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OPINION ON THE PROPOSED CHANGES TO THE MODALITIES FOR NOMINATING MEMBERS OF THE CONSTITUTIONAL COURT OF SPAIN

Spain

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Based on an unofficial translation of the Draft Amendments commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY

Constitutional courts or comparable institutions empowered with constitutional review play a key role to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions. While acknowledging the particular nature and specificities of constitutional adjudication, principles pertaining to the independence and impartiality of the judiciary have to be respected when reforming legislation regulating constitutional courts or the alike.

In this respect, a proper selection and appointment mechanism for constitutional court judges is an important safeguard for a state governed by the rule of law, providing institutional guarantees for the independence, credibility and efficiency of constitutional review. The selection rules shall aim to guarantee the independence of both the individual judges and the court as an institution, especially independence from those powers to be checked by the court.

At the same time, even when different state organs and political forces are involved in the selection process, an appropriate balance needs to be found so that the constitutional court judges are not perceived as being an instrument of one political force over another.

According to the Constitution of Spain, the twelve Constitutional Court magistrates are appointed for nine years, and renewed by third every three years. The nominating authorities are the Congress of Deputies and the Senate of Spain (four nominees each), the Government (two nominees) and the General Council of the Judiciary (GCJ) (two nominees) with the four latter being considered together for the purpose of renewal, as a consequence of the ninth transitory provision of the Constitution. In June 2022, the nine-year mandate of the four members nominated by the GCJ and the Government expired, with the mandate-holders continuing to exercise their functions until their successors have taken office. On 29 November 2022, the Government nominated its two new members but the GCJ did not proceed with the nomination, asking for the renewal of its own mandate before proceeding.

On 12 December 2022, draft amendments to the Organic Law 2/1979 on the Constitutional Court and to the Organic Law 6/1985 on the Judiciary (hereinafter “the Draft Amendments”) were introduced to change the modalities for nominating the members of the Constitutional Court of Spain with a view to proceed with the renewal by third of the Constitutional Court, which was on hold pending the nomination of two members by the GCJ. By order of 19 December 2022, the Constitutional Court decided to suspend the process of adoption of the amendments, which was reconfirmed by order of 21 December 2022. Shortly after, the GCJ proceeded with the nomination of its two members and on 30 December 2022, the four new Constitutional Court magistrates were appointed by the Royal Decrees. As the adoption of the Draft Amendments has been suspended by the Constitutional Court, the present Opinion will seek to analyze them as requested, though with a more forward-looking approach, offering recommendations to enhance existing modalities for nominating the members of the Constitutional Court with a view to limit the risk of deadlock in the future.

The importance and need to find a solution to a stalemate, especially when it concerns appointments to a key institution is recognized, though any legislative solutions should comply with the principle of legal certainty, and not be used to circumvent existing safeguards and constitutional provisions, including those designed to ensure consensus between the different political forces. Any change of the legislation relating to the Constitutional Court, especially regarding the nomination modalities/composition, which is intrinsically linked to the independence of such a Court, should be approached with great caution. Such a change should be compliant with the country's constitutional requirements and international human rights standards, adhere to the rule of law principles, and respect judicial independence. This is notwithstanding the requirement to ensure an open, transparent, inclusive and participatory process throughout the development of policy and legislative options.

As a general rule, the initiator/law-makers should also consider an appropriate transitional period allowing for a gradual implementation of amendments to prevent the proposed legislative change from being used or perceived to be used as a means at the disposal of the political majority to change the composition of the Court to its advantage. In light of this, now that the stalemate has been overcome and the institutional crisis seemingly averted, this appears to be the right time to discuss with all the political forces, with judicial actors, and civil society in general, an in-depth reform to reduce the risk of similar deadlocks in the future.

The modalities of nomination of members of the Constitutional Court should be reviewed to ensure that the nomination process includes adequate checks and balances, allows a power-balanced role of all nominating authorities and is the result of an open and transparent process underpinned by clear and objective criteria ensuring a merit-based selection. These considerations could help reducing the politicization of the nomination procedure. The legislator should also consider introducing tailor-made, effective deadlock-breaking mechanisms for each of the nominating authorities. An effective independent mechanism to identify and address irregularities of the nomination process should also be in place, with due respect for the independence of the Constitutional Court magistrates.

It is also fundamental that any future reform efforts address the issue of appointment of twelve judge members of the GCJ to ensure that it is no longer carried out by the Parliament but rather by the judiciary since the risk of stalemate cannot be properly addressed if the GCJ is or can potentially be subject to political influence.

Lastly, any such reforms must be based on a comprehensive analysis of the existing judicial system, impact assessment of the proposed policy and legislative options and should be accompanied by inclusive and meaningful public consultations at all stages of the law-making process.

More specifically, ODIHR makes the following recommendations to improve the modalities for nominating the members of the Constitutional Court of Spain as addressed by the Draft Amendments in compliance with OSCE commitments and international standards:

A. To review the modalities of nomination of the Constitutional Court magistrates to ensure that the nomination process includes adequate checks and balances, allows a power-balanced role of all nominating authorities and is the result of an open and transparent process underpinned by clear and objective criteria

ensuring a merit-based selection, in line with the constitutional requirements, principles and norms of international law and good practices; [para. 38]

B. To ensure that any future reform efforts address the issue of appointment of judge members of the GJC and consider amending Article 567 of the Organic Law on the Judiciary to specify that the twelve judge members in active service are designated by the judiciary e.g., by assemblies of judges, while retaining the existing legislative requirement to respect the principle of parity between men and women; [para. 49]

C. With respect to the voting modalities in the GCJ:

   1. To maintain a minimum quorum for the GCJ voting session and a qualified majority for votes on nominees for the position of Constitutional Court magistrates at the initial stage, while introducing tailor-made, effective deadlock-breaking mechanisms which do not jeopardize the role and independence of the GCJ and ensure adequate time for each stage of the nomination process; [para. 58]
   2. To ensure that the design of such anti-deadlock mechanisms is subject to inclusive and extensive consultation with all the interested stakeholders and representatives of the judiciary, and more generally representatives of civil society; [para. 58]

D. With respect to disciplinary measures against members of the GCJ:

   1. To provide in legislation when a misconduct by a GCJ member amounts to a disciplinary offence, a more detailed list of such disciplinary offences and the corresponding range of proportionate sanctions; [para. 62]
   2. To ensure that criminal liability should not be triggered for actions that would otherwise fall under functional immunity, including voting in council meetings, unless they constitute a criminal offense such as bribery, corruption or traffic of influence and similar offences that cannot be considered as acts committed in the lawful exercise of GCJ members' functions; [para. 62]

E. With respect to the verification of nominees for the Constitutional Court:

   1. To ensure that there is an effective independent mechanism to verify the compliance with constitutional and legal requirements for appointment as Constitutional Court magistrate, to avoid any appearance of corporatism or politicization of the verification process, to ensure the integrity of the procedure and maintain stability of the Court; [para. 67]
   2. To ensure that any mechanism to identify and address irregularities of the nomination process should be devised on the basis of clearly defined grounds and procedure, with an exhaustive list of those eligible to bring such cases and only within a reasonably short timeframe following appointment; [para. 71]
   3. To clarify that only irregularities which are of such gravity as to entail a violation of the right to a "tribunal established by law" could lead to removal of the respective magistrate and that adequate safeguards and procedure

should be in place to ensure an effective due process, including judicial review in this case; [para. 71]

F. To ensure that any future legal reform process relating to the judiciary and Constitutional Court, especially of this scope and magnitude, involves a full impact assessment including of compatibility with relevant international human rights and rule of law standards, allows for meaningful debate within the Parliament, and is transparent, inclusive, and involves extensive and effective consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations, with adequate time allocated for each stage of the policy- and law-making process. [para. 77]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 23 December 2022, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a joint request from one of the Vice-Presidents of the Congress of Deputies (hereinafter "Congress") and one of the Vice-Presidents of the Senate of Spain for a legal review of proposed amendments to the Organic Law 2/1979 on the Constitutional Court and to the Organic Law 6/1985 on the Judiciary as admitted for processing on 12 December 2022 (hereinafter the "Draft Amendments").[1] Such amendments were included in the Proposal for an Organic Law on the Transposition of European Directives and other Provisions for the Adaptation of Criminal Legislation to the European Union, and Reform of Crimes against Moral Integrity, Public Disorder and Dual-use Weapons Smuggling.

2. On 16 January 2023, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of the Draft Amendments with international human rights standards and OSCE human dimension commitments.

3. The Draft Amendments were introduced to modify the modalities for nominating the members (or magistrates)[2] of the Constitutional Court with a view to proceed with the renewal of a third of the Constitutional Court's composition, after the expiration of the mandates of four of its magistrates in June 2022, two of whom are nominated by the General Council of the Judiciary (GCJ) and two by the Government.

4. By order of 19 December 2022, the Constitutional Court decided to suspend the process of adoption of the amendments,[3] which was reconfirmed by order of 21 December 2022.[4] Following the proposal of two nominees by the GCJ on 27 December, the Constitutional Court unanimously gave its approval on 29 December 2022 to the two nominees of the GCJ and the two nominees of the government who were then appointed by the Royal Decrees of 30 December 2022. As the adoption of the Draft Amendments has been suspended by the Constitutional Court, the present Opinion will seek to analyse the Draft Amendments as requested, though with a more forward-looking approach. In particular, ODIHR will aim at offering recommendations to enhance existing modalities for nominating Constitutional Court magistrates with a view to limit the risk of stalemate in the future. The timing for initiating an in-depth reflection on the reform of the institutional mechanisms for nominating the members of the Constitutional Court appears particularly adequate in the aftermath of the aforementioned institutional crisis but sufficiently ahead of the next appointment.

5. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its mandate to provide advice to OSCE participating States on strengthening domestic legal frameworks and institutions that uphold the rule of law, including the judiciary.[5]

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1 See <Proposición de Ley Orgánica de transposición de directivas europeas y otras disposiciones para la adaptación de la legislación penal al ordenamiento de la Unión Europea, y reforma de los delitos contra la integridad moral, desórdenes públicos y contrabando de armas de doble uso (congreso.es)>, fourth and fifth transitory provisions and first and second final provisions.

2 Pursuant to Article of the Organic Law on the Constitutional Court, the twelve members of the Constitutional Court have the title of "Magistrates of the Constitutional Court".

3 See <HJ System - Decision: AUTO 177/2022 (tribunalconstitucional.es)>.

4 See <HJ System - Decision: AUTO 178/2022 (tribunalconstitucional.es)>.

5 See the *OSCE Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision MC(9).DEC/1, Bucharest, 3-4 December 2001, especially para. 22: *"[ODIHR] [w]ill provide continued advice to participating States, at their request, on strengthening domestic legal frameworks and institutions that uphold the rule of law, such as law enforcement agencies, the judiciary and the prosecuting authorities, bar associations and defence attorneys".* See also *OSCE Decision No. 7/08 Further Strengthening the*

II. SCOPE OF THE OPINION

6. This Opinion primarily focuses on the proposed key changes to Organic Law 2/1979 on the Constitutional Court and Organic Law 6/1985 on the Judiciary introduced on 12 December 2022. Thus limited, this legal review does not constitute a full and comprehensive review of each provision of the above-mentioned laws or of the legal and institutional frameworks regulating the nomination of Constitutional Court judges in Spain. This Opinion, although taking into account the existing legal and constitutional framework, does not purport to assess the constitutionality of the Draft Amendments, which is a matter falling outside the mandate of ODIHR and to be decided upon by competent national institutions.

7. The ensuing legal analysis is based on international and regional standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.

8. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*[6] (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[7] and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion analyses the potential different impact of the proposed amendments on women and men, and also integrates, as appropriate, a diversity perspective.

9. This Opinion is based on an unofficial English translation of the Draft Amendments, which are annexed to this document. Errors from translation may result. The Opinion is also available in Spanish. In case of discrepancies, the English version shall prevail.

10. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

11. The key role of constitutional courts or comparable institutions empowered with constitutional judicial review, as key instruments to ensure that the principles of the rule of law, democracy and human rights are observed in all state institutions has been emphasized in the *OSCE Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008).[8] Irrespective of the fact that a constitutional court or the alike is

Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council "*[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]*".

6 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Spain ratified CEDAW on 5 January 1984.

7 See the *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

8 See OSCE, *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), para. 4.

considered at the domestic level as part of the judiciary or not, as the ultimate guarantors of the interpretation and observance of the Constitution of a state, fundamental guarantees for its independence shall be afforded and respect for its authority ensured. Public confidence in the constitutional court, independent from political influence, is also vital in a democratic society that respects the rule of law.

12. Constitutional courts should protect the separation of powers and democracy and prevent excessive restrictions of human rights. Constitutional review is essential to guarantee the conformity of governmental action, including legislation, with the Constitution, but also to ensure that constitutions, once adopted, remain relevant to people's daily life.

13. A proper selection mechanism for constitutional court judges is an important safeguard for a state governed by the rule of law, providing institutional guarantees for the independence, credibility and efficiency of constitutional review. The selection rules shall aim to guarantee the independence of both the individual judges and the court as an institution. Constitutional courts or their equivalent exercising the power to check the constitutionality of both legislative and executive branches' activity have to be independent from those powers to be checked by the said courts. At the same time, it is necessary to ensure the independence of judges of constitutional courts and to involve different state organs and political forces in the selection process so that judges are not perceived as an instrument of one or more political forces.[9] Therefore, selection and appointment rules need to find an appropriate balance between the independence, autonomy and impartiality of the judges on the one hand, and their accountability to the law and to the principles of balance of powers on the other.[10]

14. While acknowledging the political nature and specificities of constitutional adjudication, key principles pertaining to the independence and impartiality of the judiciary shall apply to the individual judges and the constitutional court as a whole. Such principles are guaranteed by Article 14 of the United Nations (UN) *International Covenant on Civil and Political Rights* (hereinafter "the ICCPR").[11] The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are outlined in the *UN Basic Principles on the Independence of the Judiciary*,[12] and have been further elaborated upon in the *Bangalore Principles of Judicial Conduct*.[13] An international understanding of the practical requirements of judicial independence continues to be shaped by international bodies, including the UN Human Rights

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[9] See the European Commission for Democracy through Law (Venice Commission), *Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court)Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court)*, CDL-AD(2004)043, paras. 18-19; and *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary*, CDL-AD(2012)009, para. 8, noting that "*while the 'parliament-only' model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors*".

[10] See Aslı Bâli, *Courts and constitutional transition: Lessons from the Turkish caseCourts and constitutional transition: Lessons from the Turkish case*, International Journal of Constitutional Law, Volume 11, Issue 3, July 2013, pages 666–701.

[11] *UN International Covenant on Civil and Political Rights*, adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Spain ratified the ICCPR on 27 April 1977.

[12] The *UN Basic Principles on the Independence of the Judiciary* were endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[13] The *Bangalore Principles of Judicial Conduct* were adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in resolution 2006/23 of 27 July 2006. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

Committee[14] and through special procedures such as the UN Special Rapporteur on the Independence of Judges and Lawyers.[15]

15. At the Council of Europe level (CoE), to determine whether a body can be considered an "*independent and impartial tribunal established by law*" according to Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the European Court of Human Rights (ECtHR) considers various elements. These include, the manner of appointment of its members and their term of office, whether irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.[16] In *Xero Flor w Polsce sp. z o.o. v. Poland*,[17] regarding the appointment of Constitutional Tribunal judges, the ECtHR affirmed that this requirement applies to Constitutional Courts that receive individual complaints. The CoE's Committee of Ministers in its Recommendation CM/Rec (2010)12, provided that "*[t]he independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level*.".[18]

16. The Consultative Council of European Judges (CCJE),[19] an advisory body of the CoE on issues related to the independence, impartiality and competence of judges noted in its Opinion no. 1 that "*…the fundamental principles of the statute for judges are set out in internal norms at highest level, and its rules in norms at least at the legislative level*.[20] In its Opinion no. 21 it held that "*in order to avoid the perception of self-interest […], the [judicial] Council should have a mixed composition with a substantial majority of judges […]. Judge members should be elected by their peers without any interference from political authorities or judicial hierarchies […]. If members are however elected by the Parliament they should be elected by a qualified majority necessitating significant opposition support"*.[21] The present Opinion also makes references to reports of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe.[22]

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[14] See in particular UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, para. 19, which provides that States should ensure "*the actual independence of the judiciary from political interference by the executive branch and legislature*" and "*take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*.

[15] See <Special Rapporteur on the independence of judges and lawyers | OHCHR>.

[16] See e.g., ECtHR, *Campbell and Fell v. the United Kingdom* (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), para. 78. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), para. 38; *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), para. 103; *Morice v. France* [GC] (Application no. 29369/10, judgment of 23 April 2015), para. 78; on the relation of the judiciary with other branches of power: *Baka v. Hungary* [GC] (Application no. 20261/12, judgment of 23 June 2016), para. 165; *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), para. 144; ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. 26374/18, judgment of 1 December 2020), paras. 243-252.

[17] ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. 4907/18, judgement of 7 May 2021).

[18] Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges*: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

[19] The main task of the *Consultative Council of European Judges* (CCJE) is to contribute to implementation of the Framework Global Action Plan for Judges in Europe adopted by the Committee of Ministers on 7 February 2001.

[20] CCJE Opinion no. 1, on "Standards concerning the independence of the judiciary and the irremovability of judges", 23 November 2001 (2001/1), para. 16.

[21] Council of Europe, *Recommendation CM/Rec (2010)12 of the Committee of Ministers to Member States on Judges*: Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. CCJE Opinion no. 21, on "Evolutions of the Councils for the judiciary and their role in independent and impartial judicial systems", 5 November 2021 (2021/11).

[22] See the *Venice Commission* legal reviews on constitutional justice as well as Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2020)004. See also *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010 ; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

17. OSCE participating States have also committed to ensure "*the independence of judges and the impartial operation of the public judicial service*" as one of the elements of justice, "*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*" (1990 Copenhagen Document).[23] In the 1991 Moscow Document,[24] participating States further committed to "*respect the international standards that relate to the independence of judges […] and the impartial operation of the public judicial service*" (par 19.1) and to "*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*" (par 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the OSCE Ministerial Council also called upon OSCE participating States "*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*", as a key element of strengthening the rule of law in the OSCE area.[25] Further and more detailed guidance is also provided by the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) (Kyiv Recommendations).[26]

18. Ultimately, the procedure for selecting constitutional court judges should ensure the recruitment of a competent, experienced, gender balanced and diverse body of constitutional court judges, representing various legal professions, women, and minority groups in divided societies. In that respect, the *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* specifically calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*".[27] By reflecting the composition of society, a pluralistic composition can enhance a constitutional court's legitimacy for striking down legislation adopted by parliament as the representative of the people[28] and more generally trigger greater public trust in the impartiality of the Court.[29] Moreover, the legitimacy of a constitutional court and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of different social values and sensibilities,[30] which may be facilitated by ensuring diversity in its composition. To this end, the rules regarding the composition and selection/appointment should be designed to ensure gender and diversity in the constitutional court. This is by no means tantamount to a suggestion that a judge should act as the representative of a particular group, as each judge shall act independently in a personal capacity once appointed.[31]

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[23] OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June-29 July 1990), pars 5 and 5.12.

[24] OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991).

[25] OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (Helsinki, 4-5 December 2008).

[26] The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

[27] *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, para. 1.

[28] See e.g., Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, CDL-AD(2005)039, para. 3.

[29] See e.g., Venice Commission, *Opinion on the Law on the High Constitutional Court of the Palestinian National Authority*, CDL-AD(2009)014, para. 48.

[30] See e.g., European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 112; and *The Composition of Constitutional Courts - Science and Technique of Democracy*, no. 20 (1997), CDL-STD(1997)020, page 21.

[31] See e.g., Venice Commission, *Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina*, CDL-AD(2005)039, para. 13; and *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, CDL-AD(2016)001, para. 119.

19. The powers and competences of constitutional courts, as well as the mode of nomination, selection and appointment of its judges, varies across the OSCE region, and depends on many national factors, including *inter alia* legal, constitutional and political culture and traditions of a given country. Therefore, there is no one single model of selection/appointment procedure, which fits all constitutional courts and a variety of models exists.[32]

2. BACKGROUND

20. Part IX of the Spanish Constitution regulates the composition, status and powers of the Constitutional Court while Part VI regulates the judicial power.

21. Article 159 of the Constitution provides that the Constitutional Court shall consist of twelve members appointed by the King for a nine-year term. Four members shall be nominated by Congress by a majority of three-fifths of its members, four shall be nominated by the Senate with the same majority, two shall be nominated by the Government, and two by the GCJ (Article 159 (1) of the Constitution). The ninth transitory provision of the Constitution specifies that the two members nominated following proposal by the Government and the two nominated following proposal by the GCJ shall be considered as members of the same electoral origin exclusively for the purpose of renewal by third every three years as per Article 159 (3) of the Constitution. Article 159 (2) of the Constitution specifies that members of the Constitutional Court shall be appointed from amongst magistrates and prosecutors, university professors, public officials and lawyers, all of whom must be jurists of recognized standing with at least fifteen years' of professional experience. Article 159 (5) provides that the members of the Constitutional Court shall be independent and irremovable during their term of office. An organic law shall elaborate further the functioning of the Constitutional Court, the statutes of its members, the procedure to be followed before it, and the conditions governing actions brought before it (Article 165 of the Constitution). The Organic Law 2/1979 on the Constitutional Court was adopted in 1979 and amended since then.

22. Of note, the existing legal framework encompasses mechanisms to ensure the Constitutional Court's institutional stability in line with good practices.[33] As per Article 17 (2) of the Organic Law on the Constitutional Court, *"[t]he judges of the Constitutional Court shall continue in the exercise of their functions until their successors have taken office*". This is in addition to other default mechanisms to ensure institutional continuity such as having the procedure of nomination of a new

[32] Overall, there are three main systems of selection and appointment of constitutional court judges across the OSCE region: a) based on appointment, b) based on election, c) mixed systems, which combine election and appointment. Appointment-based systems do not involve any voting by representative bodies (e.g., common law systems typically involving a rubber stamp appointment mechanism of judges by the Head of State or pursuant to a binding executive nomination (Canada, Ireland, Malta); Nordic supreme courts). In most of the countries using election-based systems, the electing authority is the sole chamber of Parliament (e.g., Estonia, Hungary, Latvia, Liechtenstein, Lithuania, Slovenia, North Macedonia), the lower house of Parliament (e.g., Croatia, Poland), or both houses of the legislature (e.g., Germany), or a joint session of the two chambers (e.g., Switzerland); in such systems, there is a variety of authorities which have the opportunity to propose candidates for election, e.g., the President (Slovenia), the upper house of the legislature (Croatia), a mixture of Parliament, the executive and either the supreme court (Latvia, Lithuania) or the judicial council (North Macedonia). In mixed systems, the decision is made jointly by the executive, legislative and sometimes judicial bodies (e.g., in several countries, among them in Bulgaria, Georgia, Italy and Ukraine, the power of appointment is split three ways between the President of the country, the Parliament and a judicial authority; in Italy, the elective component requires a two-thirds majority of a joint meeting of the two houses of Parliament, thus invariably including the opposition into the appointment procedure; in Spain, the elective component is predominant in the procedure, because besides the two-two candidates appointed by the federal government and the judiciary, the two houses of the legislature, the Congress and the Senate elect four judges each, even though all the candidates are nominally appointed by the King, who has however no discretion to reject the candidates; in Portugal, which represents a unique variation of the mixed system, it involves the participation of the legislature and the Constitutional Court itself).

[33] See e.g., ODIHR, *Urgent Opinion on the Draft Constitutional Law on the Constitutional Court of Kazakhstan*, 30 September 2022, para. 40. See also Venice Commission, *Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court of Armenia*, CDL-AD(2020)016, para. 35

Constitutional Court magistrate start at least four months before the expiration of the mandate (Articles 17 (1) of the Organic Law on the Constitutional Court). Article 16 (5) also provides that *"[i]n case of a delay in the renewal by thirds of the Judges, the time delay in the renewal shall be reduced from the term of office of those appointed*".

23. The GCJ is the governing body of the judiciary (Article 122 (2) of the Constitution). It is chaired by the President of the Supreme Court and comprises a further 20 members appointed for a five-year term; of these members, twelve must be magistrates or judges drawn from all judicial categories under the terms established by organic law (Article 122 (3) of the Constitution). In addition, four members are elected by the Congress and four by the Senate, in both cases by a qualified majority of 3/5th from among jurists of acknowledged competence and over fifteen years of professional experience (Article 122 (3) of the Constitution). Article 567 of the Organic Law on the Judiciary further specifies that each of the Chambers of the Parliament elects, by a majority of 3/5th ten members in total, including six who may be any judge or magistrate in active service. The GCJ in its current composition has been serving with an expired mandate since 2018, due to the inability to reach the qualified majority threshold within the Parliament for appointing new members (see Section III.4.1).[34]

24. In June 2022, the mandate of four members of the Constitutional Court, two being nominated upon the proposal of the GCJ and two upon the proposal of the government, expired. On 29 November 2022, the Government nominated its two candidates. The GCJ did not proceed with the nomination of its two new members, asking for the renewal of its own mandate before proceeding. The two members nominated following proposal by the GCJ and the two nominated following proposal by the Government constitute a group of four for the purpose of renewal, as a consequence of the ninth transitory provision of the Constitution. Consequently, the renewal by third of the Constitutional Court was on hold pending the nomination of the two members by the GCJ, with the mandate-holders continuing to exercise their functions until their successors have taken office.

25. On 12 December 2022, two amendments were introduced to the "*Proposal for an Organic Law on the transposition of European directives and other provisions for the adaptation of criminal legislation to the European Union, and reform of crimes against moral integrity, public disorder and dual-use weapons smuggling*" with a view to amend the nomination rules. Notably, the Draft Amendments proposed to change the voting procedure in the GCJ to approve a candidate to fill a vacancy in the Constitutional Court. On 14 December 2022, an appeal for constitutional protection was filed before the Constitutional Court to contest the manner in which the two amendments were processed in the Congress. On 15 December, the Draft Amendments were adopted in first reading in the Congress. By order of 19 December 2022, the Constitutional Court decided to suspend the process of adopting the amendments, which was reconfirmed by order of 21 December 2022.[35] On this basis, the Senate proceeded to adopt the Organic Law on the Transposition of European Directives and other Provisions for the Adaptation of Criminal Legislation to the European Union, and Reform of Crimes against Moral Integrity, Public Disorder and Dual-use Weapons Smuggling, without the Draft Amendments. On 27 December, the GCJ unanimously elected its two nominees. On 30 December 2022, the four new magistrates of the Constitutional Court were appointed by the Royal Decrees.[36]

[34] European Commission, Commission Staff Working Document, *2022 Rule of Law Report Country Chapter on the rule of law situation in Spain*, SWD(2022)509, 13 July 2022, pp. 3-4.
[35] See *the Decision* of the Constitutional Court, 20 December 2022.
[36] See <Judges (tribunalconstitucional.es)>.

3. CHANGES PERTAINING TO THE NOMINATION OF CONSTITUTIONAL COURT MAGISTRATES

26. The reasoning section of the Draft Amendments noted that the composition of the Constitutional Court must correspond with the political will of the Spanish society, so that its decisions are not incompatible with the sovereign sentiment of the people.[37] Thus, the stated purpose of the changes introduced by the Draft Amendments was ensuring for the composition and functioning of the judiciary to be representative and reflect the popular will.

27. At the same time, the reasoning emphasized that the Draft Amendments sought to separate the current system of simultaneous appointment of members of the Constitutional Court nominated upon the proposal of the GCJ and those nominated upon the proposal of the government and open the possibility for one competent nominating authority to proceed with the next steps of the selection of the Constitutional Court magistrates without waiting for the nomination by the other nominating authority. The reasoning of the Draft Amendments also noted in this respect that delays in nomination have continued to occur and that there were members of the GCJ whose tenure had expired four years ago. It further noted that with the appointments to the Constitutional Court taking place by thirds every three years and the Government having designated its two candidates, the delay of the GCJ was compromising compliance with the constitutional mandate. Therefore the legal drafters' expressed main goal was to amend the existing rules and procedure for nomination to the Constitutional Court to expedite and facilitate the process of renewal of the composition of the Constitutional Court and, thus, minimize the degree of non-compliance due to a partisan blockade.

28. As mentioned under Section III.1 above, the rules regulating the selection of constitutional court judges should be designed to avoid the perception that appointments are instrumentalised for the benefit of a given political force. Ensuring the recruitment of a competent, experienced, and pluralistic body of constitutional court judges, is likely to enhance legitimacy and more generally trigger greater public trust in the institution. As such, linking the composition of the Constitutional Court to the "political will" as stated in the reasoning to the Draft Amendments does not appear *per se* a legitimate aim of the reform. At the same time, enhancing the representativeness of the judiciary would *a priori* be.

29. The importance and need to find a solution to a stalemate, especially when it concerns appointments to a key institution, is recognized, though any new legislative solutions should comply with the principle of legal certainty, and not be used to circumvent existing safeguards and constitutional provisions, including those that have been designed to ensure consensus between the different political forces. Any change of the legislation relating to the Constitutional Court, including the nomination modalities or affecting its composition, which is intrinsically linked to the independence of such a Court, should be approached with great caution. Such a change should be compliant with the country's constitutional requirements and international human rights standards, adhere to the rule of law principles, and respect judicial independence (see Section III.4). This is notwithstanding the requirement to ensure an open, transparent, inclusive and participatory process throughout the development of policy and legislative options (see Section III.6). In light of this, now that the stalemate has been overcome and the institutional crisis seemingly averted, this appears to be the right time to discuss with all

[37] See *the proposal* (in Spanish language).

the political forces but also with judicial actors, and civil society in general, an in-depth reform to avoid similar deadlocks in the future.

30. Finally, as a guiding principle of any judicial reform efforts, each power, including the legislative power, should exercise proper restraint in its relations with the other powers[38] (see also Section III.6 regarding the procedure for further amending the legal framework).

3.1. General Considerations

31. To ensure that one branch of government or an institution does not dominate the process of selecting members of the Constitutional Court, the legislation should provide for a set of checks and balances whereby no single political entity or group would be entitled to unilaterally nominate and which facilitates co-operation between different political players and branches of government, aiming for reaching a consensus. However, various international instruments recognize that although there must be "*some relations between the judiciary and the political powers*, […] *such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution"*.[39] The CoE has stipulated that "[…] *where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria*."[40] The CCJE noted that relations of the parliament and the executive with the judicial council must be based on a culture of respect for the rule of law and the role of the council.[41]

32. The Draft Amendments sought to amend Article 16 (1) of the Organic Law on the Constitutional Court, by adding that *"[t]he magistrates proposed by the* [GCJ] *and by the Government will be renewed every nine years, in accordance with the provisions of Article 159 (3) of the Constitution. If, after nine years and three months, one of these two bodies has not made its proposal, the two Magistrates designated by the body that has fulfilled its constitutional duty on time will be renewed*."

33. This proposal would have allowed either nominating authority (thus the Government or the GCJ) to nominate two magistrates of the Constitutional Court (i.e. to fill the posts) following the end of the nine-year term of sitting magistrates, and proceed without waiting for the other nominating body to make its nomination of the remaining two members, with the aim of completing the nominating process as provided by Article 159 (3) of the Constitution. The latter provision provides for a staggered appointment system with a '*renewal'* of the Constitutional Court magistrates *every three years by thirds*, with the four nominees from the GCJ and the government being considered together for the purpose of renewal (ninth transitory provision of the Constitution).

34. ODIHR notes the concerns expressed over the compatibility of the Draft Amendments with the Constitution of Spain. While it is a matter for the Constitutional Court of Spain to evaluate the constitutionality of legislation, it is of importance to ensure that these concerns are adequately addressed throughout the legislative or judicial process and that legislation is not enacted to circumvent relevant constitutional provisions and

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38 CCJE *Opinion no. 18 (2015)*, para. 39.

39 See *Commentary on the Bangalore Principles of Judicial Conduct*, page 41. See also UN Human Rights Committee, *General Comment 32*, 9 to 27 July 2007 (CCPR/C/GC/32).

40 See CoE, *Recommendation CM/Rec (2010)12 and explanatory memorandum*, para. 47.

41 *CCJE Opinion no. 24 (2021)*, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 5 November 2021, para. 40.

procedures, or a higher threshold that would generally be required to amend any constitutional provisions. Uncertainties related to alleged unconstitutionality of the proposed legislative amendments may negatively impact the credibility of the reform and ultimately the legitimacy of the magistrates who would be appointed as a result, and of the Constitutional Court in general. As stated in previous ODIHR opinions, any judicial reform should always comply with the country's constitutional requirements, adhere to the rule of law principles and be compliant with international law and human rights standards as well as OSCE commitments.[42]

35. While acknowledging that seeking a legislative resolution to dissolve a possible deadlock situation could be warranted (see Sub-Section 4.1.1 below), it is essential that any proposed anti-deadlock mechanism does not undermine checks and balances of the nomination process, as this could ultimately risk affecting the effective functioning and the independence of the Constitutional Court (see also Sub-Section 4.1.1 below). The solution proposed in the Draft Amendments seemed to *de facto* favour the Government as it had proposed its nominations, as opposed to the GCJ. This could potentially have resulted in a certain imbalance in the institutional mechanism for nominating members of the Constitutional Court thereby raising questions about the integrity of the overall process, possibly leading to the erosion of powers of the GCJ in the nomination procedure, if a decision regarding the nomination of its candidates would have continued to be halted.

36. The proposed amendments should also be seen in the backdrop of the current approach taken in the Constitution where both chambers of the Parliament, the Government and the GCJ, each have a key role in the nomination process. A number of European countries follow a more power-balanced approach.[43] It is however noted that the Congress and the Senate of Spain nominate Constitutional Court magistrates by a vote of at least three fifths. This qualified majority generally implies a political compromise and aims to ensure the democratic legitimacy of the selection procedure by preventing the ruling majority to monopolize the process.[44] Many European countries follow this model as well.

37. As the CCJE has pointed out "…*in order to achieve a proper balance of the three powers of state, each power must exercise proper restraint in its relations with the other powers*".[45] In this respect, an appropriate balance needs to be found when different state organs and political forces are involved in the selection process so that the Constitutional Court magistrates are not perceived as being an instrument of one political force over another and to prevent the proposed legislative change from being used or perceived to be used as a means at the disposal of the political majority to change the composition of the Constitutional Court.[46] This may negatively affect the Constitutional Court's appearance of independence, as the public may perceive its composition as being influenced by political considerations, which may also put at risk public confidence in its decisions.

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[42] See *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the Supreme Court and Some Other Acts of Poland*, 25 January 2023.

[43] With involvement of the executive, the legislative and judicial branches. For instance, Italy, Serbia, Bulgaria, Georgia, Ukraine etc. See also Venice Commission, *The Composition of Constitutional Courts - Science and Technique of Democracy*, no. 20 (1997), CDL-STD (1997)020, para. 1.1. Systems of Appointments.

[44] See e.g., Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI (2020)004, Section 4.3.1 Qualified majority for election; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, para. 112.

[45] See the *CCJE Opinion No. 18 (2015)*, para. 39.

[46] While relating to the introduction of limited terms for constitutional judges, relevant observations were made in the Venice Commission, *Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court of Armenia*, CDL-AD(2020)016, 19 June 2020, para. 38.

38. **It is recommended to review the modalities of nomination of the members of the Constitutional Court to ensure that the nomination process includes adequate checks and balances, allows a power-balanced role of all nominating authorities and is the result of an open and transparent process underpinned by clear and objective criteria ensuring a merit-based selection in line with the constitutional requirements, principles and norms of international law and good practices.** Concerns related to the alleged lack of constitutionality of the proposed legislation should be timely and adequately addressed.

RECOMMENDATION A.

To review the modalities of nomination of the Constitutional Court magistrates to ensure that the nomination process includes adequate checks and balances, allows a power-balanced role of all nominating authorities and is the result of an open and transparent process underpinned by clear and objective criteria ensuring a merit-based selection, in line with the constitutional requirements, principles and norms of international law and good practices.

3.2. Recommendations for Enhancing the Nomination Procedure

39. In principle, all decisions concerning the appointment and the professional career of judges, also to the highest posts within the judiciary including constitutional court judges, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.[47] Such criteria and procedures should aim at assessing the ability, integrity and experience of candidates, while ensuring that the composition of the Constitutional Court is balanced in terms of gender[48] and promotes pluralism. The objective is to ensure that the respective nomination/selection decisions are based on merit, having regard to the qualifications, skills and capacity required to carry out constitutional adjudication.

40. By enhancing the nomination procedure in this respect while improving the openness, transparency and fairness of the process, this could help reducing the politicization of the nomination procedure while ensuring the establishment of a more merit-based selection process. While legislation or other regulations may exist that provide more concrete guidance on the eligibility and the selection criteria, a number of modalities could be considered by the legislator and provided to ensure the quality of nominees and the openness, transparency, legitimacy and fairness of the nomination procedure, such as:

- providing for **an open application procedure**, ensuring that the vacancy notice(s) are readily accessible to potential candidates and the public at large,[49] while

[47] See ODIHR-Venice Commission, *Joint Opinion on the Draft Law "on Introduction of Amendments and Changes to the Constitution" of the Kyrgyz Republic*, CDL-AD(2016)025-e, para. 52.

[48] See para. 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the *Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing*, 4-15 September 1995 (A/CONF.177/20 and Add.1); and *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, para. 1. See also UN Special Rapporteur on the independence of judges and lawyers, *Report on Gender and the Judiciary* (2011), para. 81.

[49] See e.g., 2013 *Istanbul Declaration on Transparency in the Judicial Process*, endorsed by the UN Economic and Social Council on 23 July 2019, para. 80; 2010 *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct*, para. 12.3. See also the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), which are the outcome of an international research project led by Professor Hugh Corder of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative

detailing the selection criteria and specify the process of selection;[50] wide accessibility is important in order for the process to be opened to a pool of candidates as diverse and reflective of society as a whole as possible and to reach out to under-represented groups;[51]

- **ensuring that the eligibility and selection criteria[52] and overall procedure, if and when it will be defined in greater details, are non-discriminatory and accessible to all**, including persons with disabilities;
- ensuring that **adequate time be provided for each stages of the nomination process**, including the assessment of candidates;[53]
- **publishing the list of eligible candidates and of selected candidates at each stages of the nomination process as appropriate (e.g., list of received applications, list of eligible candidates, list of pre-selected candidates and final list of nominees)**, which should permit better public scrutiny of the process;[54]
- considering to which extent the **different phases of the nomination process should be public**, while balancing the need to protect the independence of the judiciary and the necessity to ensure public trust in the process;
- **organizing interviews,** ensuring equality of opportunities and that best qualified candidates are selected, and for that purpose, to pre-determine both the topic of an interview and its weight in the process of selection,[55] and that they are conducted in a manner that is respectful and fair to candidates[56]

Law, Principle 9. See also for instance, Article 8 of the Law on the Constitutional Court of Montenegro provides for the issuance of the public call in the "Official Gazette", at least one of the printed media based in Montenegro and on the website of the nominating entity; Article 8 of the Constitutional Act on the Constitutional Court of Croatia provides for the publication of "*an invitation in the Official Gazette Narodne novine to judicial institutions, law faculties, the chamber of attorneys, legal associations, political parties, and other legal persons and individuals to propose candidates for the election of one or more judges of the Constitutional Court*"; Article 7/b of the *Law No. 8577 of 10 February 2000 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania*, which provides for the announcement on public information media and on the official internet website of the President.

50 *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, para. 12.3; and the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), Principle 9, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges*

51 See e.g., OSCE High Commissioner on National Minorities, *The Graz Recommendations on Access to Justice and National Minorities*, November 2017, page 25; and 2013 *Istanbul Declaration on Transparency in the Judicial Process*, endorsed by the UN Economic and Social Council on 23 July 2019, Section 13.

52 It may also be worth considering other selection criteria that would appear especially relevant for the highest jurisdiction of a country in charge of adjudicating constitutional matters, such as sensitivity to the needs of different communities and groups, extensive expertise in human rights, since the highest courts generally have a key role to play in that respect, creativity and flexibility, ability to consider difficult and sensitive issues, commitment to the judiciary as an institution, among others. See e.g., the criteria for appointment to the UK Supreme Court, available at <https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf>; Venice Commission, *Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina*, CDL(1999)078, paras. 30 and 32; European Network of Council of the Judiciary (ENCJ), *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.4. See also e.g., Article 7/a of the *Law No. 8577 of 10 February 2000 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania*; and Venice Commission, *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*, CDL-AD(2009)023, para. 22.

53 See the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), Principles 9-11.

54 See 2013 *Istanbul Declaration on Transparency in the Judicial Process*, endorsed by the UN Economic and Social Council on 23 July 2019, Section 13. See also e.g., Article 7/b of the *Law No. 8577 of 10 February 2000 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania*, which provides for the publication of the list of candidates and list of ranking of candidates (and related reasoned report).

55 See e.g., ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. 26374/18, judgment of 1 December 2020), para. 220, which states that "*it is inherent in the very notion of a "tribunal" that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law*". For the purpose of comparison, concerning the selection/appointment of judges in general, see 2010 Kyiv Recommendations, para. 21.

56 Venice Commission Report on the Independence of the Judicial System, 2010, para. 25, which states that *"[t]ransparent procedures and a coherent practice are required*"; and *CCJE, Opinion No. 17 (2014) on the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence,* para. 11. See also e.g., Council of Europe, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights – Explanatory Memorandum*, CM(2012)40-add, 29 March

- introducing a **mechanism to ensure that the relative representation of women and men within the Constitutional Court,**[57] **as well as of under-represented groups, especially minorities and persons with disabilities**, is taken into consideration when ranking candidates though not at the expense of the basic criterion of merit (e.g., in case of a tie between two candidates, instead of the criteria of longer-serving judge, the individual belonging to the under-represented gender or persons within the Constitutional Court should be chosen; include provisions pertaining to the consequences of the violation of this gender and diversity balance requirement,[58] etc.;
- exploring **other modalities to facilitate greater public oversight over the nomination process** (e.g., involving a subcommittee composed of representatives of the legal profession, academia, civil society, etc. who would be in charge of screening the applications/shortlisting,[59] providing for participation of civil society representatives as monitors or observers during certain of the phases of the nomination process, or their involvement in consultative bodies that could be created to assist during the selection/nomination process);[60] and
- at the end of the process, the nominating entity may consider to prepare a **report regarding the nomination process that should be made available to the public**, while maintaining the principle of confidentiality of individual candidates;[61] such report may include data regarding the number of applications, information on short-listed candidates, and candidates at each stage of the selection/nomination process, all of them disaggregated by gender and other information on under-represented groups, as appropriate, as well as recommendations by the nominating entity for future selection procedures.

4. NOMINATION OF CONSTITUTIONAL COURT MAGISTRATES BY THE GCJ

4.1. Background to the Modalities of Appointment of Members of the General Council of the Judiciary

41. The GCJ is composed of twenty members, including eight non-judge members and twelve judge members, and is chaired by the President of the Supreme Court. The

2012, para. 57; and *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), Principle 12.

57 See e.g., Article 34 par 5 sub-paragraph of the Special Act of 6 January 1989 on the Constitutional Court of Belgium (as amended), which requires that the Court shall consist of at least one-third of judges of each gender (provision to enter into force on the day when the Court consists of at least one-third of judges of each gender, until which Date, the King will appoint a judge of the least represented gender if the two previous appointments did not increase the number of judges of that gender (Art. 38 of the Special Act of 4 April 2014)); Article 10 of the Law on the Constitutional Court of Montenegro states that *"[w]hen proposing candidates, proponents are obliged to take into account the proportional representation of minorities and other minority groups, as well as gender-balanced representation*".

58 For instance, the Draft Amendments could provide that the selection of the candidates of the over-represented gender shall be annulled. See e.g., Article 75 of the French Law on Equality between Men and Women (2014). See also para. 39 of the 2013 *Report of the UN Working Group on the issue of discrimination against women in law and in practice* (A/HRC/23/50), adopted on 19 April 2013.

59 As a useful reference on the issue of transparency, see for example ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), para. II.4.

60 See e.g., ODIHR Kyiv Recommendations on Judicial Independence, 2010, para. 10, which states that *"[p]ublic access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice*"; UNODC, *Criminal Justice Assessment Toolkit – The Independence, Impartiality and Integrity of the Judiciary* (2006), page 11. See also ODIHR, *Annotated Agenda and Consolidated Summary of the 2016 Human Dimension Seminar on Promoting Effective and Integral Justice Systems: How to Ensure the Independence and Quality of the Judiciary*, 21-23 November 2016.

61 See *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges*, February 2016, para. 16. See e.g., Article 11 of the *Courts and Courts Officers Act* (2002) of Ireland, which requires that the Judicial Appointments Advisory Board prepares an annual report on judicial vacancies disaggregated by gender.

Constitution provides that among the eight non-judge members, the Congress and the Senate elect four members each by three-fifths majorities (Article 122 (3) of the Constitution). It further notes that the 12 judge members are designated according to the Organic Law on the Judiciary. The latter provides that each of the chambers of the Parliament elects 6 judge members by three-fifth majorities (Article 567 (2) of the Organic Law on the Judiciary).

42. A high voting threshold can be required for appointment of members of judicial councils or other similar bodies, to reduce the risk of partisan appointments. While the election of *non*-judge members of the GCJ by the Parliament with high threshold (and relevant anti-deadlock mechanism) may be justified, the aforementioned rules of designation of judge members of the GCJ as established by the Organic Law on the Judiciary are not congruent with international and regional recommendations, which advise for judge members of judicial councils representing more than half or a substantial majority of the council membership, to be chosen by their peers.[62]

43. In principle, judicial councils or other similar bodies are crucial to support and guarantee the independence of the judiciary in a given country, and as such *should themselves be independent and impartial*,[63] i.e., free from interference from the executive and legislative branches. Indeed, interfering with the independence of bodies, which are guarantors of judicial independence, could as a consequence impact and potentially jeopardize the independence of the judiciary in general.

44. It is generally acknowledged at the international level that judicial councils or other similar independent bodies should, however, not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and also the perceptions of corporatism.[64] The mixed composition of the GCJ with a majority of judges but also including non-judge members as well as the requirement for the composition to be in accordance with the principle of parity between men and women are positive features.

45. The ECtHR and the Court of Justice of the European Union (CJEU) have both emphasized that where a judicial council is established, State's authorities should be under an obligation to ensure its independence from the executive and legislative powers.[65] In that respect, the ECtHR has highlighted that the manner in which judges are

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[62] See e.g., ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 7, which states that "*[w]here a Judicial Council is established, its judge members shall be elected by their peers*" and refers to a "*substantial number of judicial members elected by the judges"*; Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, para. 27, which states that "*[n]ot less than half the members of such councils should be judges chosen by their peers*"; European Association of Judges, *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), para. 1.3, which states that *"[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute 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*"; Consultative Council of European Judges (CCJE), *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, 23 November 2007, paras. 17-18 and 25, where it is stated that *"[w]hen there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers*". See also Venice Commission, *Report on Judicial Appointments* (2007), para. 25; and *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, para. 50, which both state that "*[a] substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself*".

[63] See the *Bangalore Principles of Judicial Conduct* (2002), Preamble, which states that the Bangalore Principles "presuppose that judges are accountable for their conduct to *appropriate institutions* established to maintain judicial standards *which are themselves independent and impartial*".

[64] See ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), para. 2 and CCJE), *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, 23 November 2007, para. 16.

[65] See e.g., ECtHR, *Grzęda v. Poland* [GC], Application no. 43572/18, 15 March 2022, para. 307; Court of Justice of the European Union (CJEU), *A.K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, judgment of 19 November 2019, paras. 138 and 142-44; and *A.B. and Others* (Appointment of judges to the Supreme Court – Actions), C-824/18, judgment of 2 March 2021, paras. 125-131.

appointed to a judicial council, and particularly the nature of the appointing authorities, is relevant in terms of judicial self-governance.[66] More specifically, the ECtHR has held that the fact that the bodies appointing the great majority of the council members were from the executive and legislative branches constituted a structural deficiency that was not compatible with the principle of independence.[67] The ECtHR has also stressed the importance of having the judicial corps elect its own representatives to the Council, in order to "*reduce the influence of the political organs of the government on the composition of the [Council]".* [68]

46. ODIHR has emphasized on several occasions that placing the authority to choose judges sitting on a judicial council within the legislature runs the risk of increasing political interference in judicial administration.[69] Similarly, the Venice Commission has underlined that when judge members of a judicial council are elected by Parliament, this places the selection process under the influence of the Parliament, which means that political considerations may prevail when electing the council members.[70]

47. Regarding Spain, the Council of Europe's Group of States against Corruption (GRECO) recently observed that "*[e]very time that a new selection of the CGPJ has taken place, misgivings have been expressed on political bargaining and parties horse-trading for appointment to key judicial positions*".[71] It further reiterated its recommendation to "*remove the selection of the [judge members in active service] from politicians*" and its concerns with respect to the "*perception of politicisation [of the judicial council] in the citizens' eyes*", given the role of the Parliament in the appointment of judge council members in Spain.[72] With reference to Council of Europe standards, it noted that "*when there is a mixed composition of judicial councils, for the selection of judge members, it is advised that judges are elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as the Parliament or the executive, are not involved at any stage of the selection process*".[73]

48. In its 2022 Rule of Law report, the European Commission noted that "…*calls by stakeholders have been reiterated to change the system of appointment of the members of the General Council for the Judiciary in line with European standards so that no less than half of its members be judges chosen by their peers. But a draft proposal to reform the system of appointment of the General Council for the judiciary proposing that its judges-members are directly elected by their peers did not get enough support in Parliament to start proceedings."*[74]

49. The stalemate regarding the appointment by the Parliament of members of the GJC in Spain shows indeed that the appointment process is extremely politicized**.** The changes proposed by the Draft Amendments fail to address this core issue. **In light of the above, it is fundamental that any future reform efforts address the issue of appointment of**

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66 See e.g., ECtHR, *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), paras. 109 to 117, particularly para. 112.

67 *Ibid.* paras. 112 and 117 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

68 *Ibid.* para. 112 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

69 See e.g., ODIHR, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland* (2017), para. 14.

70 See e.g., Venice Commission, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), para. 70; and Venice Commission, paras. 36-37, *Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine*, CDL-PI(2015)016-e, 24 July 2015, paras. 36-37.

71 See GRECO, *Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Spain*, 25 March 2021, para. 41.

72 *Ibid.* paras. 40-44 and 54 (*2021 GRECO Second Compliance Report for Spain*).

73 *Ibid.* para. 40 (*2021 GRECO Second Compliance Report for Spain*).

74 European Commission, Commission Staff Working Document, *2022 Rule of Law Report Country Chapter on the rule of law situation in Spain*, SWD(2022)509, 13 July 2022, pp. 5-6.

judge members of the GJC to ensure that more than half of the judge members are appointed by their peers. **Article 567 of the Organic Law on the Judiciary could be amended to specify that the twelve judge members in active service would be designated by the judiciary e.g., by assemblies of judges, while retaining the existing legislative requirement to respect the principle of parity between men and women.** It is also of utmost importance that the judiciary be consulted and have a say in the design of such a reform.[75]

RECOMMENDATION B.

To ensure that any future reform efforts address the issue of appointment of judge members of the GJC and consider amending Article 567 of the Organic Law on the Judiciary to specify that the twelve judge members in active service are designated by the judiciary e.g., by assemblies of judges, while retaining the existing legislative requirement to respect the principle of parity between men and women.

4.2. Voting Threshold for the Nomination of Constitutional Court Magistrates by the GCJ

50. The Draft Amendments to the Organic Law on the Judiciary were seeking to modify the voting procedure by which the GCJ nominates the two magistrates of the Constitutional Court. The proposed Article 599 (1) (1ª) (1) (1 sub-paragraphs a-b) of the Draft Amendments stipulated that in the event the currently envisioned majority (three-fifths of the GCJ members) required to support the nomination of two magistrates was not achieved within three months from the expiration of the previous term of office, "… *whoever is the President of the Council, incumbent, interim or in office, shall adopt, the day following the expiration of the three-month period, an agreement to initiate the procedure for the appointment of said Magistrates*".

51. Under the proposed new procedure, (1) within five working days, each member of the GCJ may propose one candidate to "*whomever holds the presidency*"; (2) once nominations have closed, "*the person who exercises the presidency, within a period of three working days*" convenes an extraordinary plenary session to proceed with the election of two magistrates; (3) such session shall be held within a maximum period of three working days from its convocation; (4) presented nominations are submitted for a vote by the present members "*without the need for a minimum quorum*" in an open and single vote; (5) each member may vote for a single candidate, and the two candidates who secure the highest number of votes will be deemed nominated to the Constitutional Court. In the event of a tie, "*the President, incumbent, interim or in office*" has a decisive vote.

52. The current Articles 599 (1) (1) and 600 (4) of the Organic Law of the Judiciary require a vote by a 3/5th majority for proposing for appointment two members of the Constitutional Court and a quorum of ten members and the President of the GCJ for the Plenary to be valid, respectively. Generally, such qualified majorities aim to ensure

[75] GRECO, *Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Spain*, 25 March 2021, para. 43.

broad agreement and consensus, ensuring in principle that the majority will seek a compromise with the minority.[76]

53. The proposed amendments and new procedure were aiming to overcome a decision-making deadlock within the GCJ. At the same time, the Draft Amendments were not encouraging consensus-building among the GCJ members by providing for decreasing majority or even a minority of votes for nominating a candidate, as well as by vesting "*the President, incumbent, interim or in office*" with a decisive vote in case of a tie. The current proposed solution could lead to a minority vote being the decision of the GCJ.

54. While it is indeed important to consider the introduction of tailor-made, effective deadlock-breaking mechanisms in order to ensure the continued functioning of state institutions,[77] such as the GCJ, such a change would warrant further consideration to maintain the integrity and legitimacy of the process.[78] As mentioned, any such fundamental change of the voting modalities within the GCJ should be proposed following meaningful and inclusive consultations. Appropriate transitional measures could also be considered in order not to create a perception that legislative reform is benefitting a political majority. Any anti-deadlock mechanism needs to be devised carefully in order to be effective and not to be perceived as undermining an objective of seeking consensus.[79] The primary function of the deadlock-breaking mechanism is to push the majority and the minority to find a compromise to avoid the crisis or malfunctioning of an institution; therefore such a mechanism should continue to incentivise the majority and the minority to seek an agreement, which may not be the case with rapidly decreasing a requirement for a qualified majority.[80]

55. The challenges of designing appropriate and effective anti-deadlock mechanisms must be acknowledged as there is no single model. Various solutions could be explored in this respect. For example, the participation in the vote could be made mandatory in order to have the required quorum for the Plenary of the GCJ whilst prohibiting abstention, except for grounds provided for in law. As underlined by the Venice Commission, beyond decreasing majorities in subsequent rounds of voting, which may not reach the intended goal, it is also possible to have recourse to the involvement of other,

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[76] See e.g., Venice Commission, *Opinion on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland*, and on the Act on the Organization of Ordinary Courts (CDL-AD(2017)031), para. 20; see also section 4.3.1 of *the Compilation of Venice Commission opinions, reports and studies on constitutional justice* (CDL-PI(2020)004)).

[77] See e.g., *Compilation of Venice Commission. Opinions and Reports Related to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial Council and Prosecutorial Councils and the Ombudsman*, p. 5, where it is emphasized that "…*a qualified majority and the ensuing risk of paralysis of dysfunction of an institution –in particular "safeguard institutions" — should not lead to abandon the requirement of a qualified majority but rather to devise tailor-made, effective deadlock-breaking mechanisms*". See also Venice Commission, *Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015*, CDL-AD (2015)027, para. 25, which acknowledges that a qualified majority can lead to a stalemate between majority and opposition, but notes that "…*this can be overcome through specific anti-deadlock mechanisms"*.

[78] According to Opinion no. 1 (2001) of the CCJE, "*every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria*." See also *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law on the draft law on amending and supplementing the constitution with respect to the superior council of Magistracy*, 20 March 2020 (CDL-AD(2020)001), para. 51.

[79] See e.g., Venice Commission, *CDL-AD(2018)015, Opinion on the draft law on amendments to the Lax on the Judicial Council and Judges of Montenegro*, paras. 11-15, where it is emphasized that: "*A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state*." The Venice Commission has also noted that "…*an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process*" - see *Compilation of Venice Commission. Opinions and Reports Related to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial Council and Prosecutorial Councils and the Ombudsman*, p. 24.

[80] See *Compilation of Venice Commission Opinions and Reports Related to Qualified Majorities and Anti-Deadlock Mechanisms in Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial Council and Prosecutorial Councils and the Ombudsman*, p. 13.

independent or more neutral institutional actors or consider establishing new relations between state institutions but each state has to devise its own formula.[81]

56. Of note, the timelines in the Draft Amendments include short, expeditious deadlines i.e. "within 5 working days", "within 3 days", "a maximum period of 3 working days", which may not appear appropriate. The election of constitutional judges is a serious matter that deserves, even in the case of a deadlock, sufficient time at each stage of the nomination procedure (candidacy proposals, convening of the plenary session, delay before this session etc.).

57. The predominant role of the "chairperson" of the GCJ should also be approached with caution as it may not be conducive to collegiality among the GCJ members.[82] The fact that "*the President, incumbent, interim or in office*" has the final say in the decision for a nomination cannot exclude political or other considerations may prevail over merit.

58. **In light of the foregoing, while maintaining a minimum quorum for the GCJ voting session and a qualified majority for votes on nominees for the position of Constitutional Court magistrates at the initial stage, to avoid stalemate in the future, the legislator should consider introducing tailor-made, effective deadlock-breaking mechanisms though without compromising the role and independence of the GCJ and ensuring adequate time for each stage of the process. In any case, the design of such anti-deadlock mechanisms should be the subject of meaningful, inclusive and extensive consultation with all the interested stakeholders, including representatives of the judiciary, and more generally representatives of civil society** (see Section III.6 below).

59. At the same time, it is worth emphasizing that even where the voting process within the GCJ is changed to diffuse the deadlock situation, the underlying issues pertaining to the GCJ's independence as addressed under Section 3 will persist.

RECOMMENDATION C.

C.1 To maintain a minimum quorum for the GCJ voting session and a qualified majority for votes on nominees for the position of Constitutional Court magistrates at the initial stage, while introducing tailor-made, effective deadlock-breaking mechanisms which do not jeopardize the role and independence of the GCJ and ensure adequate time for each stage of the nomination process.

C.2 To ensure that the design of such anti-deadlock mechanisms is subject to inclusive and extensive consultation with all the interested stakeholders and representatives of the judiciary, and more generally representatives of civil society.

[81] See e.g., Venice Commission, *Montenegro - Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council*, CDL-AD(2013)028, paras. 5-8; and *Tunisia - Opinion on the Draft Institutional Law on the Constitutional Court*, CDL-AD(2015)024, para. 21. See also *Final Opinion on the Revised Draft Constitutional Amendments on the Judiciary of Albania*, CDL-AD (2016)009, para. 37, which refers to the "*the nomination of candidates by other neutral bodies after several unsuccessful votes*."

[82] The Venice Commission has noted the importance of the "collegiality" in a number of reports regarding the composition and functioning of courts, including constitutional courts, which could be similarly applicable to judicial councils. See for example the *Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997)Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997)*, which provides that *"Collegiality, i.e. the fact that the members adjudicate as a group, whether or not they deliver separate opinions, constitutes a fundamental safeguard in this respect."*

4.3. Some Aspects of Criminal and Disciplinary Liability

60. The Draft Amendments proposed to add to Article 599 (1) (1[a]) of the Organic Law of the Judiciary a provision (1.1[c]) that provided that where the proposed new voting modalities of the nomination as envisaged by Article 599 (1) (1[a]) (1.1[b]) of the Draft Amendments were breached, both **"***intentionally and by negligence*", the respective President or members of the GCJ shall be subject to "*responsibilities of all kinds deriving from the legal system, including criminal ones*". This provision did not cross-reference the relevant legal provisions nor refer to any specific form of liability apart from a broad reference to all kinds of responsibility including criminal. As such, the said provision is questionable in term of its compliance with the principles of legal certainty and foreseeability. Furthermore, imposing criminal liability for the sole reason of failing to respect voting modalities is clearly disproportionate and may create a chilling effect, undermining the independence of the GCJ members and of the entire institution.

61. With respect to the accountability of individual members of a judicial council, the CCJE provides that "*the members of a council for the judiciary must live up to the highest ethical standards and must be held accountable for their actions through appropriate means…* [and] *should not be immune from prosecution under the general criminal law*."[83] However, it underlines that such means "*…must be regulated and applied in a way that does not allow their abuse to infringe the independence and functioning of a council for the judiciary*."[84] It further notes that judicial councils "*should develop standards of professional and ethical behaviour for their judicial and lay members and internal procedures for investigating shortcomings*" and that members must adhere to the values of independence, impartiality and integrity. [85]

62. Currently, the members of the GCJ may be criminally prosecuted. A criminal charge has to be brought before the Supreme Court. A three-fifths majority of the GCJ can expel a member for serious breach of his or her duties. Still, as for any judge, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general and vague definition is good practice.[86] **In this respect, a more detailed list of disciplinary offences relating to the misconduct of GCJ members, and the corresponding range of proportionate sanctions should be provided by the legislation**. **In any case, criminal liability should not be triggered for actions that would otherwise fall under functional immunity of the council members, including voting in council meetings, unless they constitute a criminal offence such as bribery, corruption or traffic of influence and similar offences that cannot be considered as acts committed in the lawful exercise of their functions. Save for these latter situations, criminal liability for failing to nominate a candidate should be excluded.** In this respect, the CCJE notes that disciplinary and criminal liability of council members is an important aspect of punitive accountability and that fair trial rights of the members must be respected and that decisions taken in this context must be given with reasons and be open to judicial review.[87]

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[83] *CCJE Opinion no. 24 (2021)*: Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 16.

[84] *Ibid.* para. 16 (*CCJE Opinion no. 24 (2021)).*

[85] *Ibid.* para. 17 (*CCJE Opinion no. 24 (2021)).*

[86] See ODIHR and Venice Commission, *Joint Opinion* on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, CDL-AD(2014)006, para. 15. See also *the CCJE, Opinion no. 3 (2002)* on Ethics and Liability of Judges, paras. 63-65.

[87] *CCJE Opinion no. 24 (2021)*: Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 17.

63. Any vague implication of misconduct due to imprecise wording on liability may have a chilling effect on the members' independent and impartial functioning and may also be abused to exert undue pressure.[88] The related disciplinary procedure against council members will need to present proper safeguards with reasoned decisions, which are published and may be reviewed by an independent court.

RECOMMENDATION D.

D.1 To provide in legislation when a misconduct by a GCJ member amounts to a disciplinary offence, a more detailed list of such disciplinary offences and the corresponding range of proportionate sanctions.

D.2 To ensure that criminal liability should not be triggered for actions that would otherwise fall under functional immunity, including voting in council meetings, unless they constitute a criminal offense such as bribery, corruption or traffic of influence and similar offences that cannot be considered as acts committed in the lawful exercise of GCJ members' functions.

5. VERIFICATION OF THE NOMINEES BY THE CONSTITUTIONAL COURT

64. The Draft Amendments were seeking to remove Articles 2 (1)(g) and 10 (1)(i) of the Organic Law on the Constitutional Court. In essence, this would have eliminated the verification by the Constitutional Court's administrative Plenary (*El Pleno Gubernativo*) through which it determines whether the nominated Constitutional Court magistrates fulfil constitutional and legislative requirements.[89] Instead, the Draft Amendments would have delegated the verification powers to "*the proposing bodies provided for in Article 159 (1) of the Constitution*," who would have had the constitutional and legal obligation to verify that candidates meet the requirements specified in Article 159 (2) of the Constitution[90] (see proposed Article 19 (3) of the Organic Law on the Constitutional Court). The Draft Amendments further specified that "*If whoever is appointed as Magistrate knows that he/she does not meet one of these requirements, he/she must make that clear before taking office*." In addition, the proposed change to Article 23 (1) of the Organic Law on the Constitutional Court would have introduced an additional ground for removal of a Constitutional Court magistrate, namely the non-compliance with the requirements set forth in Article 159 (2) of the Constitution.

65. The reasoning to the Draft Amendments noted that the Constitutional Court makes "*little use of this ex post control*" as the verification of the nominees with the requirements

[88] See, with respect to judges: *ODIHR Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland*, 14 January 2020, para. 70. See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court on the Criminal Liability of Judges*, CDL-AD(2017)002-e, para. 48, which states: "*Vague, imprecise and broadly-worded provisions that define judges' liability may have a chilling effect on their independent and impartial interpretation of the law, assessment of facts and weighing of evidence. Regulations of judges' liability that lack these qualities may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality*".

[89] This is also reflected in the Draft Fourth Transitional Provision.

[90] This provision provides: "*Members of the Constitutional Court shall be appointed among magistrates and prosecutors, university professors, public officials and lawyers, all of whom must have a recognized standing with at least fifteen years' practice in their profession*".

established in the Constitution and the laws is carried out by the nominating body according to their respective procedures and modalities.[91] As for nominations by the Government and the GCJ specifically, the reasoning stated that "*since the requirements are considered to be regulated elements of discretionary acts*", based on case law, the relevant administrative court has the competence to rule on the suitability of the appointments if an appeal were to be lodged against them.

66. An *a priori* verification by the Constitutional Court serves as an additional check for ensuring compliance with the constitutional requirements. While it is noted that the reasoning refers to the lack of use of this mechanism, the rationale for removing this verification does not offer an adequate assessment of its potential impact on the integrity of the whole nomination process as well as the post-appointment stability of the institution of the Constitutional Court.

67. If the verification is removed from the Constitutional Court's mandate, it is important to ensure that the legislation provides for an effective alternative. The solution proposed by the Draft Amendments remained unclear as to the modalities and form for such verification by the respective nominating authorities. **In any case, there should be an effective independent mechanism to ensure respect for and compliance with constitutional and legal requirements, at least when a grave breach of a fundamental rule of procedure has been committed** (see also para. 71 below).[92] This is essential first because compliance with the constitution and other applicable rules has a direct impact on the constitutional authority and legitimacy of the Constitutional Court.[93]

68. Furthermore, the reliance on the self-assessment of a nominee to determine their fitness to serve on the Constitutional Court appears problematic. If there are mechanisms, as stated in the reasoning of the Draft Amendments, for each of the chamber of the Parliament to assess the compliance with the constitutional and legal requirements, it could be questioned if there is a need to add that a nominee should express that they do not meet such requirements only "before taking office". The said mechanisms should suffice for that purpose.

69. In any case, if the verification of compliance with the constitutional and legal requirements is removed from the competence of the Constitutional Court, **it is recommended to clarify the scope, content, criteria and modalities of the verification process to be carried out by the respective nominating authorities, to assess candidates' ability, integrity and experience and ensure a merits-based nomination process by each of the nominating bodies. In this regard, it is of utmost importance that the nomination and election procedures are guided by clear and objective criteria by which the integrity and credibility of these procedures are guaranteed and politicization is rooted out**. Especially, the development of guidelines and explanations, reflecting good practices related to formal requirements for

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[91] See, for the Senate and for the Congress, *Rules of Procedure of the Senate*, Articles 184 to 186; and *Rules of Procedure of the Congress of Deputies*, Articles 204 to 206.

[92] See Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, para. 48; *Universal Charter of the Judge* (1999, as last updated in 2017), adopted by the International Association of Judges, Articles 5-2 para. 3; ENCJ, *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.10. See also *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), Principle 17, which states that *"[d]ecisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality*"; and Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020, 15 October 2012, para. 56. See also ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. 26374/18, judgment of 1 December 2020), paras. 272 and 278-286.

[93] See e.g., CCJE, *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, para. 14.

candidature and to the openness, transparency and fairness of the process would help to ensure the establishment of a merit-based selection process and that the four nominating authorities recommend individuals with the best qualifications, competences and qualities to carry out their roles in the most professional and proficient manner (see Sub-Section 3.2).

70. The above-mentioned considerations are even of more significance when read together with the new removal ground proposed by the Draft Amendments in case of non-compliance with constitutional and legal requirements for candidates of the Constitutional Court. Any ground for removal touches upon the security of tenure and irremovability of Constitutional Court magistrates, which are integral parts of the guarantee of their independence.[94] Articles 10 (1) (l) and 23 (1) of the Organic Law on the Constitutional Court provide other removal grounds and that the full court by 3/4th majority can decide on the dismissal in certain cases, such as for the proposed new removal ground. Exceptions to the principle of irremovability of judges need to be limited to specific cases that are clearly set out in law, and decisions to remove judges should not be taken lightly, or in a summary manner.[95] States have a duty to establish clear grounds for removal of judges and appropriate procedures to this end, and this is similarly applicable to judges of constitutional courts.[96] It is essential to sanction irregularities in a given judicial appointment procedure though this should be of such gravity as to entail a violation of the right to a "tribunal established by law" provided by Article 6 par 1 of the ECHR (i.e., going beyond breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process).[97] The ECtHR held that a balance must be struck in such instances to determine whether "…*there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of […] irremovability of judges, as relevant, in the particular circumstances of a case*."[98]

71. As underlined in previous ODIHR opinions, while there should be a mechanism to address irregularities during the process of appointing Constitutional Court judges, including non-compliance with constitutional and legal requirements, this should be done on the basis of **clearly defined grounds and procedure, with an exhaustive list of those eligible to bring such cases and only within a reasonable (rather short) timeframe following appointment**.[99] Indeed, it would be problematic to allow for such a procedure at any moment during a Constitutional Court magistrate's term of office as this may not only potentially undermine the independence of the said magistrate and the Court in general, but may also lead to questioning the legality of decisions made with participation of such (allegedly) unduly appointed magistrate(s) and affect the stability of the institution, and thus should be dealt with great caution.[100] There should also be safeguards to prevent the misuse for political purposes of such procedure leading to termination.[101] **Any mechanism to identify and address irregularities of the**

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94 Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010, para. 49.

95 See ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, 30 August 2017, para. 67.

96 See Principles 17-19 of the *United Nations Basic Principles on the Independence of the Judiciary*.

97 See ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC] (Application no. 26374/18, judgment of 1 December 2020), paras. 253-262. See also para. 267, where the ECtHR held that the participation in the trial of the applicant of a judge whose appointment had been undermined by grave irregularities had impaired the very essence of that right.

98 *Ibid.* para. 240 (*Guðmundur Andri Ástráðsson v. IcelandGuðmundur Andri Ástráðsson. v. Iceland)*.

99 See e.g., ODIHR, *Urgent Opinion on the Draft Constitutional Law on the Constitutional Court of Kazakhstan*, 30 September 2022, para. 61.

100 *Ibid.*

101 See e.g., *CCJE Opinion no. 24 (2021)*, Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 5 November 2021, para. 38, where the CCJE notes in this respect that "…*The procedure which may lead directly or indirectly to termination of office shall not be misused for political purposes but respect fair trial rights* [of the concerned judge]."

nomination/appointment process should be devised with these considerations in mind. Generally, the decision on a violation of the procedure of appointing a judge to the Constitutional Court should be taken by the Court itself, without the participation of the judge concerned, and not an ordinary court.[102] If a ground for removal of a Constitutional Court magistrate on this basis is indeed considered, and is deemed to fall outside the scope of the removal grounds currently provided in Article 23 (1) of the Organic Law on the Constitutional Court, it should be very carefully circumscribed to **only apply where irregularities of the appointment procedure are of such gravity as to entail a violation of the right to a "tribunal established by law" provided by Article 6 (1) of the ECHR. Moreover, adequate safeguards and procedure should be in place to ensure an effective due process, including judicial review in this case.**

RECOMMENDATION E.

E.1. To ensure that there is an effective independent mechanism to verify the compliance with constitutional and legal requirements for appointment as Constitutional Court magistrate, to avoid any appearance of corporatism or politicization of the verification process, to ensure the integrity of the procedure and maintain stability of the Court.

E.2. To ensure that any mechanism to identify and address irregularities of the nomination process should be devised on the basis of clearly defined grounds and procedure, with an exhaustive list of those eligible to bring such cases and only within a reasonable (rather short) timeframe following appointment.

E.3. To clarify that only irregularities which are of such gravity as to entail a violation of the right to a "tribunal established by law" could lead to removal of the respective magistrate and that adequate safeguards and procedure should be in place to ensure an effective due process, including judicial review in this case.

6. PROCEDURE FOR ADOPTING THE AMENDMENTS

72. These Draft Amendments were included in the legislative proposal for an *Organic Law on the Transposition of European Directives and other Provisions for the Adaptation of Criminal Legislation to the European Union, and Reform of Crimes against Moral Integrity, Public Disorder and Dual-use Weapons Smuggling*. There seems to be lack of a relationship between the Draft Amendments and the legislative initiative in which the proposal was included. It is understood that the Draft Amendments were voted by Congress on 15 December 2022, shortly after their introduction on 12 December 2022. The timeline indicates that the process was expedited and did not allow for the organization of open, inclusive and effective consultations. Whether meaningful discussions within and outside the Parliament were organized, with a view to facilitate consensus amongst key stakeholders is also questionable. It is also unclear whether a proper impact assessment was carried out and has been contemplated prior to initiation of the legislative changes. The introduction of the Draft Amendments through legislation for transposing certain EU legislation, that are unrelated to the subject matter

[102] See e.g., ODIHR, *Urgent Opinion on the Draft Constitutional Law on the Constitutional Court of Kazakhstan*, 30 September 2022, para. 61. See also Venice Commission, *Armenia - Opinion on amendments to the law on the Constitutional Court*, CDL-AD(2006)017, para. 20, where the Venice Commission recommended that "*the decision on a violation of the procedure of appointing a judge to the Constitutional Court should be taken by the Court itself and not an ordinary court*".

of the Draft Amendments, raises further concerns as to the legitimacy of the legislative process, especially as the proposed changes concerned fundamental changes in the institutional mechanisms for appointment to the highest court of the country.

73. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, para. 5.8).[103] Moreover, key commitments specify, *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[104] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[105]

74. ODIHR would like to reiterate that it is a good practice when initiating fundamental reforms of the judicial system that the judiciary, civil society and other relevant stakeholders are consulted and should play an active part in the process. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.[106] Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions,[107] unless exigency of the matter justifies urgent action. To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,[108] meaning not only when the draft is being prepared but also when it is discussed before Parliament. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in the institutions in general. In that respect, the brevity of the discussions and lack of consultations in absence of any information justifying urgent action when developing the Draft Amendments are at odds with these principles and good practices.

75. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "*the importance of judges participating in debates concerning national judicial policy*" and the fact that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".[109] The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues affecting their work, to ensure that judges are not left out of the decision-making process in these fields.[110]

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[103] See *1990 OSCE Copenhagen Document*.

[104] See *1991 OSCE Moscow Document*.

[105] See Venice Commission, *Rule of Law Checklist*, Part II.A.5.

[106] See *ODIHR Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland*, 14 January 2020, paras. 101-102.

[107] See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

[108] See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), paras. 33-34. See also e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs.

[109] CCJE *Opinion no. 18 (2015)*, para. 31, which states that "*the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system*".

[110] European Association of Judges, *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), para. 1.8. See also 2010 CCJE Magna Carta of Judges, para. 9, which states that *"[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)*"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities*

76. As mentioned in the Introduction, while the deadlock has been overcome in this specific case, it will be useful to initiate a more in-depth reflection of the necessary changes to avoid similar stalemate in the future, especially since as mentioned above, any proposed legislative change should contemplate an appropriate transitional period allowing for a gradual change to prevent that it is used or perceived to be used by the political majority to change the composition of the Constitutional Court or other judicial bodies to its advantage.[111] This is notwithstanding potential imminent changes that may be required exceptionally, for instance, due to an unforeseen extreme circumstance. However, in all cases, respect for the principle of judicial independence should be upheld and an open, transparent, inclusive and participatory process throughout the development of policy and legislative options should be ensured, whilst these changes should be implemented in line with the constitutional provisions and norms of international law.

77. Any future reform process relating to the judiciary, especially of this scope and magnitude, **should be open, transparent, inclusive, and involve effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations, should allow sufficient time for meaningful discussions in the legislative body and should involve a full impact assessment including of compatibility with relevant international human rights and rule of law standards, according to the principles stated above. Adequate time should also be allocated for all stages of the policy- and law-making process.** It would be advisable for relevant stakeholders to follow such principles in future legal reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

RECOMMENDATION F.

To ensure that any future legal reform process relating to the judiciary and Constitutional Court, especially of this scope and magnitude, involves a full impact assessment including of compatibility with relevant international human rights and rule of law standards, allows for debate within the Parliament, and is transparent, inclusive, and involves extensive and effective consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations, with adequate time allocated for each stage of the policy- and law-making process.

[END OF TEXT]

for the Judiciary in the Current Economic Climate, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms"*.

[111] See e.g., Venice Commission, CDL-AD(2020)016, *Armenia - Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court*, para. 38.