

# THE QUESTION OF LEGITIMACY: HOW TO CHOOSE THE JUDGES OF THE SUPREME COURT?

## The European doctrine and the Latin-American contrast

by

Allan R. Brewer-Carías\*

### *A. The question of legitimacy: purpose or origin of the judges selection process*

The question of legitimacy as it refers to the selection and designation of Supreme Court Judges is related to the political method established in the Constitution to ensure not only the professional competence of judges, but mainly their independence and autonomy. The question is to guarantee the selection of judges based on objective criteria without outside or political influence, their independence from the State's other branches of government when imparting justice, and their autonomy, so that they will be able to decide solely based on the law, without outside pressure or political influence. Ultimately, the question of legitimacy is a matter of determining how Judges will fulfill their "duty of lack of gratitude" (Louis Favoreu).

This question, of course, can only be raised in democratic systems of government based on the rule of law and on the principle of the separation of powers, in which the independence and autonomy of the judicial branch of government can only be ensured.

The question can also be analyzed from the point of view of the democratic origin of judges as it applies to their popular election by the citizens, or their appointment only by democratically elected State bodies. But this approach, which places emphasis on the elected origin of judges, in my opinion, does not focus on the essence of the judicial function: that judges must be independent of the other branches of government and when deciding cases they must not be subject to pressures so that they can decide only according to law. Citizen election of judges does not ensure such independence and autonomy or the objective criteria for the selection, with the question of "democratic legitimacy" being secondary in this case.

On the other hand, in comparative constitutional law, there are no examples of systems where the Supreme Court justices are elected by citizen vote. Additionally, in those systems in which lower court judges are popularly elected, while it might be

\* Professor, Central University of Venezuela.

said that the election could be more democratic and transparent, such elections have been questioned, precisely because they do not ensure that the most suitable candidates will be elected to guarantee the right of citizens to be tried by an independent and impartial tribunal, as guaranteed by the Constitution.

That is why the *Human Rights Committee of the United Nations on the United States of America*, since 1979, has expressed its concern about the suitability of the candidates popularly elected in some states of the United States; and has welcomed “the efforts of a number of states in the adoption of a merit-selection system,” recommending that the system of “appointment of judges through elections be reconsidered with a view to its replacement by systems of appointment on merit by an independent body.”<sup>1</sup>

That is why, as mentioned above, regarding the method adopted for the election of Supreme Court judges, the question of legitimacy must focus on what is essential to the judiciary, in order to guarantee the independence and autonomy of judges, something that cannot be achieved solely by popular election of judges, a process which cannot ensure the suitability of the elected candidate. Thus, in the *Explanatory Memorandum to the Charter on the Statute for Judges of the Council of Europe*<sup>2</sup>, it is recognized that “many of the Charter’s provisions are inapplicable in systems where judges are directly elected by the citizens”.

In conclusion, what is required in order to consider the election of judges legitimate is the adoption of a political method that will ensure their independence, autonomy and impartiality. To this end, election methods need to be implemented in order to guarantee, *first*, that judges will be appointed transparently based on merit through objective selection criteria; and *second*, that such designations will be made so as to ensure the independence, autonomy and impartiality of the judge, regardless of the organ or body called upon to make the election.

#### B. *Aspects of The European doctrine and principles*

The topic of the legitimacy of the selection of judges, which includes the selection of Supreme Court justices, has been addressed in Europe specifically by international entities and bodies specialized in the functioning of the Judicial Branch in a

1 Concluding Observations of the Human Rights Committee on the United States of America, UN document CCPR/C/79/Add.50; A/50/40, paragraphs 266-304, paragraphs 288 and 301. See the reference in International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, lawyers and prosecutors. A Practitioners’ Guide*, 2004, p. 49

2 See the text in Stefanie Ricarda Roos and Jan Woischnik, *Códigos de ética judicial. Un estudio de derecho comparado con recomendaciones para los países latinoamericanos*, Konrad Adenauer Stiftung, Programa de Estado de Derecho para Sudamérica, Montevideo 2005.

democratic society, which have formulated overall valid principles and recommendations on the matter.

For example, the *Judges' Charter in Europe of the European Association of Judges*, adopted in 1993, established the principle that:

The selection of judges must be based exclusively on objective criteria designed to ensure professional competence. Selection must be performed by an independent body which represents the judges. No outside influence and, in particular, no political influence must play any part in the appointment of judges<sup>3</sup>.

Derived therefrom is the general principle or recommendation that the aim of the election method for judges must be to ensure its application by a government body particularly independent from the executive and legislative branches, which must represent the judges in general, meaning that there should be no political or any other type of influence in the process.

In the same sense, the Committee of Ministers of the Council of Europe, in *Recommendation No. R (94) 12 to the Member States on the Independence, Efficiency and Role of judges*, adopted in 1994, stated in *Principle I, 2,c*, that:

All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

The general principle derived from this recommendation with respect to the selection method is, again, that it must be carried out by an authority independent of the government and the administration (Executive Branch), adding that in those cases in which constitutional or legal provisions allow the designation of judges by the government, then:

[T]here should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice, and that the decision will not be influenced by any reason other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

- I. a special independent and competent body to give the government advice which it follows in practice; or
- II. the right for an individual to appeal against a decision to an independent authority; or

3 See the text in Stefanie Ricarda Roos and Jan Woischnik, *Códigos de ética judicial. Un estudio de derecho comparado con recomendaciones para los países latinoamericanos*, Konrad Adenauer Stiftung, Programa de Estado de Derecho para Sudamérica, Montevideo 2005, p. 77.

III. the authority which makes the decision safeguards against undue or improper influences<sup>4</sup>.

The same Committee of Ministers adopted an *Explanatory Memorandum to Recommendation No. R (94) 12*, in which it insisted that “it is essential that the independence of judges should be guaranteed when they are selected and throughout their professional career” and that “in particular, where the decision to appoint judges is taken by organs which are not independent of the government or the administration or, for instance, by parliament or the president of the state, it is important that such decisions are taken only on the basis of objective criteria”; adding the following:

Although the recommendation proposes an ideal system for judicial appointments, it was recognized (see sub-paragraph 2) that a number of member states of the Council of Europe have adopted other systems, often involving the government, parliament or the head of state. The recommendation does not propose to change these systems which have been in operation for decades or centuries and which in practice work well. But also in states where the judges are formally appointed by the government, there should be some kind of system whereby the appointment procedures of judges are transparent and independent in practice. In some states, this is ensured by special independent and competent bodies which give advice to the government, the parliament or the head of state which in practice is followed or by providing a possibility of appeal by the person concerned. Other states have opted for systems involving wide consultations with the judiciary, although the formal decision is taken by a member of government.

It was not felt appropriate to deal explicitly in the text of the recommendation with systems where appointments are made by the president or the parliament, although the Committee was of the opinion that the general principles on appointments would apply also for such systems.

An important aspect of ensuring that the most suitable persons are appointed as judges is the training of lawyers. Professional judges must have proper legal training. In addition, training contributes to judicial independence. If judges have adequate theoretical and practical knowledge as well as skills, it would mean that they could act more independently against the administration and, if they so wish, could change legal profession without necessarily having to continue to be judges<sup>5</sup>.

In the same line of thought, four years later, in 1998, the Council of Europe adopted in Strasbourg the *European Charter on the Statute of Judges*, in which the following principles were set forth:

1. *General Principles*. 1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the stat-

4 Ibid, p. 80

5 Ibid., pgs. 87-88

ute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary...

*2. Selection, Recruitment, Initial Training.* 2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity.

In the *Explanatory Memorandum to the Charter on the Statute for Judges*, as mentioned, the Council recognized that notwithstanding the general applicability of principle 2.1, “many of the Charter’s provisions are inapplicable in systems where judges are directly elected by the citizens,” empathizing the following:

1.3. The Charter provides for the intervention of a body independent from the executive and the legislative where a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body, to actual decision by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the appointment body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal so to do.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision<sup>6</sup>.

Of course, the question of legitimacy in the intervention of an independent body to select judges also relates to the selection itself of the members of the independent body. In this respect, the Charter:

[Stipulates] that at least one half of the body’s members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the va-

6 Ibid. pgs. 101-102

riety of philosophical conceptions and debates in European States, a reference to a minimum of 50% judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other consideration of principles prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by political authority belonging to the executive or legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges<sup>7</sup>.

As it is evident, the question of legitimacy as regards the election of judges has been studied extensively in Europe, giving rise to the aforementioned principles and recommendations with respect to all judges, which of course can also be applied to the election of Supreme Court judges.

It is not up to me, as a Latin American jurist, to make recommendations or formulate critiques of the European systems; consequently, for this *6th International ECLN-Colloquium/IADC Round Table on The future of European Judicial Systems/The Constitutional Role of the Europeans Courts*, I have deemed it more appropriate, from the point of view of comparative constitutional law, to analyze the attempts made in Latin American constitutionalism to ensure the legitimacy of the appointment of judges, not only of the Supreme Courts, but also of Constitutional Courts or Tribunals, which, in general and contrary to what occurs in Europe, are integrated into the judicial branch on the Latin American continent.

In this matter, it can be said that in Latin America everything has been attempted to try to ensure the legitimacy of the election judges of Supreme Courts or Tribunals, in order to ensure the independence and impartiality of justice. This has even been ruled on directly in the Constitutions of all the countries, that is, "in the normative rules at the highest level," as recommended by the *European Charter on the Statute of Judges* of the Council of Europe (1. General Principles. 1.2) and its Explanatory Memorandum (1.2) even if not always with the desired success.

Latin American constitutional systems can then be classified according to whether or not the designation of Supreme Court judges (i) is accomplished with the participation of all State bodies; (ii) is attributed to the President of the Republic, always with the intervention of the parliament or the Senate; (iii) is carried out di-

7 Idem.

rectly by the full legislative body or by the Senate in certain bicameral systems, even with the intervention of independent bodies; (iv) is attributed to an independent Judiciary Council; or (v) is made by co-opting mechanisms by the Court itself. This variety of election methods has been regulated by the Constitutions, usually to legitimize the election of Supreme Courts judges in order to ensure their independence and autonomy. However, in many cases, whether because of mistaken legislation or political practice, the results pursued by the Constitutions have not always been achieved.

Nonetheless, we will analyze all those systems, both in theory and in practice, to determine to what degree they effectively ensure their independence and autonomy.

*C. Designation of supreme court judges by all the branches of government*

In the first place, mentioned can be the method of choosing the Supreme Court Justices with the participation of all the branches of government, particularly in order to avoid the predominance of one branch over the others. This is the case of the Dominican Republic where the Supreme Court judges are designated with the participation of all the different branches of government; a method that seeks to guarantee that no one branch of government will have predominance in making the designation. Nevertheless, this method in itself does not guarantee a merit-based selection of the judges to assure their independence and autonomy.

The same occurs in the case of judges of the Constitutional Court of Guatemala, the Constitutional Tribunal of Chile and the Constitutional Tribunal of Ecuador, all conceived as independent jurisdictional bodies not integrated into the judicial branch, where the intervention and participation of all different governmental bodies is a requirement for the designation of their members. In these cases, because of the control they exercise over the constitutionality of state acts the aim here is to protect the balance of powers and to make sure that the necessary autonomy exists to perform their functions.

**I. Designation of: the Judges of the Supreme Court of Justice in the Dominican Republic by a Judiciary Council with the participation of all government bodies**

According to article 64 of the Constitution of the Dominican Republic, judges of the Supreme Court of Justice are appointed by a National Judiciary Council, created not as a permanent government body, but solely in order to make such designations; therefore, it does not have among its attributions and contrary to other organs with similar names, the government and administration of the judicial power.

This Dominican National Judiciary Council is comprised of the following 7 members:

The President of the Republic, who presides. His absences are covered by the Vice President of the Republic and by the Solicitor General of the Republic in the event of the absence of the first two;

The President of the Senate and a senator elected by the Senate who must belong to a party different from that of the President of the Republic;

The Chairman of the Chamber of Deputies and a deputy elected by the Chamber who must belong to a different party than that of the Chairman of the Chamber of Deputies;

The Chief Justice of the Supreme Court of Justice; and

A magistrate of the Supreme Court of Justice elected by the Court itself, who will act as Secretary.

According to the Organic Law of the National Judiciary Council (Law No. 169-97), the candidacies can be proposed before the Council in an absolutely free manner, and “the candidates can be nominated by institutions as well as individuals, within the timeframes set and in accordance with the formalities established by the National Judiciary Council” (Art. 12). The members of the National Judiciary Council can also nominate candidates (Art. 13), and they, themselves, can also be nominated as candidates, in which case they must abstain from voting (Art. 14).

As regards the election, Article 15 of the Law states that once candidates for Supreme Court judges have been nominated, the National Judiciary Council may convene them for evaluation of the different aspects it deems advisable and, moreover, may submit candidacies to public examination, as the Council is authorized to inquire into everything it considers pertinent, in order to collect the opinions of institutions and citizens.

Once a preliminary selection has been made from among the candidacies, the Council will proceed with the election, which must be made with at least four (4) assenting votes of the members present (Art. 16) and the judges elect must take their oath before the Council.

In addition to electing the judges of the Supreme Court of Justice, the Judiciary Council must decide who will be the President of the Supreme Court, proceeding to designate a first and second alternate to replace the President in the event of the latter's absence or impediment.



II. Designation of the members of the Constitutional Tribunals of Chile, Guatemala and Ecuador

1. Exclusive attribution of government authorities for the appointment of the magistrates of the: Constitutional Tribunal of Chile

In Chile, in accordance with the constitutional amendment of 2005 and as set forth in Article 81 of the Constitution, the 10 magistrates of the Constitutional Court must be appointed for a term of 9 years as follows:

Three (3) magistrates must be elected by the President of the Republic without the interference of any state organs. The election must be made successively and in steps, over time, every three (3) years as follows:

Four (4) judges must be elected by the Senate, in sessions especially convened for this purpose, by a two-thirds majority: two directly elected by the Senate and the other two proposed by the Chamber of Deputies; and,

Three (3) magistrates elected by the Supreme Court of Justice from outside that court and by absolute majority in successive and secret ballots.

2. Appointment of the members of Constitutional Court of Guatemala by government authorities and by representatives of civil society

In 1965, a Constitutional Court was established in Guatemala initially as a non-permanent body that was integrated by the judges of the Supreme Court and of other courts of appeals and of administrative judicial review jurisdiction, whenever a case of unconstitutionality was brought.

In 1985, the Constitutional Court was regulated as a permanent jurisdiction for judicial review of constitutionality of statutes, integrated by five magistrates, designated:

One by the Supreme Court of Justice;

One by the Congress of the Republic;

One by the President of the Republic, in a Cabinet meeting;

One by the University Council of the San Carlos University of Guatemala; and

One by the assembly of the Bar Association of Guatemala.

3. Appointment of the members of the Constitutional Court of Ecuador by the National Congress, subject to proposals by government bodies and representatives of civil society

According to Article 130 of the Ecuadorian Constitution, it is the National Congress that appoints the 9 members of the Constitutional Court, by majority, as follows:

Two members from a list of three sent by the President of the Republic;  
Two members from a list of three sent by the Supreme Court of Justice, and who must not be members of the Court;  
One member from a list of three sent by the mayors and provincial authorities (prefects);  
One member from a list of three sent by the workers' unions and the legally recognized national organizations of indigenous peoples and farm workers; one from a list of three sent by the legally established Production and Commerce Chambers; and  
Two members directly elected by the Congress who must not be legislators.  
The 1997 statute on Judicial Review (control of constitutionality) specifically regulated the procedure for the integration of the three-person lists referred to in the last sub-paragraphs.

*D. Designation of the supreme court judges by the President of the Republic with the intervention of the legislative branch*

The second most common method for the designation of Supreme Court judges established in Latin American Constitutions, following the general trend of the presidential systems of governments, is characterized by attributing the power to designate those Justices to the President of the Republic, always with the intervention in some way of the legislative branch of government. In the case of Panama, this is done with the approval of the unicameral Congress, and in the case of Argentina, Brazil, and Chile, countries that have a bicameral legislative system, only with the approval of the Senate.

*I. Designation in Panama of the Supreme Court members by the President of the Republic with the agreement of the Legislative Assembly*

In Panama, the Constitution set forth that the judges of the Supreme Court of Justice are to be appointed for a period of 10 years, by agreement passed by the President of the Republic in a Cabinet Council meeting (Arts. 194 y 195,2), subject to approval by the Legislative Assembly (Art. 200). In this case no specific majority is established.

II. Designation of the Supreme Court judges by the President of the Republic in agreement with the Senate

1. The Federal Supreme Court and the Supreme Court of Justice of Brazil

The judges of the Federal Supreme Court and also of the Supreme Court of Justice of Brazil, who must be “honorable, renowned citizens with noteworthy legal experience,” are all appointed by the President of the Republic, after the approval of the proposal by absolute majority of the Federal Senate (Art. 101).

In the case of the Supreme Court of Justice, it is required that one-third of its members be selected from the ranks of the Regional Federal Courts; one-third from the ranks of the Supreme Court of Justice, according to the list prepared by the Court; and one-third, in equal parts, on rotation from the ranks of public prosecutors, lawyers and members of the federal and states’ attorneys offices of the Federal District and the Territories.

2. The Supreme Court of Argentina and the voluntary restraint of the presidential power

In Argentina, according to article 99.4 of the Constitution, the President of the Nation has the power to appoint the justices to the Supreme Court “with the agreement of two-thirds of the members of the Senate, at a public meeting called for this purpose.” The special quorum and the public character of the meeting of the Senate were introduced in the constitutional reform of 1994<sup>8</sup>.

Nonetheless, the President has voluntarily restricted the exercise of his powers<sup>9</sup>, for which purpose Decree No. 222/2003 of June 19, 2003 was issued, establishing a procedure for the exercise of power by means of a “Regulatory framework for the pre-selection of candidates to cover vacancies”. This procedure was enacted in order to establish rules “to be followed for the best selection of the proposed candidate, so that such designation would in some way contribute to an effective improvement in the service of justice,” also establishing “requirements related to moral integrity and technical suitability and commitment to democracy and defense of human rights that the nominee or nominees must fulfill”.

For the best fulfillment of these requirements it was considered “appropriate to facilitate, with express agreement from the nominee or nominees, the display of their professional and academic records, their public or private commitments, the accom-

8 See Carlos María Bidegain, “La provisión de vacantes de jueces de la Corte Suprema de Justicia de la nación”, *Anales, Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires*, Anticipo Año XXV, No. 38, la Ley, Buenos Aires, 2000

9 See Julio Rodolfo Comadira, “Selección de jueces y control judicial”, *Revista de Derecho Público*, Rubinzal-Culzoni-Editores, Buenos Aires, No. 2004-1, pg.22 and following.

plishment of requirements stipulated in the Law of Ethics of Civil Service and the fulfillment of their respective tax obligations.” At the same time, the regulation was intended to create a mechanism that would “allow citizens, individually or collectively, professional, academic or scientific organizations or associations, or non-governmental organizations with interests and actions in this matter, to express their points of view or objections they might have with respect to the appointment to be made.”

Consequently, the Decree stipulated the procedure for the President to exercise his power of nomination, ultimately for the “pre-selection of candidates to cover vacancies in the Supreme Court of Justice, within a reasonable pre-selection framework of respect for the good name and honor of the nominees, correct assessment of their moral standing, their technical and legal suitability, their record and commitment to the defense of human rights and democratic values that make them worthy of such an important function.” (Art. 2).

For those purposes, it was determined that once a vacancy arises in the Supreme Court of Justice, within a maximum term of 30 days, the name and curriculum vitae of the person or persons being considered for the vacancy must be published in an Official Press Release for three days, in at least two newspapers with nationwide circulation, as well as on the official web page of the Ministry of Justice, Safety and Human Rights (Art. 4). The individuals included in the aforementioned publication must submit “an affidavit listing all personal property belonging to them, their spouses and/or common-law spouse, marital property and that of their minor children, under the terms and conditions set forth in Article 6 of the Public Service Law of Ethics No. 25.188 and its Regulations.” They must also submit another affidavit “with a list of civil associations or companies they are members of or have been members of during the past eight years, law firms they were or are concurrently members of, a list of clients or contractors for at least eight years, as allowed by the rules of professional ethics in force and, in general, any type of commitment that may affect the impartiality of their opinion due to their own activities, those of their spouse, ascendants and descendants in the first degree, in order to allow an objective evaluation of the existence of incompatibilities or conflicts of interest.” (Art. 5).

Article 6 of the Decree allows citizens in general, non-governmental organizations, professional associations, academic and human rights entities, within a period of 15 days as of the latest publication in the Official Bulletin, to submit to the aforementioned Ministry “in writing, well-based and documented, the positions, observations and circumstances they believe must be stated with respect to those included in the pre-selection process, with an affidavit regarding their own objectivity vis-à-vis the nominees.” Additionally, within the same period, opinions may be requested of the relevant organizations in the professional, legal, academic, social, political and human rights fields for evaluation (Art 7) and to be submitted to the Federal Administration of Public Income, “preserving the tax secret, [in a] report on fulfillment of tax obligations by the individuals eventually proposed.” (Art. 8).

Within a period not to exceed 15 days as of the expiration of the period stipulated for the submission of opinions or observations, on the basis of the reasons provided for the decision, the President will decide on whether or not to submit the respective proposal, and in the event of a positive decision, the respective designation must be sent to the Senate.

3. The Supreme Court of Justice of Chile and proposals provided by the Judicial Branch

In accordance with Article 75 of the Constitution of Chile, the 21 ministers of the Supreme Court are designated by the President of the Republic, who must select them from a list of five (5) individuals for each seat to be filled, proposed by the Court in agreement with the Senate, passed by a two-thirds vote of its members, at a special meeting called for this purpose.

If the Senate does not approve the proposal of the President of the Republic, the Supreme Court will complete the list by submitting a new name to replace the one rejected. This process will be repeated until an appointment is approved.

Five members of the Supreme Court must be lawyers, unrelated to the administration of justice, at least fifteen years must have passed since they received their law degree, and they must have been outstanding in professional or academic activity, and in addition they must meet any other requirements stipulated in the respective constitutional organic law.

When a vacancy in the Judicial Branch needs to be filled, the Supreme Court will prepare a list exclusively with members of this Branch, including the most senior member of the Court of Appeals, who appears on the merits list. The other four vacancies will be filled based on the merits of the candidates. In the case of a vacancy pertaining to lawyers unrelated to the administration of justice, with prior public pre-qualification, only the names of lawyers who meet the requirements can be included on the list.

*E. Designation of the supreme court judges by the legislative body*

In the majority of Latin American countries, as a counter balance to the presidential system of government, a never-ending constitutional struggle which has characterized our constitutional history, the power to appoint the Supreme Court Judges has been attributed to the Legislative Branch. In certain cases the power is attributed to the Congress and in other cases to the Senate.

Relative to the first case, when attributed to the entire Legislative body, such power can be exercised with exclusivity as in the case of Costa Rica, Nicaragua and

Uruguay, and also of Bolivia and Peru, but in these latter cases, with respect to the Constitutional Court Justices or with the intervention of an independent body. This can be an independent State body, a Council of the Judiciary, as is the case of Bolivia and El Salvador as regards the Supreme Court justices, or it can be an independent body integrated by representatives of the citizens' organizations, as is the case of Guatemala and Honduras, and could have been the case for Venezuela.

Regarding the second case, when the power to appoint the Supreme Court justices is attributed to the Senate, such power is not exercised with exclusivity, but with the intervention of another body; with the intervention of other Judicial jurisdictions, as is the case of Colombia for the Constitutional Court justices, or from a proposal submitted by the President of the Republic, as is the case of Mexico, for the appointment of the Supreme Court justices. This is also the case of Paraguay, where the Senate appoints the Supreme Court justices from a proposal submitted by the Council of the Judiciary and with the agreement of the Executive Branch.

- I. Appointment of the Supreme Court justices by the Congress or Legislative Assembly
  - 1. Exclusive powers of the Legislative Branch of government to appoint the judges
    - a. The appointment of the judges of the Supreme Court of Justice by the Legislative Assembly in Costa Rica

In accordance with Articles 121,3 and 157 of the Constitution, it is the exclusive responsibility of the Legislative Assembly to appoint the 22 principal and alternate justices of the Supreme Court of Justice. The latter in a number of no less than 25 alternate justices selected from a list of 50 candidates to be submitted by the Supreme Court of Justice (Art. 164).

As regard the principal justices, the procedure for the Assembly to elect them begins before the Special Permanent Committee for Appointments, as stipulated in the Regulations of the Assembly (Arts. 84, 85), which must initially evaluate the candidates for justices.

The Committee must convene through the media all those interested in participating in the election process by requesting that they submit their postulation. The Committee will then hold an oral and public meeting in order to interview the candidates, and will later prepare a recommendation to the Plenary of the Assembly of the five best qualified candidates (at least two of which must be women). This recommendation, however, is not binding and the Assembly may freely appoint anyone meeting the requirements, even if this person did not participate in the previous pre-qualification.

*The Question of Legitimacy: How to choose the Judges of the Supreme Court?*

The Legislative Assembly, through Agreement No. 6209-04-05, adopted at Meeting No. 87, dated October 14, 2004, established the following Procedure for the Election of Justices of the Supreme Court of Justice, comprising two rounds:

First Round: Three votes will take place: In the first two the candidates the deputies deem advisable will participate. In the third vote of this first round, only the candidates who have obtained five or more votes may participate.

Second Round: There will be five votes. In the first vote the deputies may participate with the names they consider appropriate. In the second, only those candidates who obtained one or more votes in the preceding vote will participate. In the third vote, only candidates who have obtained ten or more votes in the preceding vote will participate. In the fourth vote, only candidates who have obtained fifteen or more votes in the preceding vote will participate, and in the fifth, only the two candidates who obtained the larger number of votes in the preceding vote may participate.

In each vote, if only one candidate obtained the number of votes stipulated in order to participate in the following vote, the voting round will be closed without an election.

The candidate obtaining at least 38 effective votes will be elected justice.

If during this process no candidate obtains the 38 effective votes, or only one candidate obtains the number of votes stipulated in order to participate in the following vote, the voting will be postponed for one week, after which the aforementioned procedure will be performed once again.”

Lastly, the Nominations Committee will be responsible for analyzing and submitting a report on the nominations to be sent to the Plenary.

b. The appointment of the Constitutional Court justices by Congress in Bolivia

In accordance with Article 119 of the Constitution of Bolivia, the Constitutional Court “is independent and is only subject to the Constitution.” The Constitutional Court is comprised of five justices designated by Congress (at a joint session of the Chambers of Deputies and Senators) by two-thirds of the votes of the members attending the meeting.

Law No. 1836 of the Constitutional Court stipulates that the Minister of Justice, as well as the Professional Association of Lawyers and Law Schools, may submit to Congress lists of candidates for Justices for the Constitutional Court (Article 14).

c. The appointment of Constitutional Court justices by Congress in Peru

In accordance with Article 201 of the Constitution of Peru, the Constitutional Court is the controlling body of the Constitution. It is autonomous and independent and

has seven members elected for five- year terms (Organic Law No. 26.435 of the Constitutional Court).

The members of the Constitutional Court are elected by the Congress of the Republic with the assenting vote of two-thirds of the legal number of its members. Judges or prosecutors who have not left office one year earlier may not be elected.

Each time elections are to be held, Congress approves a regulation that is published by the media to regulate a public competition and provide information on the candidates, and likewise allows for removal of names and public hearings by the respective Committee.

- d. The appointment of the Supreme Court justices by the National Assembly in Nicaragua

In accordance with Article 163 of the Constitution, the Supreme Court of Justice is comprised of 16 justices elected by the National Assembly for a term of five years. The National Assembly will also appoint an alternate for each justice.

- e. The appointment of the Supreme Court justices by the General Assembly in Uruguay

In Uruguay, pursuant to Articles 234 and 236 of the Constitution, the five members of the Supreme Court of Justice are designated by the General Assembly with two-thirds of the votes of the total number of its members.

The designation must be made within ninety days of the vacancy, for which purpose the General Assembly will be especially convened. Upon expiration of this term and if no designation has been made, the most senior member of the Court of Appeals, or if there is equivalent seniority in this position, the one with more years in the Judiciary or Office of the Public Prosecutor or State's Attorney, will be automatically designated to the Supreme Court of Justice.

2. Competence of the Legislative body as proposed by another State body

- a. The designation of the Supreme Court justices by Congress as proposed by a Council of the Judiciary in Bolivia

In accordance with Article 117,IV of the Bolivian Constitution, Justices of the Supreme Court are elected by the National Congress (at a meeting of the Senate and Deputies) for a term of 10 years, by two-thirds of the total votes of the members (Arts. 59,20; and 68,12), from lists proposed by the Council of the Judiciary, which



is the administrative and disciplinary body of the Judicial Branch (Arts. 116,1; 122,1; 123,I,1)).

Pursuant to Article 122 of the Constitution, the Council of the Judiciary, presided over by the President of the Supreme Court of Justice, has four members designated by the National Congress with the votes of two-thirds of the members present at the meeting. They hold office for a period of 10 years and may not be reelected until a period equal to that of their mandate has expired.

- b. The designation of the Supreme Court judges by the Legislative Assembly as proposed by the National Judiciary Council in El Salvador

In El Salvador, Article 173 of the Constitution likewise provides that the magistrates of the Supreme Court of Justice must be elected by the Legislative Assembly with the assenting vote of at least two-thirds of the elected Deputies (Art. 186) for a period of nine years. The justices may be reelected. One-third of them will be renewed every three years, and one will be the President of the Court, also considered President of the Judiciary.

The Justices will be elected from a list of candidates compiled by the National Judiciary Council, one-half of which will be furnished by entities representing the lawyers of El Salvador, in all legal specializations.

According to Article 187 of the Constitution, the National Judiciary Council is an independent body “responsible for proposing candidates for the positions of Justices of the Supreme Court of Justice, Justices of the Second Instance Divisions, Trial Judges and Justices of the Peace.” It is also responsible for the organization and operation of the School of Judicial Training, the purpose of which is to ensure improvement in the professional training of judges and other judicial officials. Its members are elected and removed by the Legislative Assembly with the qualified vote of two-thirds of the elected Deputies.

3. Competence of Congress at the proposal of an independent nominations body

In certain countries, although the Supreme Court justices are designated by the legislative body, the Constitutions have sought to restrict its political and discretionary powers, by requiring that the nomination of the candidates come from an external body independent of the Assembly and include representation from civil society organizations. These are the cases of Guatemala and Honduras, and could have been the case for Venezuela, were because of the constitutional fraud perpetrated by the National Assembly, the Constitution in this matter is not in effective force.

- a. The designation of the justices of the Supreme Court of Justice by Congress based on a proposal by a Nominations Committee in Guatemala

In accordance with Articles 214 and 215 of the Constitution of Guatemala, the Supreme Court of Justice is comprised of 13 Justices, including its President, elected by the Congress of the Republic for a period of five years from a list of 26 candidates proposed by a Nominations Committee, which is made up as follows:

One representative of the Chancellors of the Universities in the country, who presides over this Committee;

The deans from the Schools of Law or Social Sciences from each university in the country;

An equivalent number of representatives elected by the General Meeting of the Professional Association of Lawyers and Notaries in Guatemala; and

An equal number of representatives elected by principal magistrates of the Courts of Appeals and other courts referred to in Article 217 of the Constitution.

The election of candidates requires the vote of at least two-thirds of the members of the committee.

In the voting either to be on the Nominations Committee or for inclusion in the list of candidates, representation will not be accepted.

- b. The designation by Congress of the justices of the Supreme Court of Justice from a proposal by a Nominations Board in Honduras

In accordance with Articles 308 and 311 of the Constitution, the 15 justices of the Supreme Court of Justice must be elected by the National Congress with the assenting vote of two-thirds of its members, from a list of candidates of not less than three names per each justice to be elected, which must be submitted by a Nominations Board.

This independent body, regulated by the Organic Law of the Nominations Board for the election of candidates for justices of the Supreme Court of Justice (Decree No. 140-2001), conceived as “a qualified and deliberating body, with absolute independence and autonomy of its decisions,” (Art. 1) has as its “only function” to prepare the list of candidates for Justices to be submitted to Congress.

In its composition, “the principles of publicity, transparency, strict adherence to the Law, ethics, suitable selection, independence and respect for democratic principles” must be observed. The statute demands that “the authorities and pertinent social and professional groups must honor the independence of the Board in all of its decisions” (Art. 3).

The Nominations Board is composed as follows:

*The Question of Legitimacy: How to choose the Judges of the Supreme Court?*

One representative from the Supreme Court of Justice elected by the favorable vote of two-thirds of the justices at a special plenary session called for this purpose by the President of the Court (Art. 22);

One representative from the Professional Association of Lawyers, elected at a meeting and following the same procedure that is used for the election of its National Board of Directors (Art. 23);

The National Commissioner for Human Rights that propose its alternate (art. 24);

One representative from the Honduran Council for Private Enterprise, elected at a meeting and following the same procedure that is used for the election of its National Board (Art. 25);

One representative from the faculties of professors of the Schools of Juridical Sciences, whose proposal will be made through the National University of Honduras (UNAH). For that purpose, professors from the faculties of the Schools of Juridical Science of the Universities must be convened by the President of the National University of Honduras, in order to elect their members for the Nominations Board (art. 26),

One representative elected by organizations from civil society. It is the responsibility of the Secretariats of State in the offices of the Interior and of Justice to publicly convene the duly registered civil social organizations to a meeting, in which they will elect their representatives (art. 27). And,

One representative from the Confederations of Workers, which must be organized in a special meeting pursuant to their specific rules, in order to proceed with the election of their representative and alternate to the Nominations Board (art. 28).

Each of the organizations represented on the Nominations Board must prepare a list of not more than 20 candidates who are lawyers, according to the same rules followed for the election of its representatives before the Board, to be proposed to the Board. From those lists the Board must in turn prepare its own list to be submitted to Congress.

For this purpose, in accordance with Article 312 of the Constitution, the President of Congress must convene the organizations comprising the Nominations Board no later than October 31<sup>st</sup> of the year prior to the election of justices, and they must deliver their proposals to the Permanent Committee of Congress on January 23<sup>rd</sup>, at the latest, so that the election can take place on January 25<sup>th</sup>.

The election must be held once the proposal for the entire number of justices has been submitted to Congress. If the qualified majority for the election of all of the justices required is not met, a direct and secret ballot must be held as often as necessary to achieve the favorable vote of two-thirds, in order to elect the remaining justices individually.

If the Nominations Board is convened and no proposals are made, Congress must proceed with the election by the qualified majority of all its members.

- c. The designation of the Supreme Court justices by the National Assembly from a proposal by a Judicial Nominations Committee in Venezuela

One of the main reasons underlying the political crisis in Venezuela during the late nineties, and which led to the convening of a National Constituent Assembly, was the reaction against a merely partisan representative democracy, seeking to improve it with aspects of participatory democracy. The election of Supreme Court Justices was a main issue in that crisis, because the 1961 Constitution granted excessive discretionary power to Congress and its party majorities for that purpose. The complaint referred to the lack of participation by citizens' organizations and the monopoly by the political parties represented in Congress when it came to such designations.

Thus, the principle of participation was imposed over the principle of representation, and while it is true that the National Assembly was authorized to designate the Justices, the most significant reform consisted of eliminating from the Assembly the discretionary power to make such designations,<sup>10</sup> by creating a Judicial Nominations Committee with the *exclusive power* to nominate candidates and present them to the National Assembly. The candidates are presented before the Committee on their own initiative or through propositions by organizations connected with judicial activity.

As a result, nominees may not be presented directly to the National Assembly, and the National Assembly may not designate people other than those nominated by the Nominations Committee. The Committee is conceived of as an intermediate and permanent body comprised of "*representatives from different sectors of the community*" (Art. 270). The Committee is different from the National Assembly and its parliamentary committees and, consequently, the people's representatives (deputies) may not be members of such Committees.

The constitutional procedure stipulated for the designation of the justices of the Supreme Tribunal is the following: The Committee, having received the nominations and "heard the opinion of the community, will carry out a screening to be submitted to the Citizen's Branch of government." This body, made up of the Public Prosecutor, the Ombudsman or Public Defender and the Comptroller General of the Republic (Article 273) must carry out a "second screening to be submitted to the National Assembly, which will make the final selection" (Art. 264).

After the Constitution was approved through a referendum (Dec. 15, 1999), the Constituent National Assembly issued a Decree on the Transitory Regime of Government, which, among other provisions, proceeded to designate the justices of the Supreme Tribunal *without adhering* to the Constitution approved the previous week by the people, indicating that these designations would be "temporary" until the Na-

10 See Allan R. Brewer-Carías, *Golpe de Estado y proceso constituyente en Venezuela*, UNSAM, México, 2001

tional Assembly made the final designations or confirmations *pursuant to the Constitution* (Art. 20).

The National Assembly, elected in August 2000, had the Constitutional mandate (by virtue of the text of the Constitution, and by virtue of the Transitory Regime of December 22, 1999, with respect to which the Supreme Tribunal recognized its constitutional ranking) to designate the permanent justices, pursuant to the Constitution and adhering to its rules.

The form of integration of the Nominations Committees was essential in order for the Constitution to be applied; therefore, the National Assembly was *obliged to fill the legal vacuum* by legislation to regulate the Nominations Committees. It was inadmissible for the National Assembly to intend to legislate, in order not to legislate, as occurred with the Special Law for the Confirmation or Designation of Officials for the Citizen's Branch and Justices of the Supreme Tribunal of Justice for the first constitutional period as of November 14, 2000, which violated Articles 264, 270 and 279 of the Constitution and Articles 20 and 33 of the Decree on the Transitional Regime for Government. These rules required that the National Assembly, once elected, make the permanent designations of Supreme Tribunal justices "pursuant to the Constitution."

The previously mentioned Special Law for the designation of senior public officials for the Judicial Branch and the Citizen's Branch violated the Constitution by not having organized the Judicial Nomination Committee as provided for and as required by the Constitution, to include only "representatives of the different sectors of the community." On the contrary, this Special Law created a "Parliamentary Committee" with additional, external members elected by the National Assembly from a list of 12 representatives of the different sectors of the community elaborated by the deputies, members of the Committee (Art. 4).

Nominations for the designation of Supreme Court justices were to be subjected to public consultation so that reasoned support or objections could be submitted to the Committee (Art. 7). As a result of the process, the Committee had to prepare a list of nominees to be submitted to the National Assembly for permanent designation (Art.9).

It suffices to read the Special Law to understand its unconstitutionality. The statute contradicted the Constitution and confiscated the right to political participation as expressly guaranteed in the Constitutional text. Consequently, in 2000, the National Assembly designated the justices of the Supreme Court of Justice without adhering to the provisions of Articles 264, 270 and 279 of the Constitution. This provoked the Public Defender, before his replacement, to file a judicial review nullity action challenging the Special Law before the Constitutional Chamber of the Supreme Tribunal of Justice. To date, the case has not been decided (Oct. 2005).

In May 2004, the National Assembly enacted the long-awaited Organic Law of the Supreme Tribunal of Justice,<sup>11</sup> one of whose objectives was to increase the number of justices for the Chambers of the Supreme Tribunal. Thus, the government, which controlled the Assembly through the government's party, whose directors were the President of the Republic and his Ministers, by designating the Justices by simple majority, would be able to completely control the Supreme Tribunal of Justice.

Regarding the process for the nomination of justices, the statute organizing the Judicial Nominations Committee was approved violating the Constitution and the political right to participate<sup>12</sup>. Following the trend of the previous Special Law of 2000, the Organic Law, the Judicial Nominations Committee instead of solely and exclusively being integrated by "representatives of different sectors of the community," as required by the Constitution (Art. 270), was integrated by "eleven principal members with their respective alternates, five of which will be elected from the national legislative body and the other six members from other sectors of the community, which will be elected through a public procedure" (Art. 13, Second Paragraph). The deputies to the National Assembly, however, cannot be considered representatives of the community, thus the statute again violated the Constitution by actually forming an extended *Parliamentary Committee*, headquartered at the National Assembly.

The essential function of the Judicial Nominations Committee is to select "in a public and transparent process, in accordance with constitutional requirements," the candidates for justices of the Supreme Tribunal of Justice, who must be presented to the Citizen's Branch for a second screening under the terms of Article 264 of the Constitution. Article 13, fourth paragraph, also unduly limited the constitutional power of the Citizen's Branch by stipulating that this Branch "must, to the extent possible, except for a serious cause, respect the selection made by the Judicial Nominations Committee."

It has been pursuant to this Organic Law and a distorted Nominations Committee such as the one described that the justices of the Supreme Tribunal have been designated, in violation of the Constitution.

11 See the comments in Allan R. Brewer-Carías, *Ley Orgánica del Tribunal Supremo de Justicia. Procesos y procedimientos constitucionales y contencioso-administrativos*, Editorial Jurídica Venezolana, Caracas 2004

12 See Allan R. Brewer-Carías, "La progresiva y sistemática demolición institucional de la autonomía e independencia del Poder Judicial en Venezuela 1999-2004", in XXX *Jornadas J.M. Domínguez Escovar, Estado de derecho, Administración de justicia y derechos humanos*, Instituto de Estudios Jurídicos del Estado Lara, Barquisimeto 2005, pgs. 33-174.

## II. The designation of the Supreme Court justices by the Senate

In numerous countries with a bicameral legislative organization, the power to designate Supreme Court Justices has been attributed to the Senate, as is the case of Colombia for the Constitutional Court, with the intervention of other Jurisdictions, and the Supreme Court of Mexico, from a proposal submitted by the President of the Republic, and Paraguay, from a proposal submitted by the Council of the Judiciary with the agreement of the Executive Branch.

### 1. The designation of the Constitutional Court justices by the Senate from a proposal submitted by other jurisdictions in Colombia

In the case of the Constitutional Court of Colombia, Article 173,6 of the Constitution attributes to the Senate the power to elect the nine justices of the Constitutional Court, as determined by Law No. 5 of 1992 and Law 270, for an eight-year period, from individual lists submitted to the Senate by the President of the Republic, the Supreme Court of Justice and the State Council (Art. 239).

According to Article 44 of the Statutory Law of the Administration of Justice of 1996, for the designation the Senate must select a justice from each of the three lists submitted by the President of the Republic, one from each of the three lists submitted by the Supreme Court of Justice, and one from each of the three lists submitted by the Council of State.

### 2. The designation of the Supreme Court of Justice by the Senate from a proposal submitted by the President of the Republic in Mexico

In Mexico, Article 96 of the Constitution stipulates that for the designation of the 11 ministers of the Supreme Court of Justice, the President of the Republic must submit a list of three candidates to be considered by the Senate, which, upon prior appearance of the nominees, will designate a justice to fill the vacancy.

The appointment must be made with the vote of two-thirds of the members of the Senate present at the meeting, within an inextensible thirty-day period. If the Senate does not decide within this term, the position of justice will be filled by a nominee from the list submitted by the President of the Republic.

If the Senate rejects the entire list of nominees, the President of the Republic will submit a new list, abiding by the terms of the preceding paragraph. If the second list is rejected, the position will be filled by an individual from this new list of nominees designated by the President of the Republic.

Also, pursuant to Article 98 of the Constitution, when the absence of a justice exceeds one month or if a justice has passed away or is permanently absent for any other reason, the President of the Republic must designate an interim justice and

submit this appointment for approval by the Senate, thus fulfilling the previously indicated provisions (Art. 96).

3. The designation of the Supreme Court justices by the Senate from a proposal submitted by the Judiciary Council and with the agreement of the Executive Branch in Paraguay

In accordance with Article 264,1 of the Constitution of Paraguay, the Senate is responsible for designating the members of the Supreme Court of Justice, with the agreement of the Executive Branch, as per the proposal from the Judiciary Council.

In accordance with Article 262 of the Constitution, the Judiciary Council is made up of:

- One member of the Supreme Court of Justice, designated by this Court;
- One representative of the Executive Branch;
- One Senator and one Deputy, both nominated by the respective Chambers;
- Two registered lawyers designated by their peers in a direct election;
- One professor from the Law School of the *Universidad Nacional*, elected by his or her peers; and
- One professor from the Law Schools of private Universities, with not less than twenty years experience in this field, elected by his or her peers.

The Judiciary Committee has the power to propose three candidates for the Supreme Court of Justice, with prior selection based on suitability and after having considered the candidates' merits and qualifications, for subsequent submittal to the Senate.

#### *F. Designation of the supreme court justices by an independent judiciary council*

The efforts to guarantee the independence and autonomy of the Supreme Court justices, has led some countries to create an independent body to be in charge of the government and administration of the Judiciary, to which, additionally, the power to appoint the Supreme Court judges has been attributed, as in the case of Peru.

Thus, the Peruvian Constitution is the only Latin American Constitution which attributes to the Council of the Judiciary, as a permanent body within the structure of the State, competence to designate the justices of the Supreme Court of Justice and, in general, all of the judges. We have indicated that in the Dominican Republic, while the Justices of the Supreme Court of Justice are also designated by a Council of the Judiciary, this Council is made up only of representatives of other branches of government and its only function is to designate the aforementioned justices.



Article 150 of the Peruvian Constitution establishes that the Council of the Judiciary “is responsible for the selection and appointment of judges and prosecutors, except when these are elected by the people,” and article 154,1 establishes among the functions of the Council, the “appointment of the judges and prosecutors *at all levels*, upon prior public pre-qualification of merits and personal evaluation,” with the appointments requiring the affirmative vote of two-thirds of the members of the Council.

The Constitution regulates the Council of the Judiciary as an independent body with the following members (Article 155):

One elected by the Supreme Court, in plenary session, by secret vote.

One elected by the Board of Supreme Prosecutors, by secret vote.

One elected by members of the country’s Bar Association, by secret vote.

Two elected by the members of the other Professional Associations in the country, as stipulated in the law, by secret vote.

One elected by the presidents of national universities, by secret vote, and,

One elected by the presidents of private universities, by secret vote. The Judiciary may increase to nine the number of its members, with two additional members elected by secret vote by the Judiciary from among individual lists proposed by institutions representing the labor and business sector.

In this case, the election of justices of the Supreme Court of Justice by the Council of the Judiciary also includes a public invitation, through publications in the newspaper, to pre-qualify with written and oral examinations and the possibility of objections from the public.

*G. Designation of the supreme court justices by means of a cooption system*

Finally, in the constitutional effort to ensure the independence of the judiciary, some countries have established the cooption system to appoint Supreme Court justices. According to a constitutional tradition, this is the case of Colombia, where the justices are nominated by the Supreme Court itself but from a proposal submitted by the Superior Council of the Judiciary, and there is the unique case of Ecuador, where it is an exclusive attribution of the Supreme Court, a perhaps ideal system that has not functioned.

The cooption system for the designation of Supreme Court justices as per the proposal of the Superior Council of the Judiciary in Colombia

It could be said that Colombia is the only country in Latin America with a constitutional tradition when it comes to the designation of senior judges through the cooption system.

Even if the constitutional reform of 1991 modified the preceding general system, that tradition has been kept in place with respect to the justices of the Supreme Court of Justice and the State Council, which, as established in Article 231 of the Constitution, “will be designated by the respective body” but “from lists sent by the Superior Council of the Judiciary.”

This Superior Council of the Judiciary, according to Article 254 of the Constitution, has two divisions:

The Administrative Division, made up of six justices elected for a period of eight years as follows: two by the Supreme Court of Justice, one by the Constitutional Court and three by the State Council.

The Disciplinary Jurisdictional Division, made up of seven justices elected for a period of eight years by the National Congress from lists of three candidates, each sent by the government.

The impracticality of the cooption system in Ecuador and attempts to replace it by the Qualifications Committee system

The Constitution of Ecuador, in Article 202, provides for a system to designate justices of the Supreme Court of Justice by cooption from the same Court, by establishing that “when a vacancy arises the Supreme Court of Justice, in full session, will designate the new justice with the favorable vote of two-thirds of its members, observing the criteria of professionalism and of the legal profession, in accordance with the law. For the designation, professionals who have experience in court, have taught at universities or have practiced their profession independently will be alternatively selected in this same order.”

A law was never enacted to regulate the cooption selection procedure, and the designation of the first 31 justices in 1977 was made by Congress after consulting the citizen’s body; therefore, this designation was preceded by a selection process in which the candidates were qualified by nominating associations.

In subsequent years of Court operations, vacancies arose due to deaths and resignations and the new justices were designated, in full session, with the favorable vote of 2/3 of its justices. However, when at a specific time vacancies arose in the Criminal Chamber, the remaining justices of the Supreme Court could not reach a decision on the designation of the replacements. The positions were then filled by alternate judges, who are designated by the Court for fixed periods as per the proposal of its own members.

Due to the irregular integration of the Supreme Court, in May 2005, the then President of the Republic, Lucio Gutiérrez, issued a decree, upon prior declaration of a State of Emergency, in which he suspended the justices of the Court, which evidently was inconsistent with the Constitution. Immediately thereafter, Congress determined to annul the resolution of the President of the Republic and, in turn, resolved to suspend the Court, which was also inconsistent with constitutional provisions.

Having suspended the Court, in late May 2005, Congress reformed the Organic Law of the Judiciary, establishing a new system for the designation of the Supreme Court, which was also inconsistent with the provisions of the Constitution, but sought to provide a political way out of the serious institutional situation of the lack of integration of the Court, given its suspension. The Reform Law set forth that "In view of the permanent absence of the entire number of justices of the Supreme Court of Justice, their designation, this time only, will be made by a qualifications committee," comprised of the following five members:

One designated by the Presidents of the Courts of Professional Honors of the Bar Associations in the country.

One designated by the Deans or Directors of the law schools or academic units legally recognized by the State and which can prove to this entity that they have existed for at least ten years.

One designated by the judges of Superior Courts and Administrative or Tax District Courts.

One designated by the Committee for the Civic Control of Corruption.

One designated by human rights organizations with at least five years of legal experience in Ecuador.

These members must be elected by the respective electoral colleges with at least one-half plus one of the votes of the attendees, which must be secret, and the decisions so made may not be challenged.

The Committee was to issue a regulation, which would have to include requirements, a call for presentation of candidates, selection of the best candidates, and designation and swearing-in of these candidates.

By July 2005, the Committee had not yet been formed and by October 2005, Ecuador was lacking a Supreme Court. Certain members of the Qualifications Committee asked the President of the Republic to convene a consultation with the people, in order to ask Ecuadorians if they agreed with the selection process. The President, in response to this request, sent a petition to the National Congress to declare the urgency of the call to consultation and proposed several questions. The petition was returned so that a mixed Committee (Government-Congress) would be the one to prepare the subject matter of the consultation, all of which occurred in August 2005.

The Ecuadorian general institutional crisis provoked by the absence of a Supreme Court spurred the decision of the United Nations to appoint observers to follow the process.

#### *H. Final remarks*

As mentioned at the beginning, the question of the legitimacy as it relates to the selection of Supreme Court justices must focus on what the essential trend of the judiciary must be in a democratic society, that is, the selection of judges based solely on objective criteria without outside or political influence, in order to guarantee their independence from other branches of government and their autonomy, in the sense that they will be able to decide solely based on the law, without outside pressure or political influence. To put it succinctly, using the expression of my remembered friend, Louis Favoreu, the question of legitimacy is a matter of determining how Judges will accomplish their “duty of lack of gratitude”.

The selection method of judges, above all and in fact must guarantee that the appointees will not remain grateful to the nominator, or simply that the appointed justices must not be burdened with any sense of gratitude toward the State organ that had selected them. Thus, the question of legitimacy in this matter tends to answer the question of how the appointed judges will be devoid of any sense of gratitude toward the nominating body, so that when the time arrives they will be able to rule autonomously and independently against the interest of such body.

To this end, all kind of methods have been implemented to guarantee *first*, that judges will be appointed transparently based on merit through objective selection criteria; and *second*, that such designations will be made so as to ensure the independence, autonomy and impartiality of the judge, regardless of the organ or body called upon to make the election.

One conclusion can be pointed out, which is that there are no examples of systems where the Supreme Court justices are elected by citizens. The popular election of judges does not ensure that the most suitable candidates will be elected to guarantee the right of citizens to be tried by an independent and impartial tribunal.

Regarding the European doctrine, the tendency is to propose the selection of judges based exclusively on objective criteria that is performed by an independent body (mainly from the government and the administration) which represents the judges, in order to avoid outside influence, particularly political influence in the appointment of judges.

In Latin America, by including the regulations in the Constitutions, it can be said that everything has been attempted, in order to ensure the legitimacy of the election of the Supreme Courts justices and to guarantee their independence and impartiality,

not always with the desirable success in practice. Nonetheless, five methods can be distinguished for the appointment of Supreme Court justices: first, the appointment of Justices with the participation of all State bodies; second, the appointment by the President of the Republic, always with the intervention of parliament or the Senate; third, appointment by the full legislative body or by the Senate in certain bicameral systems, even with the intervention of independent bodies, a method that is the most widespread; fourth, appointment by an independent Council of the Judiciary; and fifth, appointment made by co-opting mechanisms by the Court itself..

The first method tends to arrange the appointment of Supreme Court justices with the participation of all the branches of government, in order to avoid the predominance of one branch over the others. Such is the case of the Dominican Republic where this is done through a Council of the Judiciary, integrated exclusively by the head of the Branches of government and with the sole purpose of making the appointments. As regards the appointment of the judges of the Constitutional Court or Tribunal of Guatemala, Chile, and Ecuador this is also accomplished with the exclusive participation of all the branches of Government.

The second most common method for the designation of Supreme Court judges, following the general trend of the presidential systems of governments, attributes the power to designate Supreme Court justices to the President of the Republic, always with the intervention in some way of the legislative branch of government, the Congress, as in the case of Panama, or of the Senate, as in the case of Argentina, Brazil, and Chile.

In some cases, as occurred in Argentina, executive decisions have imposed self-restraint regulations on presidential powers, setting conditions to be fulfilled by the nominees relative to moral integrity and technical suitability and commitment to democracy and defense of human rights; allowing citizens, individually or collectively, as well as professional, academic or scientific organizations or associations, or non-governmental organizations to express their points of view or objections with respect to the appointment to be made.

The third method adopted in the majority of the Latin American countries, as a counterbalance in the case of the presidential system of government, is to attribute the power to appoint the Supreme Court Judges to the Legislative Branch, or to Congress and to the Senate.

With respect to the first case, when attributed to the Legislative body such power can be exercised with exclusivity as exemplified by Costa Rica, Nicaragua and Uruguay and also by Bolivia and Peru (regarding the Constitutional Court Justices); or with the intervention of an independent body that can be an independent State body such as a Council of the Judiciary, as is the case of Supreme Court justices in Bolivia and El Salvador; or an independent State body integrated by representatives of the citizens organizations, as is the case of Guatemala and Honduras and as could have been the case in Venezuela.

Regarding the second option, when the power to appoint the Supreme Court justices is attributed to the Senate, such power is always exercised with the intervention of another body: with the intervention of other Judicial jurisdictions as in the case of the Constitutional Court in Colombia; or appointment from a proposal submitted by the President of the Republic as is the case of Mexico for the appointment of the Supreme Court justices. The same is true of Paraguay where the Senate appoints the Supreme Court justices from a proposal submitted by the Council of the Judiciary, with the agreement of the Executive Branch.

The fourth method adopted only in Peru for the appointment of Supreme Court justices in order to guarantee their independence and autonomy, is to attribute such power to an independent body in charge of the government and administration of the Judiciary, the Council of the Judiciary. It is the only case in which the appointment of the Supreme Court justices is attributed to the head of the Judiciary, with the Council being integrated not only by representatives of the Supreme Court and the Board of Supreme Prosecutors, but also by members of the country's Bar Association, members of other Professional Associations in the country, and the chancellors of national as well as private universities.

Finally, the fifth method for the appointment of Supreme Court justices that can be found in Latin America is the cooption system (appointments by the Court itself), a long-standing tradition in Colombia which now is carried out on the basis of a proposal submitted by the Superior Council of the Judiciary. This system has been established in a unique form also in Ecuador, where it is an exclusive attribution of the Supreme Court. It is an ideal method, but one that in practice has proven its virtual inoperability in political crises, to the point that for almost all of 2005, Ecuador simply lacked a Supreme Court.

It is clear that anything can be tried in an attempt to ensure the legitimacy of the method for the appointment of Supreme Court justices and guarantee the Court's independence and autonomy, but from the Latin-American experience, it is likewise clear that the constitutional formulas do not serve to achieve this purpose. What is required, above all, is the political commitment of all of the political parties and organizations of a country to integrally distance the Judiciary from the political struggle. This has been achieved in Continental Europe since the XIX Century; conversely, and unfortunately, it is a commitment not yet adopted in our countries.