



Guidelines for a transparent and merit-based system for the appointment of Supreme Court justices

A properly functioning justice system is a prerequisite for a genuine democracy; one that ensures respect for the rule of law and the separation of powers. The **Supreme Court of Justice** is a major pillar of the justice system: not only is the Court the final authority on the interpretation of the law, but it is also responsible for the internal administration of the judicial system. (For instance, it often has disciplinary powers over lower judges). It is therefore critical that only the most qualified candidates are appointed to the Supreme Court. Experience shows that this can only be ensured through a transparent selection process that is based on the merits of the candidates rather than on their association or sympathy with the government in office or powerful special interests.

In this document, DPLF presents a series of recommendations on what it considers to be necessary elements in the selection process of Supreme Court justices, in order to ensure that only the most qualified professionals are selected. These recommendations have been elaborated on the basis of international comparative experiences in judicial selection processes.

DPLF believes that in an adequate *process* for the appointment of justices:

- **The entities responsible for shortlisting the candidates must be autonomous.**
This means that such entities should be independent, rather than being subject to the direct or indirect influence of other powerful sectors in the country. When the entity charged with shortlisting the candidates is made up of representatives from different national sectors and professional associations, there should be guarantees that their decisions are based solely on the merits of the candidates. This autonomy increases the potential for better decisions based on substantive criteria rather than political or economic considerations. It is important to note that the demonstrated independence of selection bodies gives greater legitimacy to the selection and appointment process.
- **The appointment of justices must be guided by clear and previously established criteria.**
These criteria should include the professional and personal attributes which are essential to all Supreme Court justices. It is essential that these requirements are sufficiently detailed and that they are established and published in advance, so that all candidates know and understand these requirements. The existence of such **detailed and previously established description of qualifications** is also an important tool to guide the work of selection bodies and help prevent

any arbitrary decisions by these entities. (An analysis of the required qualifications for justices is established in more detail below.)

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

For the appointment process to have legitimacy the society as a whole must have a high level of confidence that the actors involved will perform their role effectively. The existence of a pre-established road map for the appointment process and a description of the role of all entities is essential. **Transparency and publicity** – at all stages of the procedure – are also indispensable elements.

In this respect, **the following information should be made public:**

- What process will be followed?
 - What is the role of the entities engaged in the process?
 - Which are the powers of these entities?
 - What are the required qualifications for justices?
 - Who are the candidates?
 - How will the skills of the candidates be assessed in practice? (How is every aspect of their personal and professional skills and experience weighed?)
 - What are the motivations behind the nominations? (In the event that candidates are scored based on their professional expertise and the candidates with the highest scores have not been selected.)
- **The selection bodies must offer opportunities for different sectors of society to provide input on the candidates, as well as for time to investigate any challenges made.**

Even if a certain nominee has acquired a vast professional experience that makes him or her a strong candidate, the selection body should not ignore disqualifying elements to serving as a justice that exists in that candidate's history. This could be the case if there has been serious professional misconduct (even when the misconduct was not investigated or sanctioned), ties to organized crime structures, or personal problems such as addictions. There should be a mechanism for the public to submit any reliable information they have on these cases. Due to the sensitivity of the allegations, it is recommended that only reports submitted by natural persons and containing their name and surname (i.e. not anonymous) be accepted.

When an allegation of this nature is made, an investigation becomes imperative. The process that such an investigation should follow, should be previously established. In order to ensure the legitimacy of the investigation, it is highly advisable to entrust the examination of the case to an autonomous body, such as a Prosecutor's Office.

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

Such hearings are highly effective tools to learn what the candidates think about the law and the role of the Judiciary and the Supreme Court in society. Some important aspects of candidates'

qualifications, such as their commitment to the judicial branch as a public institution and the role that, they believe, the Judiciary should play in society, will be hard to assess without this type of analysis. Public interviews enable participants to question candidates on their personal and professional affiliations; candidates, in turn, can account for any controversial aspects of their past (or present).

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

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

- **Independence and impartiality**

The foundation for a successful functioning Judiciary is the impartiality and independence of its members. In other words, judges should not be influenced by interests beyond the law. This is an important guarantee that their decisions will be based solely on legal considerations. Given the crucial importance of judicial independence and impartiality, several international instruments recognize this condition as a fundamental right of citizens (for instance, Art. 14 of the ICCPR and Art. 8 of the IACHR).

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

It is recommended that, in order to evaluate their personal background, all candidates furnish a **sworn statement** containing a comprehensive list of clients, contractors, former work and professional colleagues, as well as business and professional entities in which they have a stake or have been involved with, in the past. At the **public interview**, such background should be assessed thoroughly.

- **Reputable conduct and spotless record of integrity**

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

In order to assess the probity of candidates and their record of integrity, their **work references should be checked thoroughly**: the person should not have been sanctioned by a labor court or

an ethics committee. The **public interview** may examine these issues, as well as any potential observations (**challenges**) made by citizens, which should be investigated and taken into account when assessing a candidate's eligibility.

- **Outstanding knowledge of the law**

Another fundamental characteristic of a Supreme Court justice should be his or her extraordinary legal knowledge: because of the importance and complexity of cases coming before the Supreme Court, its justices should have an excellent understanding of legal issues. To cover Supreme Court vacancies, the search should focus on jurists with extensive expertise in two areas of the law (**generalists**) or a profound knowledge of a specific legal field (**specialists**). The type of candidate's profile (generalist or specialist) and the specific thematic expertise sought for, should depend on the legal knowledge needed in the Supreme Court of Justice at the time of the vacancy.

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

- The academic education of the candidate;
- His or her participation in specialized courses;
- The publication of legal articles or books which have received positive peer reviews (i.e. publications that have been recognized as being important contributions to the legal debate);
- Academic or professional lectures on legal issues;
- Recognition as a legal expert, i.e., he or she has been a resource person for national and international entities.

- **Excellent oral and written communication skills and analytical competency**

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

To assess their oral and written skills, it is important to **review any briefs and documents** prepared by the candidates during their professional career. If the candidate for the Supreme Court is a judge, one could look at their past judgments. In the case of candidates who are legal scholars, an analysis of their books or academic articles should be conducted. For candidates from the private sector, special attention should be given to their contributions to their field of expertise (such as legal briefs submitted to the courts). If candidates have not made significant contributions of this sort, they could submit essays to support their nomination, so that their writing and analytical skills can be assessed.

A candidate's **presentations** in professional forums may be considered as evidence of his or her oral communication skills. The **public interview** will also provide valuable insight on such skills.

- **Highly developed creative intelligence**

Given the nature of the work performed by the Supreme Court of Justice and the potential impact of its decisions, justices should be prepared to deal with new situations and problems. To adequately respond to these challenges in a context of tremendous work pressure and high demands from citizens, justices should be able to face the problems that may be encountered in a proper and professional manner, but also promptly and constructively.

It is therefore important that justices possess the following characteristics:

- A **problem-solving orientation**;
- A capacity to **build consensus**; as well as
- An ability to **take into account other people's views**.

In order to assess these capacities, the candidate could **present examples** of situations in which those skills were applied in the past. This evidence should be evaluated at the **public interview**, when the examples provided by the candidate are to be further examined.

- **Commitment to the Judiciary as a public institution**

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

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

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

Human rights and democratic values are at the heart of modern democracies, and have been codified in several international instruments. Transparency of public administration is a critical element, as has been recognized by the Inter-American Court of Human Rights (Case of Claude Reyes, among others).

Given the importance of these principles, Supreme Court candidates should prove their commitment to such values. This commitment could be demonstrated through past **written documents and public statements**, and the activities of the candidates should be discussed in depth during the **public interview**.

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

As part of its work, the Supreme Court of Justice deals with important cases which may have an important impact on the social and legal context of the country. Justices should be aware of this **responsibility** and act accordingly.

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

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

The work of the Supreme Court of Justice, in addition to being crucially important for the country, is extremely demanding. Experience shows that many cases heard by the Supreme Court are highly complex and sensitive, due to the potential impact of the decisions. In order to ensure a speedy delivery of justice – another fundamental human right that must be safeguarded by the Supreme Court of Justice – the Court works under great pressure. It is essential that the justices of the Supreme Court are able to find the right balance between maintaining a high level of productivity, ensuring high-quality decisions, and providing a thorough analysis of the case brought before them.

Candidates for Supreme Court vacancies should demonstrate their experience with and aptitude for working in such an environment by describing their **work experience** and providing examples of outstanding performance. These issues should be addressed in detail during the **interview**.