknowledged that in 2013 “the overall budget for the justice system [was] only 0.53% of the National Budget.” This limitation—in addition to the legal impossibility of opening a competitive appointment process for judges so long as the country’s main codes remain unchanged—is the basic cause of the scant results offered by the work of the governing entity that oversees the justice system. Ninety-eight courts were created between 2012 and 2013, a period that also saw the challenge of a growing judicial caseload. With regard to disciplinary matters, according to official government information there were 1,988 complaints received in 2013 and 446 “cases adjudicated” between 2012 and 2013; this resulted in the effective imposition of sanctions in 175 cases, including the removal of three judges and a justice. Internal challenges within the Council have gained public notoriety.

A report on procedures implemented by the Judicial Council for the appointment of provisional judicial authorities during 2012 and the first half of 2013 lays out several shortcomings, including a lack of clear parameters for appointments, low professional standards, disregard for the ability to speak predominant languages, and lack of respect for the assessment of merits. The report concludes with the assertion that the old Council of the Judiciary performed better than the elected Judicial Council.

With respect to the Plurinational Constitutional Court, the assessment focused on its independence, an aspect strongly questioned by its critics. The analysis of several judgments from this Court reveals deep concern with respect for fundamental rights and guarantees, which on different occasions has led to decisions clearly inconsistent with the will and actions of the government. Nevertheless, the Plurinational Constitutional Declaration adopted by the Court in 2012, which made it possible for President Evo Morales to be reelected in 2014, exhibits very dubious legal reasoning. This can be interpreted, as several critics have done, as a display of deference to the will of the government.

Various statements made by high-ranking government officials, in particular Vice President Álvaro García Linera, have included pejorative remarks about judicial independence, which has been described as “illusion and wishful thinking.” It has even been said that that “the State, as representative of the common interest, should not and cannot lose to anyone.” These statements run counter to the standards of the inter-American human rights system, in which the independence of judges—as both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have frequently recalled—is considered an indispensable guarantee of their impartiality in resolving disputes between private parties and in overseeing the constitutionality and legality of the government’s acts.

Public complaints of pressure exerted on certain justices by government actors complete this picture.

V. DISCONTENT AND THE ALTERNATIVES

Given the absence of change in the justice system in recent years, voices from the government and from the opposition agree that the judicial electoral process is a “failure” and call the system for the election of justices a “mistake.” At the end of 2013, Vice President García Linera spearheaded a government campaign, promoted by two justice ministers and eventually by President Morales himself, of harsh criticism of the justice system and self-critical questioning of the election mechanisms that brought “poncho y pollera” (traditional indigenous garb) to the highest ranks of the system.

To an extent, the criticism from the opposition and government dissenters has been eclipsed by this shift in the government’s position. That position has entailed, in particular, the disapproval of specific decisions—especially those of the Plurinational Constitutional Court—that are deemed contrary to the interest or policies of the government. Finally, since April 2014, President Morales has suggested the need for a “judicial revolution,” which would include a proposed consultation on the revocation of the mandates of the justices elected three years ago.

In their responses, the justices in question underscore the lack of available means to make changes. But these arguments have been overshadowed by the repeated attacks of the government, whose proposals have been supported by critics of all that has happened to the justice system under the Constitution of 2009. Those who think it is premature to make an assessment are in the minority. At the end of July 2014, the Plurinational Legislative Assembly resolved to initiate proceedings for malfeasance in office against Constitutional Court Justices Soraide Cháñez and Ligia Velásquez because of the position they both took in a case decided by the Court. This was the state of affairs leading up to the 2014 presidential election.

Conclusions

1. In Bolivia, as in most Latin American countries, the history of appointments to the high courts at the discretion of the political authorities has not provided satisfactory outcomes for the justice system. This is because of the insufficient professional caliber of some of the persons selected as well as the demonstrated lack of independence of the high courts from specific sources of power.
2. The choosing of judges by popular vote is a method used in some countries, but in no other case has it been used to select the judges of the highest courts. The election of judicial authorities was introduced in Bolivia by the Constitution of 2009.
3. The main objections to the popular election of high court justices raised in Bolivia have revolved around the prior selection of candidates by the legislature. With regard to this pre-selection, the most frequent challenges have pointed to the absence of a technical evaluation of the candidates' merits and to the essentially political nature of the selection process.
4. In addition, in relation to the judicial electoral process, critics have called into question several provisions aimed at distancing the style of this election from what is typical of a partisan race and at ensuring that the candidates have equal access to the voting public. The limitations and prohibitions ended up severely curtailing the public's awareness of the process and, in particular, of the candidates, as various Bolivian figures have acknowledged.
5. In the election itself, the voter abstention rate was the same as it has been in recent general elections, but nearly 60% of all ballots cast were blank or void. Whatever the reasons for this percentage may be, and irrespective of the legality of the election—since Bolivian law does not consider blank or void ballots to be “valid votes”—that result posed a legitimacy problem for the elected judges, one that has been debated at length over the past three years.
6. The work of the elected officials during their two and a half years in office could not be sufficiently evaluated for this report, given the lack of prior research on the subject. As far as what is known publicly, there are various internal conflicts and disputes within the highest ranks of the institutions of the justice system, especially the Judicial Council, the Agro-Environmental Court, and the Plurinational Constitutional Court. With respect to the Judicial Council, note must be taken of various existing challenges and of the paucity of results that can be verified by examining official documents. In the case of the Plurinational Constitutional Court (TCP), there are specific objections to its lack of independence, which is illustrated mainly by its 2013 decision regarding the re-election of the president. Nonetheless, the examination of other TCP decisions reveals jurisprudential activity that has placed clear limits on the actions of executive branch organs.
7. With regard to judicial independence, high-ranking government figures have made statements that are, at the very least, ambiguous. If those opinions were to lead to attempts by government to control or manipulate the courts—as some critics have warned—it would jeopardize not only the independence of the judges and their resulting impartiality, but also the system of checks and balances that is essential to a democratic system.
8. On the basis of very different arguments, and to varying degrees, key actors across the Bolivian political spectrum have expressed their dissatisfaction with the election of judicial authorities that took place in 2011. They agree on the need to make significant changes to the way in which top justice system officials are appointed. The words “mistake,” in reference to the judicial election, and “failure,” in reference to its outcome, are widely used in the public debate. While civil society organizations have

had a secondary role in this debate, the most active participants all point to the absence of changes in the justice system over the past three years. In addition, the government places emphasis on certain questionable decisions by judicial organs, while critics of the government underscore the lack of judicial independence.

9. Some observers, most notably government officials, maintain that the judicial authorities elected in 2011 should be removed before completing the term for which they were appointed. Various rationales are offered for resorting to this measure. The means proposed for taking such action are also varied and, in certain cases, of dubious legality.
10. With a view to the future, three potential scenarios, with varying degrees of proposed regulatory changes, were suggested in mid-2014. The first scenario was the simplest, as it proposed modifications to improve the procedure without changing the regulatory framework. However, the debate on the issue had probably already passed the point at which these types of changes would have seemed satisfactory or sufficient. The second scenario entailed a legal change in the procedure to include an academic/technical screening of candidates, subjecting them to tests and examinations in order to assess them on the basis of their merits at the pre-selection stage, which is currently the responsibility of the Legislative Assembly. The third scenario involved the farthest-reaching regulatory change: a constitutional amendment designed to modify or replace the popular election mechanism.

Recommendations

1. Because judicial independence is an essential element of a system in which the rule of law is respected, it would be advisable for the government of Bolivia to put a stop to the obscure, confusing, or ambiguous statements about this principle coming from some of its main spokespersons. Respect for the principle of judicial independence makes it possible to have impartial judges in a democratic society.
2. In spite of the extensive and long-running debate on the issue, many experts have agreed that there is no ideal system for appointing judges. Nevertheless, it is advisable to keep in mind certain criteria derived both from the standards of international law and from the experience acquired in recent decades through various attempts to reform justice systems in the region. Most notable among these lessons learned is the need to appoint judges on the basis of their merits, as demonstrated in a transparent selection process.
3. Aside from the question of who appoints the highest-ranking judges, the merits of the candidates must be assessed independently by an authority composed of highly competent, widely recognized individuals. To the extent possible, these persons should not represent political sectors or interests. Toward this end, several countries in the region have opted to establish councils or commissions responsible for the pre-selection of candidates.
4. This autonomous authority responsible for the pre-selection process must establish its legitimacy before society through the objectivity and transparency of its proceedings. Accordingly, it is of utmost importance that:
 - The profile of the justice, in terms of the set of desired qualifications for the post, is clearly established before pre-selection begins.
 - The rules of the selection and evaluation process are clearly defined in advance.
 - The responsible authority provides mechanisms for receiving observations about the candidates and investigates the information received.
 - Public hearings are held with the candidates, during which their abilities can be evaluated effectively.
 - The pre-selection process seeks to ensure that the composition of justice system institutions reflects the country's social diversity.
 - The entity in charge of pre-selection states the grounds for its final decision.
5. With regard to the suitability of members of the high courts, it seems especially important to seek candidates with the following qualities:
 - Independence and impartiality throughout their professional career.
 - Good reputation and a personal history of irreproachable conduct.
 - Legal knowledge at a level above the professional average.
 - Demonstrated commitment to the protection of human rights, collective interests, democratic values, and transparency.
6. Finally, when it comes time to decide the future of those who currently hold the highest positions within the justice system, it is essential not to lose sight of the fact that, although this is a highly politicized and polarizing issue in Bolivia, the overarching aim should be to strengthen the institutional culture. This requires, among other things, demonstrating respect for the rules in force, even

if their application does not appear to have produced the best or most desirable outcomes. The justices elected in October 2011 were given a term of office defined by the current law. Unless there is a resignation, interrupting this term of office, however well-intentioned such action might be, would mean perpetuating the lack of respect for established rules—a widespread phenomenon that has contributed to the flawed state of justice in our countries.

On October 16, 2011, the citizens of Bolivia went to the polls to elect the members of the Supreme Court of Justice, the Plurinational Constitutional Court, the Agro-Environmental Court, and the Judicial Council. The 2008 Constitution made Bolivia the only country in the world where the highest judicial authorities have been elected by popular vote. Three years later, numerous actors held the opinion that the justice system had not been substantially changed; government authorities themselves maintained that the judicial election was a “mistake,” and its outcome “a failure.” What can be learned from this unique experience? The report *Judicial Elections in Bolivia: An Unprecedented Event* examines the process for the appointment of justices, documents opinions raised in the debate surrounding that process, and outlines available options for Bolivia in this regard.

The **Due Process of Law Foundation (DPLF)** is a regional organization composed of a multinational group of professionals, whose mandate is to promote the rule of law in Latin America. DPLF was founded by Thomas Buergenthal, former president of the International Court of Justice (The Hague) and of the Inter-American Court of Human Rights (Costa Rica). Its work focuses on the strengthening of judicial independence, the fight against impunity, and respect for fundamental rights in the context of natural resources extraction. DPLF conducts its work through applied research, cooperation with public and private organizations and institutions, and advocacy and outreach actions.

DPLF’s Judicial Independence Program promotes the strengthening of judicial systems through the monitoring and analysis of judicial independence and transparency, the processes for the selection of judicial authorities, and the effects of improper pressure on the excessive use of pretrial detention. This report is published within the framework of that program’s activities.

Fundación Construir is a Bolivian non-profit organization engaged in research, training, communication, consultation, monitoring, and social outreach. It seeks to contribute to processes of citizen participation in order to strengthen access to transparent and independent justice with gender equality. Its institutional mission is focused on attaining democratic changes in society through the application of the law and the exercise of citizenship. Its work is carried out through three programs: access to criminal justice, the promotion of indigenous people’s rights, and human rights defense.