

Contribution for the consideration of the seventh periodic report submitted by the State of  
Chile to the Human Rights Committee  
of the United Nations at its 140th Session  
February 2024



**Right to a fair trial and judicial independence (Art. 14 ICCPR):  
Challenges in the selection process of high authorities  
of the justice system in Chile**

This report is a contribution to the review of the seventh periodic report submitted by the State of Chile to the United Nations Human Rights Committee, presented by *Acción Cívica contra la Corrupción y la Captura Estatal* and the *Due Process Foundation (DPLF)*<sup>1</sup>. It contains information on the selection and appointment processes of high court judges and high prosecutors -including the Attorney General - in the country and their impact on human rights, in relation to the right to a fair trial and the principle of judicial independence, established in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). This document has been prepared based on the review and follow-up of current legislation, policies and practices implemented by the State of Chile in relation to its obligation to respect and guarantee this right, as well as on the monitoring carried out by civil society.

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<sup>1</sup> Acción Cívica contra la Corrupción y la Captura Estatal is a Chilean civil society organization that works to promote a culture of transparency, access to information and accountability on the part of public and private institutions to achieve a corruption-free society with full respect for human rights, and whose lines of work include the selection and appointment processes of high authorities of the justice system in Chile.

The Due Process of Law Foundation (DPLF) is a regional human rights organization whose mandate is to promote the rule of law and the protection of human rights in Latin America. Through its judicial independence program, DPLF promotes the strengthening of the region's justice systems and their autonomy.

## **The selection process for Supreme Court and Constitutional Court justices in Chile**

This section addresses the processes of selection and appointment of justices to the country's two high courts: the Supreme Court and the Constitutional Court. In both cases, the design of the selection mechanisms, and the way in which they have historically been developed in practice, has allowed these appointments to be permeable to political influences, without the existence of institutionalized mechanisms as a counterweight to ensure the effective participation of citizens or effective scrutiny by social sectors.

In both cases, the selection processes involve the participation of political bodies. Regarding the **Supreme Court** the Chilean Constitution (Art. 32, numeral 12; Art, 53, numeral 9; Art. 78) establishes that the supreme justices and supreme prosecutors are appointed by the President, from a short list of five persons proposed by the Court itself. The appointment requires the agreement of the Senate<sup>2</sup>.

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<sup>2</sup> Constitution of Chile

"Art. 32.- The President has special powers:

(...) 12. To appoint the supreme justices and supreme prosecutors of the Courts of Appeals and the judges, at the proposal of the Supreme Court and the Courts of Appeals, respectively; the member of the Constitutional Tribunal that it is responsible for appointing; and the justices and judicial prosecutors of the Supreme Court and the Attorney General, at the proposal of said Court and with the agreement of the Senate, all in accordance with the provisions of this Constitution.

(...)

Art. 53.- The Senate has exclusive powers:

(...)

9. To approve, in a specially convened session and with the affirmative vote of two thirds of the senators in office, the appointment of the supreme justices and supreme prosecutors of the Supreme Court and the Attorney general.

(...)

Art. 78.

The supreme justices and supreme prosecutors of the Supreme Court shall be appointed by the President, choosing them from a list of five persons who, in each case, shall be proposed by the Court itself, and with the consent of the Senate. The Senate shall adopt the respective resolutions by two thirds of its members in office, in a session specially called for such purpose. If the Senate does not approve the proposal of the President, the Supreme Court shall complete the list by proposing a new name in substitution of the rejected one, repeating the procedure until an appointment is approved.

Five of the members of the Supreme Court must be lawyers from outside the administration of justice, have at least fifteen years of professional experience, have distinguished themselves in professional or university activity and meet the other requirements set forth in the respective constitutional organic law".

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On the other hand, the Constitution (Art. 92)<sup>3</sup> establishes that the **Constitutional Court** is composed of ten (10) justices, who are appointed by various branches and organs of the State: three (3) of them are appointed by the President, four (4) are elected by the National Congress, and three (3) are elected by the Supreme Court in a secret ballot.

Despite their enormous importance in guaranteeing the judicial independence of the entire Chilean justice system, and the right to a fair trial and to a court previously established by law, both selection mechanisms present **extremely low levels of transparency and information, and an absence of institutional mechanisms for participation and social scrutiny** to ensure that state bodies apply objective criteria to assess the merits and abilities of the persons appointed. Some of these challenges are mentioned below.

- a) **Little transparency, limited publicity and restrictions on access to information:** In both cases, there is little or no public disclosure of the criteria used to evaluate candidacies and form the short lists. The deliberations of the competent bodies are not public, nor is there any obligation to give reasons for the votes or the election of one candidate or another. Even in certain cases, votes have been secret. This prevents the citizenry from understanding the basis of the decisions, from scrutinizing the suitability of the candidates, and makes the election vulnerable to external influences. An important factor that facilitates this opacity is that the Judiciary is not subject to the jurisdiction of the national body that guarantees transparency and access to information, which is the Council for Transparency, which also prevents access to these bodies to denounce or challenge the lack of transparency in the selection processes.

Likewise, the regulation of the processes does not guarantee the publicity of the applicants' background information, nor of the protocols used (in case they exist) to interview them, when it comes to the evaluations carried out by the Supreme Court. In the case of interviews before the Senate, the sessions are broadcasted, and legislators may ask questions or express their opinions. In the last selection processes, a virtual mailbox has been created so that citizens can send the Senate relevant information or letters of support or observation to the applicants, but citizens cannot directly expose these

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<sup>3</sup> Political Constitution of Chile

"There shall be a Constitutional Court composed of ten members, appointed as follows: a) Three appointed by the President of the Republic; b) Four elected by the National Congress. Two shall be appointed directly by the Senate and two shall be previously proposed by the Chamber of Deputies for approval or rejection by the Senate. The appointments, or the proposal as the case may be, shall be made in single ballots and shall require for their approval the favorable vote of two thirds of the Senators or Deputies in office, as the case may be. c) Three elected by the Supreme Court in a secret ballot to be held in a session specially called for such purpose (...)."

objections in the parliamentary sessions, nor are these letters read, so that citizens cannot know their contents or all the information that has been sent. Much less is there clarity on how the Senate treats this information<sup>4</sup> .

- b) **Absence of mechanisms for citizen participation:** In both selection mechanisms, there are no institutionalized or formal mechanisms for citizens, organized civil society, or other relevant actors such as academia or judicial associations, to participate effectively in these appointments, influencing them to exclude people without the qualifications to hold these positions or with questionable ties that could affect their independence and impartiality. This exclusion reduces society's ability to contribute to a judicial system that is more representative, diverse and responsive to the needs and concerns of the population.
- c) **Risks of external influences:** The preponderant participation of political bodies in the selection mechanisms raises concerns regarding the guarantee of merit-based appointments, generating a high risk of appointments being made for political reasons, or even being affected by illicit external influences. This risk increases, among other reasons, because the lack of mechanisms for citizen participation prevents these external influences from being detected and publicly exposed, preventing them from having a long-term influence on the justice system.
- d) **Affecting the independence of the courts from the political powers: the figure of the "integrating lawyer":** This figure is provided for in the Organic Code of Courts (Art. 215 et seq.), and consists of lawyers chosen from lists drawn up by the Executive Branch (Art. 218) to integrate the country's high courts (Supreme Court and Courts of Appeals) when there is a lack or inability of any of its members.

These "integrating lawyers" do not belong to the judiciary, and their inclusion in the lists prepared by the Executive is not carried out through a transparent or participatory mechanism; however, they have the same decision-making power as a justice in the cases in which they intervene. The lawyers who are part of these lists continue to belong to their law firms, businesses or universities, and their impartiality can only be challenged by the parties before the hearing of a case, provided that an amount of money fixed by the Court is paid. The recusal is only admissible on two occasions. In proceedings in which there is no hearing, the parties cannot challenge the integrating lawyers involved, and have no legal instrument to protect their right to be judged by impartial authorities.

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<sup>4</sup> As an example of the last nomination process <https://www.senado.cl/nombramientos-0>

- e) **Lack of accountability mechanisms:** Without effective public scrutiny, it is difficult for civil society to activate accountability mechanisms for irregular or illicit acts that may be committed by state officials involved in the selection mechanisms. At the same time, there are no legal remedies for appointments made in contravention of the principles of transparency, merit, or equality and non-discrimination, since the domestic legal framework does not provide for judicial remedies to challenge the selection processes or their results. All this finally affects the possibility for society to hold judges and magistrates accountable for their actions, which is particularly problematic in cases of corruption or grave human rights violations.
- e) **Lack of regulations guaranteeing equal representation of women in high judicial positions:** Unlike other Latin American countries, Chile does not have a legal framework that expressly guarantees equal access and equal opportunities for women to be appointed to high positions in the judiciary, such as the Supreme Court and the Constitutional Court.

As an example of the challenges mentioned above, the recent selection process for a Supreme Court justice in 2023, included a secret ballot to form the list of finalists, in which alternate supreme justices also participated. Although the minutes of the respective Supreme Court session show that there was a debate prior to the vote, this debate was not public, nor is it possible to know whether the decision that the alternate justices participate, or the secret nature of the vote, were also debated.

The opacity and lack of publicity of the selection criteria, the lack of mechanisms for citizen participation that allow for public scrutiny, and the absence of safeguards against external influences, can erode public confidence in the persons appointed, and as a consequence, in the judicial system as a whole, because when selection processes are perceived as opaque or influenced by political interests, the perception of impartiality and fairness in judicial decisions is undermined.

### **The process of selection and appointment of senior prosecutors**

Given the importance and role of prosecutors in the protection of rights such as access to justice, the presumption of innocence and the right to a fair trial, the selection process of the highest authorities of the prosecutor's office, especially the figure of the Attorney General, is fundamental for the strengthening of the rule of law and the safeguarding of democracy. In Chile, the selection and appointment process for senior national and regional prosecutors raises concerns similar to those indicated for its high courts.

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According to the Chilean Constitution (Art.85)<sup>5</sup>, the selection mechanism for the **Attorney General** involves the Executive, the Senate and the Supreme Court. First, the Supreme Court draws up a list of five persons (5) for the position. Although the constitutional norm does not establish the obligation of a public and open competition, in practice the Supreme Court launches a public call for this position and carries out an evaluation of the candidacies before elaborating the list, which is sent to the President. The President, in turn, chooses a person from the list, and proposes him/her to the Senate, requesting its agreement. With the agreement of three-fifths (3/5) of its members in office, in a specially convened session, the Attorney General is appointed.

Regional Prosecutors are appointed by the Attorney General from shortlists presented by the Courts of Appeals of the respective region (Art. 8 CN).

The selection process for the Attorney General and regional prosecutors presents similar deficiencies in terms of transparency, publicity, access to information, equal representation of women, as well as an absence of institutionalized mechanisms for the participation of civil society. As in the case of the high courts, the selection mechanism for the Attorney General is not under the jurisdiction of the national body that guarantees transparency and access to public information, the Council for Transparency.

Given the decisive participation of two political bodies in the appointment of the Attorney General - the Executive and the Legislature, through the Senate - with no space for citizen participation, the mechanism is particularly vulnerable to external influences - which generates a high risk of appointments being based on political interests.

This is especially worrisome, as it may in turn generate a risk of political interference in criminal prosecution, especially in politically sensitive cases or in corruption investigations involving politicians or campaign financiers, high-level public figures or powerful economic interests. In cases of serious human rights violations, these influences can reach state security agents, both police and/or military.

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<sup>5</sup> Political Constitution of Chile

"Article 85.- The National Prosecutor shall be appointed by the President of the Republic, upon a proposal in quina of the Supreme Court and with the agreement of the Senate adopted by two thirds of its members in office, in a session specially called for that purpose. If the Senate does not approve the proposal of the President of the Republic, the Supreme Court shall complete the quina by proposing a new name in substitution of the rejected one, repeating the procedure until an appointment is approved.

Article 86: There shall be a Regional Prosecutor in each of the regions into which the country is administratively divided, unless the population or geographic extension of the region makes it necessary to appoint more than one.

The regional prosecutors shall be appointed by the National Prosecutor, upon the proposal of the Court of Appeals of the respective region. In the event that there is more than one Court of Appeals in the region, the shortlist shall be formed by a joint plenary of all of them, specially convened for this purpose by the President of the Court of oldest creation."

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The deficiencies are clearly seen in the most recent process of selection and appointment of the Attorney General, in 2022. This process was questioned because the Supreme Court sent a list of five (5) candidates to the President, including a person who had publicly resigned from the competition. This generated that the President did not have five but four candidates under consideration, contrary to the provisions of the constitutional norm. This situation could not be legally challenged, given the absence of judicial remedies to challenge any irregularity in the selection process.

Another aspect worth highlighting, and which is directly related to the absence of mechanisms for citizen participation in the selection process, is the **lack of a register of disqualifications of the Attorney General**, which would make public, in a transparent and accessible manner, the professional background and links of the top prosecutor, which could generate conflicts of interest and affect the impartiality of his or her decisions. This same register of disqualifications does not exist for the rest of the prosecutors of the institution.

Civil society has requested the creation of this registry before the General Council of the Attorney General's Office of Chile, which was rejected. The same request was made to the Comptroller of the Republic, but this body refrained from issuing a pronouncement, under the argument that it has no powers or competence to supervise the AG.

## **Recommendations**

1. It is necessary to promote constitutional and legal reforms to adapt the selection processes of high-level judicial authorities and senior prosecutors to the standards of transparency, publicity, meritocracy, citizen participation, accountability and equitable representation developed in the United Nations Basic Principles on the Independence of the Judiciary, and in the various reports issued by the United Nations Special Rapporteur on the Independence of Judges and Lawyers.
2. In particular, objective, public and verifiable criteria must be guaranteed to establish the merits of candidates, to ensure appointments based on merit and capabilities, and to avoid politically motivated appointments.
3. It is also recommended that the requirements for applicants to these positions be developed in detail to avoid ambiguous interpretations regarding experience, academic background, trajectory, etc., and thus reduce the discretion of the bodies involved in the selection mechanisms.
4. To reduce the risks of external and undue interference in the selection mechanisms, it is necessary that the secondary laws incorporate

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institutionalized mechanisms for civil society participation that guarantee broad social scrutiny of the selection processes by the citizenry at all stages.

5. On the other hand, to guarantee transparency and access to information in the appointment of high authorities, it is advisable to reform the internal laws to broaden the competencies of the Council for Transparency regarding the selection mechanisms.
6. To guarantee an equitable representation of women in the high courts and senior prosecutor's offices, it is recommended that the legislation be modified to include parity as a guiding principle in the selection mechanisms, as well as to incorporate a quota mechanism, or alternation in the case of prosecutor's offices.
7. Finally, to guarantee the independence and impartiality of the designated judicial and prosecutorial authorities, it is advisable that domestic legislation provide for the obligation to establish a public and accessible register of disqualifications, which will make it possible to detect potential conflicts of interest.