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(VENICE COMMISSION)

CHILE

OPINION

**ON THE DRAFT CONSTITUTIONAL AMENDMENTS IN RESPECT OF
THE JUDICIARY**

**Adopted by the Venice Commission
at its 143rd Plenary Session
(online, 13-14 June 2025)**

on the basis of comments by

**Mr Richard BARRETT (Member, Ireland)
Ms Nina BETETTO (Member, Slovenia)
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I. Introduction

1. By letter received on 12 February 2025, the Minister of Justice of Chile, Mr Jaime Gajardo Falcón requested an opinion of the Venice Commission of the Council of Europe on the Draft Constitutional Amendments in respect of the Judiciary (CDL-REF(2025)020 hereinafter “the draft amendments”).

2. Mr Richard Barrett, Ms Nina Betetto and Mr Martin Kuijer acted as rapporteurs for this opinion.

3. On 21-23 April 2025, a delegation of the Commission composed of Ms Nina Betetto and Mr Martin Kuijer accompanied by Ms Delphine Freymann, Deputy Secretary of the Commission, travelled to Chile. The Venice Commission delegation met in Santiago de Chile with the Minister of Justice and Human Rights, the Ministry for Foreign Affairs, the Supreme Court, the Constitutional Tribunal, the Presidents of the Santiago and San Miguel Courts of Appeals, the Judicial Academy, representatives of civil society, professional associations and academia, as well as representatives of the international community. The delegation met with representatives of the Senate and of the Chamber of Deputies in Valparaíso. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.

4. Following the visit, the rapporteurs have received written complementary information from various interlocutors. In their written comments, the Chilean authorities informed the Commission of a number of changes to the draft amendments adopted by the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies, which have been taken into account in the present opinion.

5. This opinion was prepared in reliance on the English translation of the Draft Constitutional Amendments in respect of the Judiciary. The translation may not accurately reflect the original version on all points.

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Santiago de Chile and Valparaíso from 21 to 23 April 2025. The draft opinion was examined at the Joint meeting of the Sub-Commissions on the Judiciary, on the Rule of Law and on Latin America on 12 June 2025. Following an exchange of views with Mr Ernesto Muñoz, Undersecretary of Justice, Ministry of Justice and Human Rights of Chile, it was adopted by the Venice Commission at its 143rd Plenary Session (online, 13-14 June 2025).

II. Background and scope of the opinion

A. Previous attempts of Constitutional reforms

7. The current constitution of the Republic of Chile was adopted in 1980 during the Pinochet regime. It was amended for the first time in 1989 (through a referendum) and afterwards almost 70 times. In September 2005, under Mr Ricardo Lagos' presidency, extensive amendments of the Constitution were approved by the Congress.

8. Since the return to democracy, several constitutional and legal reforms have been introduced to modify judicial governance and, especially, the judicial appointment system. In 1991, a Constitutional Reform Project on the Judiciary, National Council of Justice and Ombudsman, was submitted to the National Congress by former President Patricio Aylwin and former Minister of Justice Francisco Cumplido proposing the creation of a National Council of Justice. It was followed by a proposal by former President Sebastián Piñera including a constitutional reform bill and a legal reform bill proposing the creation of a National Judicial Appointments Commission. None of these initiatives has been enacted.

9. On 24 December 2019, after civil unrest which led to an agreement (*Acuerdo por la paz social y la nueva constitución*) amongst almost all political parties on the preparation of a new constitution, a constituent process was launched. A Constitutional convention, directly elected in May 2021, prepared the text of the new constitution. Regarding the judiciary, this proposal created a Council of Justice - an autonomous body - in charge of “appointments, government, management, training and discipline in the National Justice System”, which was composed of a total of seventeen members. The draft Constitution was submitted to a referendum (*plebiscito de salida*) on 4 September 2022.¹ The new constitution was however rejected by the Chilean people in the referendum (62% against, 38% pro, with a turnout of 85,8%).

10. After the referendum, on 12 December 2022, almost every political party signed an agreement, the “*Acuerdo por Chile*”, which laid down the rules for a new constitution-making process.² This resulted in another draft text and another referendum which was held on 17 December 2023. The second constituent process rejected the idea of a Council of the Judiciary, proposing instead that judicial government should be vested in four autonomous bodies, coordinated among themselves and with the Supreme Court, one of which should be in charge of judicial appointments. In particular, this body was responsible for making appointments or nominations for judicial ministers and prosecutors of the Supreme Court and the Courts of Appeals, judges, assistants to the administration of justice and other persons established by law. These appointments were to be made through a public competition based on objective factors, especially professional capacity, merit, probity and experience. This proposal maintained the participation of the Executive and the Senate in the process of appointing Supreme Court justices. The proposed constitution was again rejected by the Chilean people in the referendum (56% against, 44% pro, with a turnout of 84,5%).

11. In addition, various parliamentary motions for constitutional reform were put forward to modify the mechanisms for the appointment of judges in the Judicial Branch. Besides, a number of proposals were prepared by various universities in the country.

B. Purpose of the reform

12. In 2024, the judicial system in Chile faced a severe crisis due to several incidents of alleged corruption involving high-ranking judicial officers. As noted by the UN Special Rapporteur on the independence of judges and lawyers in her August 2024 statement,³ these incidents reinforced and amplified existing criticisms in respect of vulnerabilities in the judicial appointment process “*where political or personal considerations may overshadow merit-based appointments*”. The ensuing erosion of public trust in the judicial institutions led the government of President Gabriel Boric to address these pressing issues through the preparation of a draft constitutional reform of the judiciary which is the subject-matter of the present opinion.

13. In their message initiating a constitutional reform in respect of judicial governance (hereafter “the Message”),⁴ the President of the Republic and the Minister of Justice and Human Rights identify the following concerns in respect of the functioning of the judiciary. In the present system, the Supreme Court and the Courts of Appeal exercise broad governance powers: “*the judicial career and disciplinary responsibility depend on the same courts that jurisdictionally review the judgments of the lower courts*”. This also places a considerable work burden on those courts; the Message refers to the fact that these courts need to issue approximately 200 appointment decrees per year. At the same time, the system heavily relies on seniority without adequately assessing the candidates’ knowledge, skills and merit. Currently, securing an appointment or promotion “*depends mainly on the candidates’ ability to make direct or indirect efforts to obtain*

¹ Venice Commission, Chile, Opinion on the drafting and adoption of a new Constitution, [CDL-AD\(2022\)004](#).

² Venice Commission, Chile, Opinion on the 2023 Constitutional reform, [CDL-AD\(2023\)034](#).

³ [Statement](#) by the UN Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, at the end of her official visit to Chile, 9 August 2024.

⁴ [CDL-REF\(2025\)020](#).

support or vote commitments from the respective Court and, in the case of candidates for the highest magistracy, also from the Senate". Lastly, the Message refers to the use of a substantial number of lawyers who act as substitute judges and the risk of conflicts of interest.

14. According to the Message, the proposed constitutional reform seeks to (i) separate judicial governance from the adjudicatory role of the judiciary, (ii) introduce a more transparent and merit-based process in respect of decisions affecting judicial appointments and other aspects related to the judicial career, (iii) regulate the management of conflicts of interests. To this end, the proposal is:

- (a) to create an autonomous body responsible for appointments (the Judicial Appointments Council);
- (b) to constitutionally acknowledge an autonomous body (the Council of the Administrative Corporation of the Judiciary) responsible for the administration and management of the resources of all courts of the Nation (with the exception of the Constitutional Court and the Electoral Courts);
- (c) to assign the disciplinary function to the Judicial Prosecutor's Office (*Fiscalía Judicial*) which will be responsible for ensuring the proper conduct of judges and for carrying out investigations into disciplinary breaches and violations of probity; and
- (d) to abolish the practice of lawyers acting as judicial substitutes (*abogado integrante*).

15. Most of the Venice Commission delegation's interlocutors in Chile underlined the need for judicial reform, in particular in respect of judicial appointments and judicial governance. Nevertheless, there exists a variety of views amongst stakeholders on the scope and modalities needed for this reform.

C. Scope of the opinion

16. The Venice Commission wishes to stress that while the scope of the reform is limited to the four areas mentioned above, it raises issues related to the overall strategy of a judicial reform that go beyond the object of the opinion. In particular, the issue of the human resources of the judiciary was mentioned in meetings with some interlocutors. The need for additional staff to support judges in primary and secondary courts was raised, as well as the insufficient number of judges requiring the substantial use of substitute magistrates, amongst which are lawyers acting as judicial substitutes (*abogado integrante*) (see below section III.F.). The Venice Commission delegation was also told that appointment procedures are often delayed causing problems in courts' operations. Some of the interlocutors also raised the issue of the lack of a strategy regarding mobility as well as judicial training. While the Venice Commission is not called to look into these matters, it nevertheless wishes to stress that they certainly need to be taken into account by the authorities in designing the reforms.

17. At the time of the Venice Commission delegation's visit to Chile, the draft constitutional amendments prepared by the Ministry of Justice were pending before the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies. At the time of the preparation of this opinion, there still does not exist a finalised or consolidated text of the draft amendments. In addition, the Commission is aware that the draft organic laws will only be prepared at a later stage after the adoption of the draft constitutional amendments (see section III. B. below) which makes it difficult to fully understand the implications of the reform at stake. Under these circumstances, the Commission's opinion cannot but be rather abstract and general. The aim of the present opinion is not to look into all provisions of the draft amendments in an exhaustive manner but to address the main issues, which in the view of the Venice Commission warrant further consideration and improvement. The absence of remarks on other aspects of the draft amendments should not be interpreted as their tacit approval.

18. The Commission aims to give a concrete contribution by providing information on international standards with a view to helping the drafters of the amendments to make their choices in the

most informed manner. Although Chile is not bound by European standards, certain elements of the European constitutional heritage that have universal relevance may be useful in interpreting and applying provisions of international law applicable to Chile.

III. Analysis

A. Reform process

19. As the Venice Commission has previously stated⁵ *“the process of introducing amendments to the Constitution should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution.”*⁶ Constitutional amendments should be the result of a “slow and incremental” process and should follow other procedures than those of everyday politics.⁷

20. The message of the President of the Republic and the Minister of Justice and Human Rights as well as the meetings held during the visit to Chile, show that for several years the above-mentioned concerns have attracted attention at both the academic and political levels and led to a profuse public debate on possible solutions to improve the system of judicial governance. This has resulted in the elaboration, by different actors, of a series of proposals for the reform of judicial governance including the system for the appointment judges. The Venice Commission delegation was informed that since 1990, more than 30 judicial reform bills have been presented, of which 12 originated in the Senate and 18 in the Chamber. According to the message, the preparation of the draft amendment has taken into consideration the different proposals submitted to the National Congress on the matter, from 1991 to date; the contributions and proposals made in the constituent processes of 2022 and 2023; the opinion that the Supreme Court has held in this regard since 2014; the opinion of the National Association of Judges and Magistrates, as well as the Preliminary Observations of the UN Special Rapporteur on the Independence of Judges and Lawyers, Margaret Satterthwaite, after her visit to the country in August 2023. The Venice Commission was also informed of the existence of working groups composed of Academics having met regularly in 2024. While some representatives of professional associations expressed concerns as to the inclusiveness of the consultation process, the reform process seems to have taken place in a transparent and consultative way so far. Consultation and inclusiveness do not necessarily lead to consensus, as there will inevitably be divergences of expectations and of political programmes and visions. The consultation should be meaningful but the responsibility for processing the input received through the consultation process and translating them into the text where appropriate rests with the legislator.

21. Given the fact that the proposed constitutional amendments concern the judiciary, a key institution in any state governed by the Rule of Law, it is essential to continue to have proper public consultations in the coming months before a parliamentary vote on these amendments.

B. Constitutional and statutory regulation

22. The draft amendments foresee in their transitional provisions that within one year from the publication of this constitutional reform in the Official Journal, the President of the Republic shall submit to the National Congress the bills for the organic laws referred to in the amendments. The Venice Commission is aware that this is the usual process in Chile but wishes to underline that it makes it difficult to fully understand the scope and modalities of the reform. In addition, the Venice Commission notes that various basic features are not covered by the draft constitutional

⁵ Venice Commission, Chile, Opinion on the 2023 Constitutional Reform, [CDL-AD\(2023\)034](#), para. 17.

⁶ Venice Commission, [CDL-AD\(2022\)031](#), Opinion on the draft constitutional amendments concerning the electoral system of Mexico, para. 21.

⁷ Venice Commission, [CDL-AD\(2010\)001](#), Report on Constitutional amendment, para. 75.

amendments but will be dealt with in a constitutional organic law. This raises the question which core issues should be dealt with on a constitutional level, and which issues can be delegated to subsequent organic laws.

23. The Venice Commission has previously noted⁸ that “*the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts*”, and that “*certain basic elements, such as the appointment, guarantees and powers of the judiciary, should be entrenched in the Constitution [...] to preserve the system of judicial governance from political fluctuations.*” Given that the appointment of judges is of vital importance for guaranteeing their independence and impartiality, the Venice Commission has previously recommended that the procedure for judicial appointments be regulated by the Constitution, while some States have chosen to entrench also eligibility criteria on a constitutional level. The Venice Commission therefore invites the authorities to regulate the main features of the proposed system in the constitutional amendments themselves and not in the subsequent organic laws.

C. Models of judicial governance

24. The Venice Commission wishes to stress that legal traditions and culture necessarily influence the development and successful implementation of judicial reforms. Totally disregarding them would risk creating a hurdle to the understanding, acceptance, and especially interpretation and application of the new rules by politicians, judges, the administration, the legal profession, academia, and all those who will be called upon to implement the reform. For these reasons, the Venice Commission is of the view that the national legal traditions should be duly taken into account when designing the judicial reform.

25. The Commission was explained by the Ministry of Justice that the draft amendments under consideration constitute only limited measures aimed to respond to specific issues to address the eroded trust in the judiciary. In view of the previous two failed constitutional processes, a more comprehensive reform is considered unlikely to be adopted.

26. One of the important aspects raised by a number of interlocutors during the visit is the specific nature of the Presidential system in Chile as well as the organisation of the judiciary that has existed for almost two centuries with a high degree of external independence based on the hierarchical structure that places the Supreme Court at the top of the organisation: the principle of hierarchy not only applies because of the regular system of review by higher courts by means of appeal, but also because of the role superior courts have in respect of aspects of a judge's career.

27. Recent reports from the Supreme Court, judges associations, academics as well as the authors of the ongoing reform have questioned the merit of such structure asserting that it may negatively affect the internal independence of judges. While external independence protects the judiciary from interference by other branches of government, internal independence addresses the relationships within the judicial hierarchy itself.⁹ This concept is particularly relevant to the Chilean context, where administrative, disciplinary, and appointment powers are concentrated with the Supreme Court. The Venice Commission's Rule of Law Checklist¹⁰ underlines “*that the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making*”

⁸ [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 22; See also [CDL-AD\(2016\)015](#), *Amicus Curiae* Brief for the Constitutional Court of the Republic of Moldova on the Right of Recourse by the State against Judges, paras. 48-49; [CDL-AD\(2024\)006](#), Opinion on the draft law on the Administrative Judiciary of Lebanon, para. 13.

⁹ European Court of Human Rights, *Parlov-Tkalčić v. Croatia*, application no. 24810/06, 22 December 2009; Council of Europe Recommendation [CM/Rec\(2010\)12](#) on judges' independence, efficiency and responsibilities, para. 22.

¹⁰ Venice Commission, Rule of Law Checklist [CDL-AD\(2016\)007](#), para. 72.

activity. “Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges¹¹ of the Consultative Council of European Judges (CCJE) emphasizes, inter alia, *“that the hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be the transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary.”*”

28. The Message of the President of the Republic and the Minister of Justice and Human Rights as well as a number of interlocutors met by the Venice Commission delegation during the country visit, referred to the problematic “besamanos” practice.¹² While there seemed to be a consensus amongst all the stakeholders met that the draft amendments would reduce opportunities for political influence in judicial careers and alleviate the concentration of power that has reportedly undermined internal independence, some concerns have been expressed that the reform would increase the risk of hampering external independence.

29. The Venice Commission notes that the reform is aimed at deconcentrating power from the Supreme Court and establishing a merit-based judicial appointment system. The drafters have made the choice of separating the functions (judicial appointment, disciplinary procedures, administrative management of the judiciary) between different bodies (Judicial Appointments Council, Judicial Prosecution) rather than merging all powers into a single council. The Venice Commission wishes to stress from the outset that there is no uniform model of judicial governance. There exists a wide variation, both in respect of institutional design as well as in respect of the mandate and powers of the various councils. It is worthwhile remembering that not all judicial councils have powers in respect of the career of individual judges such as appointments, transfers, disciplinary measures and dismissals.

30. The Venice Commission notes that the need for certain reforms of the judiciary in Chile are widely acknowledged, also by relevant stakeholders in the Chilean judiciary itself (see section above) and welcomes that the draft amendments proposed by the President and the Minister of Justice and Human Rights heed this call for reform. It is commendable that the Chilean authorities contemplate the establishment of autonomous councils in order to separate judicial governance from the adjudicatory role of the judiciary and to introduce a more transparent and merit-based process in respect of decisions affecting judicial appointments and all aspects related to the judicial career. The Venice Commission therefore supports the underlying rationale of the proposals. The Commission will look into the specific measures proposed in the following sections to assess whether they can satisfactorily achieve the aims of the proposed reforms in line with international standards.

D. Appointment of judges

1. Creation of a Judicial Appointments Council

a. Composition of the Judicial Appointments Council and method of election and status of its members

31. The draft amendments establish a new system for judicial appointments centred around the Judicial Appointments Council that will manage selection processes for judicial positions throughout the Chilean court system (new Article 76 bis). The Judicial Appointments Council will have a mixed composition of five members: a Supreme Court minister, a Court of Appeals

¹¹ CCJE [Opinion No. 1](#) on standards concerning the independence of the judiciary and the irremovability of judges, para. 68.

¹² The “besamanos” Practice: Career advancement depends heavily on candidates' ability to seek direct or in direct support from respective Courts through a practice known as “besamanos” (hand-kissing) or private audiences to express interest and provide information on qualifications. This practice is so ingrained in the internal culture that those who don't perform it are considered uninterested and disregarded during voting.

minister, a judge from the Judicial Branch, a representative appointed by the Council of Rectors of Chilean Universities (chosen from former law school deans), and a lawyer appointed by the President upon proposal from the High Public Management Council. The judicial members will be selected through a lottery system from lists of judges with at least ten years of experience and no disciplinary sanctions. All Council members will serve five-year terms without the possibility of re-election, except for replacements who served less than two years. During their terms on the Council, the judicial members will not exercise judicial functions but will return to their positions afterwards. External members of the Council will be subject to certain incompatibility rules, including a prohibition from practicing law. The reform specifies that the Council will have a technical secretariat appointed by the High Public Management Council (Management Council). In addition, the Council would have the power to transfer a judge “with good cause” to another court of equal rank.

32 In their written comments, the authorities informed the Commission that on 7 May, the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies approved a provision which changes the composition of the Council to the following members:

- (a) One Justice of the Supreme Court;
- (b) One Judge of a Court of Appeals;
- (c) Two professional judges from the Judiciary (an increase of one compared to the composition proposed in the original bill);
- (d) One representative appointed by the Council of Rectors of Chilean Universities, selected from among individuals who have served as deans of a faculty of law at one of its members institutions;
- (e) One lawyer of recognized professional or academic distinction, with no less than twenty years of legal practice, appointed by four-sevenths of the sitting members of the Chamber of Deputies, from a shortlist proposed by the Senior Public Management Council;
- (f) One lawyer of recognized professional or academic distinction, with no less than twenty years of legal practice, appointed by four-sevenths of the sitting members of the Senate, from a shortlist proposed by the Senior Public Management Council.

33. Contrary to what its name might suggest, the Judicial Appointments Council will be in charge of the selection process (based on competitions which may be entrusted to the Judicial Academy) and proposing shortlists of candidates for vacancies to the President of the Republic (with Senate confirmation for appointments to the Supreme Court). As regards the modalities of guaranteeing judicial independence, including in the context of appointments, the Venice Commission is not in favour of one single model. Methods of judicial appointments vary greatly according to different countries and their legal systems.¹³ The importance of a country’s legal culture and traditions has been pointed out and the Commission has given due consideration to the existence in a national judicial system of formal safeguards set out in the constitution and laws, and informal safeguards entrenched in the political culture and practice.¹⁴

34. The Commission underlines that international standards favour the extensive depoliticisation of judicial appointments. Political considerations should not prevail over the objective merits of a candidate. Under the Venice Commission’s 2016 Rule of Law Checklist, *“it is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so”*, while *“conferring a role on the executive [in decisions on the appointment and career of judges] is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation”*.¹⁵

¹³ Venice Commission, France - Joint Opinion on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures [CDL-AD\(2023\)015](#), para. 32.

¹⁴ Venice Commission, the Netherlands - Joint opinion on the legal safeguards of the independence of the judiciary from the executive power [CDL-AD\(2023\)029](#), paras. 8-9.

¹⁵ Venice Commission, Rule of Law Checklist [CDL-AD\(2016\)007](#), paras. 79, 81-82.

35. Over the last few decades, judicial councils have become a common feature in many legal orders as a mechanism for the governance of the judicial branch.¹⁶ Judicial councils have in common that they are responsible for the management of certain aspects of the judiciary. However, beyond that general statement, it is difficult to formulate more specific common features. Given the great variety, both in respect of institutional design as well as in respect of the mandate and powers, of the various judicial and prosecutorial councils, the Venice Commission has been hesitant to formulate hard rules and has instead promoted parameters which the legislator needs to meet.¹⁷

36. The Commission summarises these parameters here below, as they will be the main principles of reference for most of the following analysis:

- A balance needs to be struck between judicial independence and self-governance, on the one side, and the necessary accountability of the judiciary, on the other side, in order to avoid negative effects of corporatism within the judiciary. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.¹⁸
- At least half of the members of judicial councils should be judges elected or appointed by their peers. In its Opinions (most notably on Bulgaria¹⁹, Serbia²⁰ and France²¹), the Commission has made reference to the standard set in this respect by the Committee of Ministers of the Council of Europe, i.e. that “*not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary*”.²² This is a standard that has also been reflected in the case-law of the European Court of Human Rights (“ECtHR”).²³
- Corporatism should be counterbalanced by membership of other legal professions, the ‘users’ of the judicial system.²⁴ This representation is justified since the objectives of a judicial council relate not only to the interests of the members of the judiciary, but especially to general interests. Such non-judicial members may provide democratic legitimacy of the judicial council and a fresh perspective on what is needed to become or be ‘a good judge’. Merit is not solely a matter of legal knowledge, analytical skills or

¹⁶ The French Conseil Supérieur de la Magistrature is often considered to be the first modern judicial council (established in 1946), followed by the Italian Consiglio Superiore della Magistratura. Nowadays, the European Network of Councils of the Judiciary consists of members from 21 European countries (with the judicial councils from the United Kingdom being granted observer status).

¹⁷ See Venice Commission, Report on Judicial Appointments, [CDL-AD\(2007\)028](#), International Round Table – “Shaping judicial councils to meet contemporary challenges”, Rome (Italy), 21-22 March 2022, [CDL-PI\(2022\)005](#), General conclusions.

¹⁸ Venice Commission, Republic of Moldova, [CDL-AD\(2018\)003](#), Opinion on the Law on amending and supplementing the Constitution (Judiciary), para. 56; Venice Commission, Republic of Moldova, [CDL-AD\(2020\)015](#), Urgent Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft law on amending the law No. 947/1996 on Superior Council of Magistracy.

¹⁹ Venice Commission, Opinion on the Judicial System Act, [CDL-AD\(2017\)018](#), para. 14; Bulgaria, Opinion on draft amendments to the Criminal Procedure Code and the Judicial System Act, concerning criminal investigations against top magistrates, [CDL-AD\(2019\)031](#), para. 69; and Bulgaria, Urgent Interim Opinion on the draft new Constitution, [CDL-AD\(2020\)035](#), para. 44.

²⁰ Venice Commission, Serbia, Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, [CDL-AD\(2021\)032](#), para. 64; and Serbia, Opinion on three draft laws implementing the constitutional amendments on Judiciary, [CDL-AD\(2022\)030](#), para. 71.

²¹ Venice Commission, France, Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures, paras. 23-25.

²² Committee of Ministers of the Council of Europe, Recommendation [CM/Rec\(2010\)12](#) on the independence, efficiency and responsibilities of judges, para. 27.

²³ ECtHR, *Grzęda v. Poland* [GC], application no. 43572/18, 15 March 2022, para. 305.

²⁴ Venice Commission, [CDL-AD\(2018\)003](#), op. cit., para. 56; Venice Commission, Bosnia and Herzegovina, [CDL-AD\(2014\)008](#), Opinion on the draft law on the High Judicial and Prosecutorial Council, paras. 30,31.

academic excellence. It also includes matters such as character, judgment, accessibility, communication skills, efficiency to produce judgements.²⁵

- The judicial component in a council should represent the whole judiciary. The Commission has recommended that there should be a balanced representation of judges from all different levels and courts and the widest possible diversity and representation of gender and regions.²⁶
- Non-judicial members should have the same protection as judicial members especially as concerns security of tenure and the right to a fair hearing in case of discipline, suspension, and removal, as a crucial precondition for the independence of the Council.²⁷ Any difference in treatment between judicial and non-judicial members should be duly justified.²⁸

37. The Venice Commission welcomes that at least a majority of the Council members are judges and that the law provides for a non-renewable term of office.²⁹ Equally, the Commission finds the proposed term of office of five years acceptable.³⁰

Judicial members

38. According to the draft amendments, the judicial members of the Council shall be appointed by means of a drawing of lots, conducted in accordance with the principles of integrity and transparency, from lists prepared by the Judicial Appointments Council. These lists shall consist of individuals with at least ten years of experience in the exercise of judicial functions and who have not been subject to disciplinary sanctions during that period. In their written comments, the Chilean authorities refer to the Chilean legal tradition, judicial culture, and the substantive reasons underlying the need for a change in judicial governance (see paragraph 13 above) to justify the selection by lots from lists, considering that the system is well suited to avoid hierarchical influence and the risks of corporatism within the judiciary, while enabling the selection of a qualified person with the requirements set out for integrating the lot.

39. The Venice Commission first wishes to stress that the draft amendments do not provide sufficient information in relation to the system envisaged. While the draft amendments foresee that the judicial members of the Council will be selected from lists of judges, they are silent on the manner these lists will be drawn up. The Commission considers that while not all details need to be regulated at the constitutional level, the constitution should establish a clear framework. The Venice Commission has recommended *“a well-balanced council, not only between the judicial and non-judicial members, but also among the judicial members so that they represent different types of judges and levels of the judiciary, while ensuring balance between the regions, gender balance etc.”*³¹ The Venice Commission recalls that at least half of the Council's members

²⁵ Venice Commission, Cyprus, Opinion on three Bills reforming the Judiciary, [CDL-AD\(2021\)043](#), paras. 50-51. See also: Rule of Law Checklist, [CDL-AD\(2016\)007](#), para. 82: “Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided.”

²⁶ Venice Commission, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, [CDL-AD\(2011\)010](#), paras. 20-22; The Netherlands, Joint opinion on the legal safeguards of the independence of the judiciary from the executive power, [CDL-AD\(2023\)029](#), para. 42; Bulgaria, Opinion on the draft amendments to the Constitution, [CDL-AD\(2023\)039](#), para. 48.

²⁷ CCJE, [Opinion No. 24 \(2021\)](#), on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, paras. 37 and 38.

²⁸ The Netherlands, Joint opinion on the legal safeguards of the independence of the judiciary from the executive power, [CDL-AD\(2023\)029](#), paras. 55-56.

²⁹ Venice Commission, Republic of Moldova, Opinion on the law on amending and supplementing the constitution of the Republic of Moldova (judiciary), [CDL-AD\(2018\)003](#), paras. 52-53.

³⁰ Venice Commission, Türkiye, Opinion on the composition of the Council of judges and prosecutors and the procedure for the election of its members, [CDL-AD\(2024\)041](#), para. 60, in which the Commission found a term of office of 4 years ‘rather short’.

³¹ Venice Commission, Bulgaria, Opinion on the draft Amendments to the Constitution, [CDL-AD\(2023\)039](#), para. 48.

must be judges elected by their peers so as to provide for broad and fair representation of all levels and types of courts.³² On the basis of the information contained in the draft amendments, the Commission is unable to say whether the system envisaged provides for any form of election by peers, and whether the system meets the requirement of broad representation. The 10-years' experience does not appear relevant and sufficient in this regard. The Commission therefore recommends that the authorities develop further a system that complies with the requirement of election by peers and ensures diversity among the judges and courts.

40. As to the eligibility criteria, the draft amendments propose that candidates for the judicial component of the Council should have ten years of judicial experience and no disciplinary records. While these criteria aim to ensure experienced and professionally irreproachable representatives, they raise concerns about achieving a balanced and pluralistic representation of the judiciary as a whole. According to the Opinion no 10 (2007)³³ of the CCJE *"Members, whether judges or not, must be selected on the basis of their competence, experience, understanding of judicial life, capacity for discussion and culture of independence"*. The Venice Commission is of the opinion that the eligibility criteria for the appointment of members to the Judicial Appointment Council which the draft amendments are relying upon do not reflect such expertise. Members ought to be elected based on their capacity, competence, experience and understanding of judicial life. The ten-year experience requirement significantly limits the pool of eligible candidates to senior judges. It is worth noting that such a significant minimum experience requirement is not common in countries with a judicial council. The absence of disciplinary sanctions as an eligibility criterion is reasonable in principle, but the extent of this requirement deserves careful consideration. A life-time ban for any disciplinary sanction, regardless of its severity or when it occurred, might be disproportionate and could further reduce the diversity of potential candidates. The Commission recommends requiring certain qualitative standards for those members (in terms of their performance appraisals and their disciplinary records). In addition, it recommends excluding persons convicted of criminal acts of a certain nature or severity.

Lay members

41. The Venice Commission wishes to reiterate that *"the purpose of electing lay members to a judicial council is to obtain a plural, democratically legitimised composition that can help to strengthen the council's external legitimacy and reduce the negative aspects (and deviations) of corporatism."*³⁴ The draft amendments initially defined two lay members, namely a representative appointed by the Council of Rectors and a lawyer appointed to the Council by the President of the Republic, upon the proposal of the High Public Management Council. On 7 May, the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies reportedly changed it to three lay members, namely: one representative appointed by the Council of Rectors of Chilean Universities, selected from among individuals who have served as deans of a faculty of law at one of its members institutions; one lawyer of recognized professional or academic distinction, with no less than twenty years of legal practice, appointed by four-sevenths of the sitting members of the Chamber of Deputies, from a shortlist proposed by the Senior Public Management Council; one lawyer of recognized professional or academic distinction, with no less than twenty years of legal practice, appointed by four-sevenths of the sitting members of the Senate, from a shortlist proposed by the Senior Public Management Council.

³² Venice Commission, France, Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Superior Council of Magistracy and the Status of the Judiciary as Regards Nominations, Mutations, Promotions and Disciplinary Procedures of France [CDL-AD\(2023\)015](#), para. 31.

³³ CCJE, [Opinion No. 10](#) (2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, at paras.18-21.

³⁴ Venice Commission, Türkiye, Opinion on the composition of the Council of judges and prosecutors and the procedure for the election of its members, [CDL-AD\(2024\)041](#), para. 45.

42. The Commission welcomes the change in the draft amendments as reported in the authorities' written comments, shifting the appointment of two of the lay members from the President of the Republic respectively to the two Chambers of the Congress, with a qualified majority based on a shortlist by the Senior Public Management Council. The Venice Commission has previously stated that *"In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest"*³⁵, *most preferably with a qualified majority of votes.*"³⁶ The Commission is of the opinion that having the Council of Rectors involved in the process of the third lay member is to be welcomed. While noting that the current criteria are based on seniority for two lay members (being a former Dean; having 20 years of legal work experience; lawyer with no less than twenty years of legal practice) which may limit generational diversity, the third lay member foreseen by the 7 May revised amendments should be a lawyer of recognized professional or academic distinction. The Venice Commission considers that maintaining a legal background for lay members is appropriate, given the foreseen competences of the Council. Since the Council will focus specifically on judicial career matters rather than administrative/management functions, legal expertise is essential for evaluating candidates' qualifications and understanding the requirements of judicial roles.

b. Size and representativity of the Judicial Appointments Council

43. The Commission recalls that is important that the composition of the Council, in numbers and categories of its members, be adapted to the nature, status, dimension and relevance of the judicial system in a given State. In this respect, it is relevant to recall the above-mentioned principle that the judicial component in a council should represent the entire judiciary and should respect the pluralism within the judiciary. Hence, there should be a balanced representation of judges from all different levels and courts and the widest possible diversity and representation of gender and regions (see standards reported above).³⁷

44. In comparison to other judicial councils, the proposed Council consists of a rather low number of members. Previous recommendations on this issue concerning the numbers of members, typically refer to councils with a broader list of functions. Opinion No. 10 (2007) of the CCJE observes that *"membership of the Council for the Judiciary should reflect the size of the judiciary and, consequently, the volume of tasks to be fulfilled."*³⁸ A judicial council of five members is not at odds with any international standard and has previously been accepted by the Commission.³⁹ A larger council would also more easily allow for representation *"from all different levels and courts and the widest possible diversity and representation of gender and regions"* as indicated above, especially in a country the size of Chile. The Commission takes notes of the authorities' written comments according to which on 7 May, the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies increased the composition to seven members instead of five. The Commission welcomes this increase both of the number of judicial and non-judicial members while maintaining an uneven number of members.⁴⁰

³⁵ Venice Commission, Report on Judicial Appointments by the Venice Commission, [CDL-AD\(2007\)028](#), para. 29. See also Republic of Moldova, Opinion on the Law on amending and supplementing the Constitution (Judiciary) [CDL-AD\(2018\)003](#), para. 54; Serbia, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia, [CDL-AD\(2008\)006](#), para. 76.

³⁶ Venice Commission, North Macedonia, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges, [CDL-AD\(2015\)042](#), para. 77.

³⁷ Venice Commission, Türkiye, [CDL-AD\(2024\)041](#) Opinion on the composition of the council of judges and prosecutors and the procedure for the election of its members.

³⁸ CCJE, [Opinion No. 10](#) (2007) on the Council for the Judiciary at the service of society, at para. 34.

³⁹ Venice Commission, Netherlands, Opinion on legal safeguards of the independence of the judiciary from the executive power, [CDL-AD\(2023\)029](#), para. 40.

⁴⁰ Venice Commission, Serbia, Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, [CDL-AD\(2018\)011](#), para. 59.

2. Appointment process for judges

45. The appointment process for judges, as established in the draft amendments, involves a two-stage procedure: first, the Judicial Appointments Council is responsible for managing selection processes based on merit and competitive examinations. According to the new Article 78, the Council prepares shortlists of candidates ranked in descending order based on evaluation results. Second, according to Article 32(12) and Article 78 as amended, the President of the Republic makes appointments from these shortlists. For Supreme Court ministers, the President's selection requires Senate approval following a public hearing, with resolutions requiring a two-thirds majority of Senate members in office. For other judicial positions (Court of Appeals ministers, judicial prosecutors,⁴¹ and judges of lower instances), the President selects directly from the Council's shortlists without requiring Senate confirmation. An innovation in Article 78 as amended is that if the President does not select any candidate within ten days of receiving the Council's shortlist, the top-ranked candidate is automatically appointed. Article 78 as amended also stipulates that an organic law will regulate the detailed procedures for judicial appointments, including administrative processes, competitive mechanisms, and functions that may be delegated to judicial training bodies.

46. The Venice Commission first wishes to welcome the allocation of the task of *selecting* suitable candidates for judicial vacancies to an autonomous judicial council using a merit-based driven process. Selection should be based on the candidates' merits and qualifications, and decisions concerning the selection of judges should be based on objective criteria clearly pre-established by law.⁴² A system of competitive entry examination is an appropriate manner for the selection of judges.

47. However, the Venice Commission recommends providing for effective judicial review of decisions by the Council, thus safeguarding the procedural fairness of these decisions and remedying any procedural irregularities. Such judicial review should primarily check whether the decision of the Council was procedurally flawed. The reviewing body should respect the discretion of the Council to which the Constitution explicitly entrusted the power to select judges.⁴³

48. The Venice Commission recalls that allocating the competence of *appointing* a (shortlisted) candidate to the President, is not *per se* impermissible. A distinction needs to be made between those systems where the President has more formal powers and is withdrawn from party politics (usually parliamentary systems) and those systems where the President plays a prominent role with a clear political drive (usually presidential or semi-presidential systems).⁴⁴ In assessing the involvement of the executive/head of state what matters most is the extent to which they are free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council. The proposals from this council may be rejected only exceptionally, and the executive/head of state would not be allowed to appoint a candidate not included on the list submitted by the council.⁴⁵ As long as the executive/head of state is bound by a proposal made by an independent judicial council, the appointment does not appear to be problematic.⁴⁶

⁴¹ See para. 58.

⁴² Venice Commission, Georgia, Opinion on the selection and appointment of Supreme Court judges, [CDL-AD\(2019\)009](#), para. 26 and CCJE [Opinion No. 10](#) (2007) on the Council for the Judiciary at the service of Society, para. 50.

⁴³ Venice Commission, Serbia, Opinion on three draft laws implementing the constitutional amendments on Judiciary, [CDL-AD\(2022\)030](#), para. 40.

⁴⁴ Venice Commission, France, Opinion on the Superior Council of Magistracy and the status of the judiciary as regards nominations, mutations, promotions and disciplinary procedures, [CDL-AD\(2023\)015](#), para. 36.

⁴⁵ Venice Commission, Serbia, Opinion on the Provisions on the Judiciary in the Draft Constitution, [CDL-AD\(2005\)023](#), para. 17.

⁴⁶ Council of Europe's Recommendation [CM/Rec\(2010\)12](#) on judges' independence, efficiency and responsibilities, para. 47 and 52.

49. The Venice Commission notes that in the context of the Chilean Presidential system, important institutional safeguards mitigate potential risks to judicial independence. First, the Commission notes that the draft amendments are aimed at ensuring that all shortlisted candidates presented to the President are qualified, having already been evaluated and ranked based on merit through the Council's competitive selection process. This means that regardless of which candidate the President chooses, the appointee will have met professional standards set by an independent body. In addition, the Commission welcomes that the draft amendments stipulate that the person who occupies the first place on the short list shall be deemed appointed if the President does not within a given time-limit appoint a particular shortlisted candidate. These provisions limit presidential discretion and reinforce the primacy of the Council's merit-based evaluation in the process. The Venice Commission therefore considers that providing that the President is bound to choose from a confined list of ranked candidates that are selected by the Judicial Appointments Council based on a merit assessment, affords limited discretion, limiting the risk of politicisation. The authorities' written comments note that article 78 as revised implicitly means that the President of the Republic would not be in a position to appoint a judge that is not included in the list. The Commission stresses nevertheless that the amendments should explicitly stipulate that the President is not allowed to appoint a candidate not included on the list submitted by the council.⁴⁷

50. In respect of appointments to the Supreme Court, the draft amendments stipulate that justices shall be appointed by the President of the Republic, choosing them from a shortlist of three candidates to be proposed by the Council, and with the consent of the Senate (with a two thirds majority) after a public hearing. If the Senate does not approve the President's choice, the Council must complete the shortlist by proposing a new name to replace the rejected one, repeating the procedure until an appointment is approved.

51. While some of the interlocutors met by the Venice Commission delegation objected to the continued intervention of the President and the Senate in the appointment process in view of the risk of politicization, others insisted on the importance of having a balance of the three branches of power in the appointment process (the Council, the President and the Senate) in view of the specific Chilean constitutional context, also stressing that the limited scope of the current reform did not allow for a full institutional reshuffle. In their written comments, the authorities informed the Commission that at the 14 May session of the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies, Article 78 was amended to include an anti-deadlock mechanism: Supreme Court justices shall be appointed by the President of the Republic, selecting them from a ranked shortlist proposed by the Judicial Appointments Council, and with the agreement of the Senate following a public hearing. The Senate shall adopt the respective agreements by a two-thirds majority of its sitting members, in a session specially convened for that purpose. If thirty days pass from the date the President of the Republic communicates the nomination to the Senate without a vote on the agreement, it shall be understood that the President's nomination has been approved.

52. The Venice Commission recalls that it is not uncommon to have some form of parliamentary involvement in judicial appointments to superior or (quasi-) constitutional courts.⁴⁸ In the view of the Venice Commission, in assessing the involvement of the political bodies what matters most is the extent to which they are free in deciding on a judicial appointment. Whilst there is no standard that prohibits nomination of superior court judges by a parliament, and parliamentary involvement does provide democratic legitimacy to a highest court, the Venice Commission has been wary of the dangers of politicisation when decisive power in the appointment of judges is

⁴⁷ Venice Commission, Malta, Opinion on the constitutional arrangements, separation of powers, independence of the judiciary and law enforcement, [CDL-AD\(2018\)028](#), para. 44. See also the follow up in [CDL-AD\(2020\)006](#), paras. 30-36 and [CDL-AD\(2020\)019](#), paras. 32-33; [CDL-AD\(2007\)028](#), Report on judicial appointments, para. 14.

⁴⁸ Court of Justice of the European Union (CJEU), Research and Documentation Directorate, *Research Note on Procedures for the appointment and designation of judges in the member states*, October 2020, pp. 9-12.

placed with a political body and the involvement of that body is not only formal.⁴⁹ Here again, the Venice Commission wishes to stress the importance of the selection process carried out by the Council based on merit which would ensure that regardless of which candidate the Senate approves, the appointee will have met professional standards set by an independent body.⁵⁰ The Venice Commission considers that the requirement of a hearing adds to the transparency and public accountability of the process.

53. While the requirement of a qualified majority of two-thirds usually ensures the broadest possible political support for any candidate, some interlocutors met by the Venice Commission delegation notably stated that such majority was too high in the Chilean context and would favour bargaining between political groups for the attribution of posts. The Commission welcomes the reported amendments to article 78 defining an anti-deadlock mechanism in case the required qualified majority in the Senate cannot be reached in respect of candidates that are proposed.⁵¹ These modifications to Article 78 ensure broad consensus for Supreme Court appointments while preventing institutional paralysis that could harm the functioning of the judicial system.

3. Transfer of judges

54. Current Article 80 of the Constitution states that *“the Supreme Court, in a plenary session specially convened for this purpose and by an absolute majority of its members in office, may authorise or order the transfer of judges and other officials and employees of the Judiciary to another post of equal rank.”* Based on the draft amendments, the Judicial Appointment Council will have the power to transfer a judge *“with good cause”* to another court of equal rank. It is in principle welcome that the competence to transfer a judge is allocated to the Judicial Appointment Council and that the law stipulates that a transfer can only be realised to another court of equal rank.⁵² However, the Commission is concerned about the wording of the draft amendments in so far as they empower the Council to transfer a judge *“with good cause”*. This allows for an undesirable discretion, whereas international standards favour a system in which a judge may not be transferred to another court against his or her will, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.⁵³ Additionally, it should be specified that legal protection is available to the judge concerned following such a decision of the Council. The Venice Commission recommends to further regulate the competence of the Council to transfer a judge *“with good cause”*.

E. Disciplinary proceedings against judges

55. By virtue of its correctional superintendence, the Supreme Court currently exercises disciplinary functions over all courts of justice. Current Article 80 of the Constitution states that *“the Supreme Court, at the request of the President of the Republic, at the request of an interested party, or on its own initiative, may declare that judges have not behaved well and*

⁴⁹Venice Commission, Latvia, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, [CDL-AD\(2002\)026](#), paras. 13 and 21-23; Venice Commission, Montenegro, Opinion on the draft amendments to the Constitution, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council [CDL-AD\(2011\)010](#), paras. 12-13; Venice Commission, Ukraine, Preliminary Opinion on the Draft Law on amending the Law on the Judicial System and the Status of Judges [CDL-AD\(2015\)008](#), paras. 50-51; Venice Commission, Hungary - Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, [CDL-AD\(2021\)036](#) para. 15; Venice Commission, Republic of Moldova - Opinion on the draft law on amending some normative acts (Judiciary), [CDL-AD\(2022\)019](#) para. 12-13.

⁵⁰Venice Commission, Georgia, Urgent Opinion on the selection and appointment of Supreme Court judges [CDL-AD\(2019\)009](#), para. 57.

⁵¹ Venice Commission, Montenegro [CDL-AD\(2018\)015](#), Opinion on the draft law on amendments to the law on the judicial council and judges, para.10.

⁵² Which implies – it may be assumed – that the judge's salary is not negatively affected.

⁵³ Council of Europe Recommendation [CM/Rec\(2010\)12](#) on judges' independence, efficiency and responsibilities; Venice Commission, Georgia, Follow-up Opinion to Previous Opinions concerning the Organic Law on Common Courts, [CDL-AD\(2023\)033](#), para. 25.

remove them by a majority of the total number of its members. The Supreme Court, in a plenary session specially convened for this purpose and by an absolute majority of its members in office, may authorise or order the transfer of judges and other officials and employees of the Judiciary to another post of equal rank.”

56. According to the draft new article 80a of the Constitution, the “Judicial Prosecutor’s Office” (*Fiscalía Judicial*) will be in charge of assessing and investigating disciplinary and probity offences, prohibiting its members from exercising jurisdictional functions. The bill establishes that the competence to evaluate conflicts of interest, investigate breaches of probity and carry out investigations for disciplinary responsibility will be the responsibility of the Judicial Prosecutor’s Office, headed by the Judicial Prosecutor of the Supreme Court. In addition, the draft amendments foresee that those who serve in this position are prevented from exercising jurisdictional functions. The Judicial Prosecutor’s Office will also be responsible for issuing general opinions on matters related to conflicts of interest, which will be binding on members of the judiciary. The powers of the Judicial Prosecutor’s Office shall extend to all judges of the Republic, with the exception of those who sit on the Constitutional Court and the Electoral Justice.

57. The Venice Commission delegation was explained during the meetings that contrary to what its name might suggest, the Judicial Prosecutor’s Office is composed of magistrates and has no connection with the prosecution service. It is an auxiliary institution of the administration of justice, which is exercised by the Judicial Prosecutor of the Supreme Court, who is the head of the service, and by the judicial prosecutors of the Courts of Appeal.⁵⁴ Its current mission is to rule on points of law in civil proceedings and in all cases established by law, and to inform the Court of Appeals and the Supreme Court, when these courts so require, of its opinion in the cases it hears on matters related to the respective process.⁵⁵

58. The Venice Commission notes that the draft amendments do not provide detailed information about the specific courts that will adjudicate disciplinary cases; the procedural framework for disciplinary proceedings; the grounds that constitute disciplinary liability; the types of sanctions that may be imposed (beyond removal); and appeal mechanisms for disciplinary decisions. The draft amendments create the institutional framework for a new disciplinary system but leave many specifics to be defined through subsequent organic laws. In the absence of an organic law at this stage, the Commission is not in a position to comment on the substantive disciplinary grounds nor the procedural elements of disciplinary proceedings. In this connection the Venice Commission reiterates that disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: “*the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority.*”⁵⁶ The Venice Commission recommends that these principles are taken into account in the reform.

59. The Venice Commission recalls that “[T]he rules on disciplinary liability have direct effect on the independence of the judges” and that it has previously recommended that “[T]he types of unethical behavior which may lead to a disciplinary liability should be described in sufficient detail

⁵⁴ <https://www.pjud.cl/post/download/174>.

⁵⁵ Oberg Yáñez, Héctor and Manso Villalón, Macarena (2009). *Derecho Procesal Orgánico*. Editorial Legal Publishings, Santiago, Chile, p.142.

⁵⁶ Venice Commission, Albania, Final Opinion on the revised draft constitutional amendments on the Judiciary [CDL-AD\(2016\)009](#), para. 34; Venice Commission, the Republic of Moldova, Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges, [CDL-AD\(2014\)006](#), para. 12.

*in the Constitutional Law itself.*⁵⁷ Referring to the section II. B. above the Venice Commission recommends that the draft constitutional amendments should contain safeguards ensuring the Judicial Prosecutor's Office's independence, including clear provisions regarding its operational autonomy.

60. Based on the draft amendments, the Judicial Prosecutor's Office will be responsible for investigating disciplinary and probity offenses and bringing charges before *“the courts established by an organic constitutional law.”* This separates the investigative function from the adjudicative function, with the Judicial Prosecutor's Office serving as the initiating authority and specialised courts making the final decisions. The Venice Commission has previously considered that the body responsible for the initiation of a disciplinary procedure and its investigation should not be the same body deciding the disciplinary matter.⁵⁸ This is also in line with the CCJE's position.⁵⁹ In the view of the Commission, this separation is welcome.

61. The Venice Commission notes that Article 80 bis as amended suggests the Judicial Prosecutor's Office can act *“at the request of the President of the Republic, at the request of an interested party, or ex officio,”* indicating multiple pathways to initiate investigations, according to Article 32(13) as amended The President has the power to *“oversee the ministerial conduct of judges”* and *“request the judicial prosecutor's office to carry out investigations into disciplinary and probity offences.”* The extent of presidential influence over the office's decisions remains undefined raising questions about separation of powers and judicial independence. First, the Commission considers that greater clarity would be needed regarding the scope and limitations of this presidential power.⁶⁰ Second, it recommends that the Judicial Prosecutor's Office should function as a fully independent body, capable of initiating investigations based on objective criteria without external political influence.⁶¹

62. The Venice Commission is of the opinion that this dual function to conduct investigations for disciplinary and probity on the one hand and to issue opinions and evaluate conflict of interest on the other hand might create a conflict of interest, if the advice on a potential conflict of interest is given in an individual case and the Office would subsequently investigate and prosecute the same individual.

63. The Venice Commission has previously noted that *“[I]t is important to ensure a strict separation of duties and responsibilities between the advisory body on ethics and the disciplinary body, since the judge should not have to face the risk that his/her request to the advisory body on ethics be transferred to another procedure that could result in a disciplinary sanction.”*⁶² The Venice Commission more recently observed that: *“[t]he bodies providing ethical advice should be distinct and well differentiated from the disciplinary organs. The opinions obtained through these mechanisms should serve as confidential recommendations to judges. While adherence to such advisory opinions is not mandatory, it might be viewed as indicative of acting in good faith.”*⁶³ The Venice Commission delegation was informed during the meetings in Chile that there is no unified code of judicial ethics and that there is no system for the implementation of the various existing codes of ethics. While underlining the importance of developing a judicial ethics system, the Venice Commission wishes to reiterate the need to clearly distinguish between judicial ethics and judicial discipline.

⁵⁷ Venice Commission, Kazakhstan, Opinion on the Draft Code of Judicial Ethic [CDL-AD\(2016\)013](#), paras. 24 and 27

⁵⁸ Venice Commission, North Macedonia, [CDL-AD\(2015\)042](#), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges, para. 73.

⁵⁹ CJCE, [Opinion No. 27](#), para. 19.

⁶⁰ Venice Commission, Kazakhstan [CDL-AD\(2018\)032](#), Opinion on the Concept Paper on the reform of the High Judicial Council, para. 16.

⁶¹ See CCJE, [Opinion No. 27](#), para. 19.

⁶² Venice Commission, Kyrgyz Republic [CDL-AD\(2014\)018](#), Joint Opinion on the draft amendments to the legal framework, para. 30.

⁶³ Venice Commission, Bulgaria [CDL-AD\(2024\)004](#) Joint Opinion on the code of ethical conduct for judges, para. 52.

F. Creation of a Council of the Administrative Corporation of the Judiciary

64. Under draft amendments to Article 76 and 82, it is proposed that an autonomous body be created that will be “*responsible for the administration and management of the resources of all the courts of the nation.*” This responsibility previously fell on the Supreme Court, which had control over the economic management of all ordinary courts; however, it is proposed that (under Article 82) “[t]he Supreme Court may issue such orders as may be necessary for the proper administration of justice in all the courts of the Nation.”

65. The Venice Commission recalls that paragraph 7 of the Magna Carta of Judges states that “*the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system.*” Furthermore, the Magna Carta at paragraph 9 holds that “*the judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation).*” In its Opinion No. 10 (2007),⁶⁴ the CCJE holds that “*the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a Council for the Judiciary or an independent agency.*”

66. While it has no issue with the principle of creating an autonomous body that manages the resources of the judiciary, the Commission notes that the basic features are left to a future organic law which makes it impossible to comment on this aspect of the draft amendments in view of the lack of information at this stage on this new council that will have a broad mandate (see section I.B. above). There will certainly be a need also to further clarify the residual power afforded to the Supreme Court and regarding the relationship between this new autonomous body and the Supreme Court in relation to their decision-making capacity and administrative functions over resources of the judiciary.

G. Elimination of the practice of lawyers acting as judicial substitutes (*abogado integrante*)

67. In the current system, lawyers from outside the judiciary are called upon to sit on a Court of Appeal or the Supreme Court, or any of its chambers, when, due to absence or disqualification, there are not enough judges to hear and resolve a case. These lawyers are appointed by the President of the Republic in January of each year from among lawyers who meet the conditions required to hold the office of minister and who have distinguished themselves in their professional or academic activity. The draft amendments propose the elimination of the institution of lawyers acting as judicial substitutes, in order to reduce the structural risks arising from conflicts of interest in the judicial system, which may arise from maintaining the figure of the lawyers as members of the judiciary. Thus, the proposal establishes that the jurisdictional function can only be exercised by those who are formally invested as judges.

68. The Venice Commission recalls that the institution of substitute judges is not inherently contrary to international standards of judicial independence. The compatibility of such arrangements with these standards very much depends on the specific circumstances of implementation, including safeguards against conflicts of interest, transparency in appointment, clear incompatibility rules, and appropriate recusal mechanisms. This practice varies across jurisdictions, with different mechanisms and safeguards to address potential conflicts of interest. Given the time and thematic constraints of this opinion, it has not been possible to carry out a thorough comparative study, and only some selected pertinent examples will be cited. The Venice Commission wishes to underline in this context that evidence from different legal systems cannot be definitively compared in isolation from the whole legal framework and without taking into due account the specific broader social, political and historical background. In the Netherlands, the practice of appointing advocates (lawyers) as substitute judges (*rechter-*

⁶⁴ CCJE [Opinion No 10](#) , para. 74.

plaatsvervangers) is legally permitted and has been a longstanding tradition. This system aims to enrich the judiciary with practical legal experience from various sectors. In England and Wales, experienced lawyers can be appointed as part-time judges, known as “Recorders” or “Deputy District Judges”. To mitigate conflicts of interest, strict recusal rules are in place, and appointees must adhere to the judicial code of conduct. Norway employs “deputy judges” (*dommerfullmektig*) who are appointed for up to three years. These positions are often filled by young legal professionals, including recent law graduates. While serving, they perform full judicial functions under the supervision of permanent judges. France has utilized “*juges de proximité*” (local judges) who handle minor civil and criminal cases. These positions have been filled by individuals with legal experience, including lawyers. Spain appoints “substitute judges” (*jueces sustitutos*) to fill temporary vacancies in the judiciary. These positions can be held by legal professionals, including practicing lawyers, who meet specific eligibility criteria.

69. While several countries therefore permit legal professionals, including advocates or lawyers, to serve as substitute or part-time judges, this dual role could pose challenges to judicial impartiality and public confidence in the judiciary. The Council of Europe’s Group of States against Corruption (GRECO) in its Fourth Evaluation Round report on the Netherlands⁶⁵ highlighted the unique position of substitute judges and emphasized the need for appropriate guidance to manage potential conflicts of interest.

70. The Venice Commission notes that in Chile lawyers acting as judicial substitutes are appointed by the executive, whereas transparent and clear pre-established merit-based criteria for their appointment seem to be lacking as well as proper regulation regarding these functions. Many interlocutors expressed concerns with this practice that contributes to the distrust in respect of the judiciary because of the perception that the position allows the *abogados integrantes* to benefit their clients as lawyers.⁶⁶ The Commission welcomes the abolishment of the practice in Chile given the beforementioned considerations.

IV. Conclusion

71. By letter received on 12 February 2025, the Minister of Justice of Chile, Mr Jaime Gajardo Falcón requested an opinion of the Venice Commission on the draft constitutional amendments in respect of the Judiciary. The draft amendments seek to separate judicial governance from the adjudicatory role of the judiciary, introduce a more transparent and merit-based process in respect of decisions affecting judicial appointments and other aspects related to the judicial career, and regulate the management of conflicts of interests. To this end, the proposal is to create an autonomous body responsible for appointments (the Judicial Appointments Council), another autonomous body (the Council of the Administrative Corporation of the Judiciary) responsible for the administration and management of the resources of the courts (with the exception of the Constitutional Court and the Electoral Courts), and to assign the disciplinary function to the Judicial Prosecutor’s Office (*Fiscalía Judicial*) which will be responsible for ensuring the proper conduct of judges and for carrying out investigations into disciplinary breaches and violations of probity. The reform also foresees to abolish the practice of lawyers acting as judicial substitutes (*abogado integrante*).

72. While the Venice Commission is not called to look into broader matters related to the functioning and administration of the judiciary such as human resources, training and mobility strategies, it nevertheless wishes to stress that they certainly need to be taken into account by the authorities in designing the reform of the judiciary.

73. At the time of the Venice Commission delegation’s visit to Chile, the draft constitutional amendments were pending before the Committee on Constitution, Legislation, Justice and

⁶⁵ GRECO, [Fourth Evaluation Round report on the Netherlands](#), paras. 100-101.

⁶⁶ See also the Statement by UN Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite (9 August 2024).

Regulations of the Chamber of Deputies and at the moment no finalised or consolidated text of the draft amendments exists. In their written comments, the Chilean authorities informed the Commission of a number of changes to the draft amendments adopted by the Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies, which have been taken into account in the present opinion. Given the fact that the proposed constitutional amendments concern the judiciary, a key institution in any state governed by the Rule of Law, it is essential to continue to pursue proper public consultations in the coming months before a parliamentary vote on these amendments.

74. The aim of the present opinion is not to look into all provisions of the draft amendments in an exhaustive manner but to address the main issues and provide the existing international standards in this regard.

75. The Venice Commission recommends to include the main features of the proposed system of judicial governance and merit-based appointment process in the constitutional amendments themselves and not in the subsequent organic laws. The Commission refers to various specific recommendations in this regard in the main text of this opinion. Given the aim of the draft amendments (i.e. to introduce a merit-based model) it would appear necessary to give at least a basic description of the parameters to evaluate those merits. Likewise, the introduction of an autonomous body needs to be accompanied by a description of the main features of its competences and composition (see for example Section III.F).

76. The Venice Commission notes that the reform is aimed at deconcentrating power from the Supreme Court and establishing a merit-based judicial appointment system. The drafters have made the choice of separating the functions (judicial appointment, disciplinary procedures, administrative management of the judiciary) between different bodies (Judicial Appointments Council, Judicial Prosecution) rather than merging all powers into a single council. The Venice Commission considers that there is no uniform model of judicial governance and that not all judicial councils have powers in respect of the career of individual judges such as appointments, transfers, disciplinary measures and dismissals. The Venice Commission considers it commendable that the Chilean authorities contemplate the establishment of autonomous councils in order to separate judicial governance from the adjudicatory role of the judiciary and to introduce a more transparent and merit-based process in respect of decisions affecting judicial appointments and all aspects related to the judicial career. The Venice Commission therefore supports the underlying rationale of the proposals.

77. More specifically, the Commission welcomes:

- the establishment of a Judicial Appointment Council which is responsible for judicial appointments operating on a merit-based process;
- the principle of the establishment of an autonomous body in charge of the administration and management of the resources of all courts;
- the separation of the task of investigating and bringing disciplinary charges and the task of taking disciplinary decisions;
- the abolishment of the practice to appoint lawyers as substitute judges (*abogado integrante*).

78. In respect of *the Judicial Appointments Council*, the Commission recommends:

- regulating core characteristics of the Council on the constitutional level as well as security of tenure of its members;
- including additional eligibility criteria for becoming a member of the Council;
- that the authorities develop further a system that complies with the requirement of election by peers and ensures diversity among the judges and courts
- providing effective judicial review of decisions by the Council;
- further regulating the competence of the Council to transfer a judge “with good cause”.

79. In respect of *the power of the President to appoint judges*, the Commission insists on the importance of the proposed provisions stating (1) that the President is bound to select from a confined list of ranked candidates that are selected by the Judicial Appointments Council based on a merit assessment and (2) that the person who occupies the first place on the short list shall be deemed appointed if the President does not within a given time-limit appoint a particular shortlisted candidate. In addition, it recommends stipulating that the President is not allowed to appoint a candidate not included on the list submitted by the Council.

80. In respect of *the involvement of the Senate in the process of appointing judges to the Supreme Court*, the Commission welcomes the revised amendments adopted by Committee on Constitution, Legislation, Justice and Regulations of the Chamber of Deputies foreseeing a suitable anti-deadlock mechanism if the required qualified majority in the Senate cannot be reached in respect of proposed candidates.

81. In respect of the *Judicial prosecutor's Office*, the Commission recommends:

- providing safeguards ensuring the Judicial Prosecutor's Office's independence, including clear provisions regarding its operational autonomy.

82. In respect of the *disciplinary proceedings*, the Commission recommends:

- providing clarity regarding the scope and limitations of the presidential influence over the Judicial Prosecutor's Office;
- ensuring that the following principles are taken into account in the reform: the disciplinary liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority.

83. While underlining the importance of developing a judicial ethics system, the Venice Commission recommends establishing a clear distinction and complementary character vis-à-vis the provisions concerning professional discipline.

84. The Venice Commission remains at the disposal of the Chilean authorities for further assistance in this matter.