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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
OF THE COUNCIL OF EUROPE

(VENICE COMMISSION)

CHILE

DRAFT CONSTITUTIONAL AMENDMENTS
IN RESPECT OF THE JUDICIARY*

**Translation provided by the Chilean authorities*

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I. Message from H.E. the President of the Republic initiating a Constitutional reform project that modifies the judicial government and creates a Judicial Appointments Council (unofficial translation from Spanish into English)

Santiago, October 15, 2024

MESSAGE NO. 232-372/

Honorable Chamber of Deputies:

In use of my constitutional powers, I have the honor to submit for your consideration a constitutional reform bill that modifies the judicial government and creates a Judicial Appointments Council.

BACKGROUND

1. Current status of judicial governance

Under the current institutional design of the Judicial Branch, the Supreme Court and the Courts of Appeals, along with exercising jurisdiction, concentrate the functions of judicial government, by virtue of the corrective, disciplinary and economic superintendence that the Constitution entrusts to the highest court of our judicial system. This forces the ministers of the Courts to devote themselves to other tasks, which distracts them from the exercise of the jurisdictional function, which is the central aspect of the Judicial Branch, and poses a significant threat to the internal independence of the judges.

In this regard, the diagnosis according to the specialized literature is that "the most relevant affectation of judicial independence is verified within the Chilean judicial structure"¹, while "the problems of affectation of judicial independence by other powers of the State, especially the Executive, as was the case in European countries and some Latin American countries [...], has not occurred in Chile with the same intensity".²

Along these lines, Juan Enrique Vargas said that "it is probably because our country has overcome the greatest and most serious attacks on judicial independence, which have generally come from outside the judicial world, that perhaps we are not so aware of the magnitude of the damage that politicization within the justice system or the influence of other power groups (economic, religious, mafia or of whatever nature) can generate on it".³

The paradox of this situation, he concluded, is that the strong institutional armor that protects our Judiciary, along with being the best safeguard against possible external intervention, generates new risks for the independence of judges, now from the internal front, as it favors the hierarchy.⁴

In particular, since the judicial career and disciplinary responsibility depend on the same courts that jurisdictionally review the judgments of the lower courts, this increases the risk that the latter will resolve the legal disputes submitted to them based on factors other than mere compliance with the law.

¹ BORDALÍ S., Andrés (2014). Proposals for a new judicial government in Chile. In: Revista de Estudios de la Justicia N°21. p. 44.

² Idem.

³ VARGAS V, Juan E. (2018). In: Judicial Government Independence and Strengthening of the Judiciary in Latin America. Chile Chapter. Alberto Binder and Leonel González. JSCA. P. 94.

⁴ Idem.

In accordance with the above, as stated in the preliminary observations of the United Nations Special Rapporteur on the Independence of Judges and Lawyers (9 August 2024), Chilean judges declare that "they enjoy a commendable level of independence in their daily work, with minimal political interference". Likewise, these observations point out that the essential risks to their activity may stem from the broad powers of judicial governance of the superior courts of justice, especially those associated with a wide range of appointments, which may end up distorting the jurisdictional function and ultimately generate incentives for politicization for reasons other than the application of law in judicial sentences.

2. Current system of judicial appointments

Our current system of judicial appointments, by maintaining wide margins of discretion and giving excessive preeminence to seniority in the position as a demonstrative element of suitability, does not allow for an adequate assessment of the merit of the candidates.

The processes of appointments and promotions of judges and magistrates do not have effective mechanisms of opposition of the applicants to evaluate their knowledge, skills and merit for the position, beyond the process of admission to the Judicial Academy. At from there, the attainment of appointments and promotions depends mainly on the candidates' ability to make direct or indirect efforts to obtain support or vote commitments from the respective Court and, in the case of candidates for the highest magistracy, also from the Senate

In this context, it is stated that the practice of "besamanos" or private audience by the candidate in order to express his interest and provide information on his experience and qualifications for the position "is of such importance in the internal culture that it is considered that those who do not perform it 'have no interest' and, therefore, are not considered at the time of voting".⁵

Then, the specialized literature notes that, with respect to those who manage to be included in the shortlist, the analysis carried out in the other stages of the process is strictly political: "whether the candidates are progressive or conservative, whether or not they have applied the amnesty law, whether they have a 'sensitivity' close to one of the majority political blocs in the country, among other aspects".⁶ This part of the process, according to another author, "sends a very strong signal to the ministers who want to reach the Supreme Court: the best way to do so is to go unnoticed, to have the most anodyne jurisdictional conduct possible. Otherwise, they will only be able to be appointed if they are part of a very complex and exhausting negotiation political",⁷ which allows -in view of the high quorum for ratification in the Senate- to overcome the veto that a political sector may impose.

This can be seen, according to Juan Carlos Ferrada, from the observation of the composition of the lists drawn up by the Supreme Court in recent years, where "it is striking that there is historically a correlation between the preferences or political sensibilities of the persons selected and the consecutive or alternating order agreements of the political parties represented in the Senate (...) This is even more evident if we consider that most of the names are not repeated in the successive lists, but interspersed, following the corresponding political turn".⁸

In addition, judicial appointments place a considerable workload on the Courts, which distracts them from the exercise of the jurisdictional function. According to the data available as of May

⁵ SIERRA, Lucas and ZAPATA, Francisca. Judicial Appointments and Gender Gap. In: *Judicatura y Nueva Constitución*. In: *Judicatura y Nueva Constitución*. op. cit. p. 311.

⁶ BORDALÍ, Andrés (2014). Op.cit. p. 47.

⁷ VARGAS, Juan Enrique. "Judicial appointments and promotions: Is it really the politics of the problem?". *Anuario de Derecho Público UDP*. Santiago. Ediciones Universidad Diego Portales. p. 157.

⁸ FERRADA B., Juan (2022). "El sistema de designación de los jueces de la Corte Suprema en el ordenamiento jurídico chileno. Much politics, low legitimacy and little judicial independence". In: *Judicatura y nueva Constitución*. Dir. Flavia Carbonell and Francisca Zapata. Tirant lo Blanch. Valencia. p. 334-335. The author's analysis of the latest quinas prepared by the Supreme Court for each of the appointments can be found in footnote 6.

28, 2024, the positions on the Judicial Branch's Primary Scale amount to 2,022 persons, distributed as follows: 54 in the Supreme Court (ministers, clerk, secretary, pro-secretary and rapporteurs), 344 in the Courts of Appeals (ministers, clerks, judicial prosecutors and rapporteurs) and 1,664 in the first instance (judges and clerks). Between 2018 and 2023, a total of 1,183 tenured appointments were made, with approximately 200 appointment decrees issued per year.

3. Structural risks of conflicts of interest in the judicial system

A first structural risk factor for conflicts of interest is the number of lawyers. While there are twenty-one nominal positions in the Supreme Court, the Executive has the power to appoint twelve lawyers. In the case of the Courts of Appeals, there are one hundred and forty-five ministerial positions, but there are more than one hundred and thirty lawyers that can be appointed by the Executive. Therefore, the lesser the availability of tenured positions in the superior courts of justice, the greater the role of the lawyers. Since it is not a full time position, the figure of the member attorney increases the risk of conflict of interest situations.

A second risk factor is the absence in the current regulations of rules for managing conflicts of interest of judges and judicial officials. What is crucial in this regard is not that a judge or official is in a situation of conflict of interest, but the lack of mechanisms to manage this conflict in a way that allows to generate a culture of consultation in these situations, thus safeguarding the impartiality of decisions and resolutions.

4. Proposals taken into consideration in the elaboration of this constitutional reform project

For several years now, the aforementioned problems have attracted attention and concern at both the academic and political levels at . As a result, there has been a profuse public debate on possible solutions to improve our system of judicial governance. This has resulted in the elaboration, by different actors, of a series of proposals for the reform of judicial governance systems and the appointment judges.

Therefore, the preparation of this initiative 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; as well as the Preliminary Observations of the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Margaret Satterthwaite, after her visit to the country last August.

The following is a summary of this background information.

a. Opinions of the Supreme Court in matters of judicial governance and judicial appointments

The Supreme Court, through successive pronouncements, has requested the separation of jurisdictional functions from administrative functions and the placement of the latter in a special body within the Judiciary or made up, at least, of a majority of members from the judiciary.

The first pronouncement in this sense is contained in Minute No. 187-2014, of the 2014 Reflection Days, of Chillán. Through this document, said magistracy agreed to "urge for the separation of jurisdictional functions from the non-jurisdictional ones exercised by the Supreme Court". To this end, the minutes state that "the way to achieve this separation will be through the creation of an internal body, proper of the Judiciary, composed exclusively of representatives of all the estates that compose it"

Later on, it was up to the Supreme Court to issue its opinion on the initiative presented by the Government of former President Sebastián Piñera in 2021.⁹ In this context, it stated that the creation of a National Commission on Judicial Appointments "may constitute a step forward to improve the current system of appointments of judges and contribute to judicial independence", although in order to achieve this goal it would be necessary to "eliminate or reduce the participation of the various branches of government in the selection of the members of the commission, to eliminate its political nature and ensure the independence of its members".

In his speech inaugurating the judicial year 2023, the President of the Supreme Court, referring to the figure of the councils of the judiciary, existing in comparative law, was of the opinion that "it should be discarded as a solution for judicial government in our country", warning that such bodies "composed of representatives totally alien to the judiciary and, in general, of partisan political origin, have led to permanent and serious conflicts and divisions within them, with the consequent disruption of their activity in the service of the community".

Finally, the Supreme Court once again made a pronouncement on the matter, through Minute No. 134-2024, dated July 1, 2024, "Bases for a proposal to reform the appointment system". In this document, the main outlines of what, in the Court's opinion, should be the basis for a future reform of judicial governance and the appointment of judges were set forth.

Thus, the Supreme Court states that the separation of functions must be achieved through the creation of one or more autonomous bodies, ideally endowed with constitutional autonomy and that, in line with previous efforts in this area, it is a priority to begin with changes to the system of judicial appointments.

In this regard, the majority position of the Plenary is the creation of three Macro-zonal Councils or Units, which would be responsible for the respective appointment functions in their corresponding territories, which would be exercised in a coordinated manner among them and with the national appointment council or body.

The Macrozonal Councils or Units would exercise jurisdiction over judges and judicial officers serving in the courts and judicial units of their respective territories, except for judicial ministers and prosecutors of the Courts of Appeals.

On the other hand, the council or national instance would be in charge of appointments, transfers and exchanges of ministers and prosecutors of the Courts of Appeals; as well as the elaboration of quinas for the appointment of the ministers of the Supreme Court and its Judicial Prosecutor; maintaining the participation of the three Branches of the State with respect to the latter.

Each of these bodies would have a mixed composition, with the majority of its members being members of the judiciary chosen by lot from among the judges who have expressed interest in position.

b. Opinion of the National Association of Judges and Magistrates

In the framework of the first constituent process, the National Association of Magistrates prepared a document called "Jurisdiction and New Constitution", which stated that the current model of judicial appointments "reproduces the defects of the particular Chilean form of organization of the judiciary, since it involves the Supreme Court and Courts of Appeals in the process of appointing the different positions within the Judiciary".¹⁰

⁹ Report on Bill No. 10-2021, contained in Official Communication 108 - 2021, dated June 8, 2021, of the Supreme Court.

¹⁰National Association of Judges and Magistrates. Jurisdiction and the New Constitution. December 2, 2021. p. 20. Available [on line https://www.cconstituyente.cl/comisiones/verDoc.aspx?prmID=529&prmTipo=DOCUMENTO_COMISION

In this regard, the trade association proposes a new appointment system based on a body other than the Courts, which should be regulated at the constitutional level, given the importance of "providing sufficient protection to the independence of the judiciary by removing any unregulated intervention in the process of appointing judges".¹¹

c. Draft constitutional and legal reforms related to the appointment system

Since the return to democracy, several constitutional and legal reforms have been introduced to modify judicial governance and, especially, the judicial appointment system.

i. Constitutional Reform Project on the Judiciary, National Council of Justice and Ombudsman, by former President Patricio Aylwin and former Minister of Justice Francisco Cumplido.

This constitutional reform was submitted to the National Congress in 1991 and is the first reform proposal aimed at modernizing the functioning of the Judicial Branch in order to guarantee its independence and efficiency.

This initiative proposed the creation of an autonomous body called the National Council of Justice, which would be in charge of judicial policy, participating in the appointment of the Ministers and the Judicial Prosecutor of the Supreme Court and overseeing the independence and proper functioning of the Judicial Branch.

The National Justice Council would be composed of the following 15 members

- The Chief Justice of the Supreme Court;
- Two Supreme Court justices elected by their peers, appointed by the Court itself;
- Two ministers of the Courts of Appeals, appointed by officials of the second category of the primary scale of the Judiciary;
- The president of the oldest Magistrates Association in the country;
- Two judges sitting in the Courts of Appeals, appointed by vote in the manner determined by law;
- Two members appointed by the President of the Republic;
- Two Senators appointed by an absolute majority of the sitting members of that chamber of Congress;
- One member appointed by the absolute majority of the members in office of the national board of directors of the oldest Bar Association in the country;
- One member appointed by the absolute majority of the members in office of the Boards of Directors of the Bar Associations operating outside the Metropolitan Region; and
- A member appointed by the President of the Republic, from a list of three candidates presented to him by the Council of Rectors of Universities recognized by the State, composed for these purposes only of rectors of universities with a law school with at least 10 years of seniority.

ii. Proposal by former President Sebastián Piñera

This proposal is structured around two complementary initiatives: a constitutional reform bill (bulletin No. 14192-07) and a legal reform bill (bulletin No. 14191-07). They propose:

a) The creation -at the legal level- of an autonomous body, called the National Judicial Appointments Commission, for the selection and appointment of the members of the Judicial

¹¹ Idem. p. 21.

Branch Primary Scale, between the second and seventh category, and others that the law entrusts to it

This reform proposal did not include a modification to the system of appointments of ministers and the judicial prosecutor of the Supreme Court, nor modifications to the system of appointments of the Secondary Scale or the Scale of Employees' Personnel.

b) The Commission was composed of five members, who were appointed as follows: one by the President of the Republic, who presided over the body; two by the Senate; and two by the Supreme Court. In addition, an executive secretary was also contemplated.

In order to carry out its functions, the Commission had the support of the Administrative Corporation of the Judiciary, which was in charge of conducting public competitions and the "pre-selection" of candidates to be evaluated by the Commission, in addition to an Advisory Council as an advisory body - also of legal rank.

iii. Proposed Political Constitution of the Republic of Chile of 2022

This proposal, drafted by the Constitutional Convention¹² (hereinafter "the Convention") emerged from the first constitutional process to replace the current Political Constitution of the Republic.

This proposal created a Council of Justice - an autonomous, technical, parity and plurinational body - in charge of "appointments, government, management, training and discipline in the National Justice System" (article 342), which was composed of a total of seventeen members, of whom

- Eight were tenured judges elected by their peers;
- Two were officials or professionals of the National Justice System
- Two were members elected by the indigenous peoples and nations; and
- Five were appointed jointly by the Congress of Deputies and Deputies and by the Chamber of Regions, after the corresponding shortlists had been determined by public competition by the High Public Management Council (art. 344).

This Council was to be organized in a decentralized manner (art. 345.2) and was to make appointments through public competitions regulated by law, which in turn were to include public hearings (art. 348.1).

iv. Proposed Political Constitution of the Republic of Chile for 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 (art. 160.1).

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 (arts. 162.1 and 162.4).

¹² It is framed within the mandate of Law No. 21,200 of December 24, 2019, which modifies Chapter XV of the Political Constitution of the Republic, establishing a procedure for the elaboration of a new constitutional text, which considered an initial plebiscite, elections of the representatives that will integrate the mentioned Constitutional Convention and, finally, a plebiscite with the purpose of approving or rejecting the text proposed by the aforementioned drafting body.

This proposal maintains the participation of the Executive and the Senate in the process of appointing Supreme Court justices. In effect, it was established that ministers and judicial prosecutors of the Supreme Court would be appointed by the President of the Republic, who would choose them from a list of five persons, to be proposed in each case by the body in charge of the appointments, and with the agreement of 3/5 of the Senate.

The appointing body was composed of:

- A person appointed by the President of the Republic, after a public competition.
- Two persons appointed by the Senate, after a public competition, in a single vote and by 3/5 of its members;
- Four judges appointed by lot from a list drawn up by the body in charge of the administration and management of the Judicial Branch, composed of incumbent judges of courts sitting in the Court, with a length of service of not less than 10 years and who have not been sanctioned during that period (Art. 162 N°8 and 167).

v. Parliamentary motions and proposals from academic groups.

It is also important to mention the efforts made through various parliamentary motions for constitutional reform to modify the mechanisms for the appointment of judges in the Judicial Branch. Among these efforts are the motions presented in recent years by Representatives Yovana Ahumada, Miguel Ángel Calisto, Erika Olivera, Rubén Oyarzo, Joanna Pérez, Víctor Pino, Jorge Saffirio (bulletin No. 17150-07); Jaime Araya, Miguel Ángel Calisto, Pamela Jiles, Harry Jürgensen, Johannes Kaiser, Camila Musante, Leonidas Romero, Marisela Santibáñez, Héctor Ulloa, Cristóbal Urruticoechea (bulletin N° 17144-07); Ximena Ossandón, Miguel Ángel Becker, Andrés Celis, Eduardo Durán, Camila Flores, Andrés Longton, Marcia Raphael, Jorge Rathgeb, Hugo Rey, Frank Sauerbaum (bulletin N° 17115-07); Mercedes Bulnes Núñez, Lorena Fries Monleón, Andrés Giordano Salazar, Javiera Morales Alvarado, Maite Orsini Pascal, Marcela Riquelme Aliaga, Camila Rojas Valderrama, Carolina Tello Rojas (bulletin N° 16979-07); Camila Musante, Jaime Araya, Karol Cariola, Marcos Ilabaca, Maite Orsini, Raúl Soto (bulletin No. 16852-07); Tomás Hirsch, Andrés Longton, Catalina Pérez, Leonardo Soto, along with former H. Gabriel Boric, Marcelo Díaz, Gonzalo Fuenzalida, Hugo Gutiérrez, Luis Rocafull, Matías Walker (bulletin N° 12607-07).

c) Proposals from academics from different universities in the

In addition to the aforementioned efforts, there is the work and proposals made by at least the Catholic University of Chile and the University of Los Andes and by a group of academics, coordinated by the Adolfo Ibáñez University.¹³

FUNDAMENTAL

The purpose of this constitutional reform project is to:

1. Separate the administrative and jurisdictional functions, which the responsibility of the Supreme Court under the current regulation, into different autonomous bodies

¹³ Isabel Aninat (Dean of Law, UAI); Enrique Barros (professor of Law, UCH); Rodrigo Correa (professor of Law, UAI); Jorge Correa (professor of Law, UDP); Guillermo Jiménez (professor of Law, UAI); Domingo Lovera (professor of Law, UDP); Juan Carlos Marín G. (Professor of Social Sciences and Government, Tecnológico de Monterrey); Patricia Miranda (Professor of Law, UCH); Diego Pardo (Professor of Law, UAI); Carlos Peña (Rector, UDP); Patricia Pérez (former Minister of Justice); Catalina Salem (Professor of Law, UDD); Constanza Salgado (Professor of Law, UAI); Lucas Sierra, (Professor of Law, UCH); Sebastián Soto (Professor of Law, PUC de Chile); Samuel Tschorne (Professor of Law, UAI); Verónica Undurraga (Professor of Law, UAI); Paulina Veloso (Counselor, CDE).

2. Generate new procedures for the appointment of judges governed by competitive examinations and competitive examinations, allowing the merit and abilities of each candidate to be evaluated.

3. Establish clear criteria for managing conflicts of interest in the judicial system, reducing opacity and the risk of corruption.

The following is an explanation of the three axes of the aforementioned project.

1. The need to separate the jurisdictional function from that of judicial government.

As noted above, one of the main problems facing the Judiciary today is the risk of affecting its internal independence, given the structure of the current system of judicial governance. However, the current cases of public knowledge show that there is also a risk of affecting external independence, to the extent that the risk of politicization and undue influence has not been prevented.

This has been the subject of concern of different political sectors for several years now. In this sense, for example, in the Message of the constitutional reform project presented by former President Sebastián Piñera, it is precisely emphasized that "in Chile, the Judiciary has managed to achieve a remarkable independence from external influences", although its structure, "based on an ascending hierarchy, where the Supreme Court is at the top (...) strains the internal judicial independence, that is, the one that judges must maintain before their superiors" (bulletin No. 14192-07).¹⁴

Likewise, the need to remove the powers of judicial government from the Courts implies not only dealing with judicial appointments, but also with the administration of the courts and, in general, with all aspects related to the judicial career, including disciplinary responsibility.

By virtue of the above, it is proposed the creation of an autonomous body in charge of the administration and management of the resources of all the courts of the Nation, with the exception of the Constitutional Court, the courts of electoral justice and the other courts determined by a constitutional organic law. This will free up the workload that the Courts currently dedicate to administrative matters, focusing their work on the exercise of the jurisdictional function. In addition, in order to safeguard transparency and probity, the economic management of the courts will be subject to higher levels of control, by subjecting this body to accountability before the Office of the Comptroller General of the Republic.

In turn, it is necessary to remove disciplinary powers over judges from the competence of the Supreme Court, so that the body responsible for evaluating the behavior of judges is not the same body responsible for jurisdictional control of their decisions. In addition, it is considered that the competence to receive disciplinary complaints and to carry out investigations for misconduct of this nature should be separated from the competence to rule on such matters.

Therefore, the Judicial Prosecutor's Office is entrusted with overseeing the proper conduct of judges and officials of all the courts of the Nation, with the exception of the Constitutional Court, the courts of electoral justice and other courts determined by a constitutional organic law. Thus, it is the Judicial Prosecutor's Office that will conduct investigations for disciplinary and probity offenses and, if appropriate, bring charges before the competent courts.

As a corollary of the above, it is necessary to abolish the directive, correctional and economic superintendence of the Supreme Court, which in simple terms means that "the Supreme Court

is responsible for the administrative management of the courts, which is responsible for the appointment and discipline of judges, and which also involves the budgetary management of the Judiciary".¹⁵

2. Election based on the capacity and suitability of judges and magistrates.

In order to make the system of judicial appointments more transparent and objective, a reform is proposed in the following terms. This reform seeks to establish a specific system of appointments for judges and members of the Primary Scale of the Judiciary. Other judicial employees will not be subject to this new system, due to the administrative nature of their functions.

In this sense, a public appointment and promotion procedure is proposed, with mechanisms of effective competition, which would allow evaluating exclusively the merit of the candidates according to the position and put an end to one with a wide margin of discretion and structured the basis of the applicant's seniority in the position and personal knowledge of the candidate.

An autonomous body, composed of a majority of members who are judges, will be in charge of managing these selection processes, in order to safeguard the external independence of the judiciary. However, instruments emanating from various international bodies also recognize the importance of including in the composition of members from outside the judiciary, such as law professors, prestigious jurists, or citizens of recognized reputation and experience. In the case of the external members of these bodies, the recommendation is that they should not come from politics, nor should they be members of Congress, the Government or the Administration, and that the election of such non-judicial members should be entrusted to non-political authorities.¹⁶

3. Need to reduce risk factors for conflicts of interest in the exercise of jurisdiction.

In order to avoid the structural risks of conflicts of interest described above, it is considered necessary, in the first place, to require that the jurisdictional function always be exercised by judges legally vested as such, thus eliminating the figure of lawyers who are members of the Supreme Court and the Courts of Appeals. In this way, jurisdictional decisions will always be in the hands of persons with exclusive dedication to such work, avoiding situations of conflict of interest that occur due to the practice of the profession by the lawyers who are members. In addition, this limits the power of the Executive Branch in the appointment of persons to exercise the jurisdictional function in the Superior Courts of Justice.

Secondly, the Judicial Prosecutor's Office is entrusted with the evaluation of conflicts of interest and is empowered to issue opinions for their management. In this way, it seeks to promote a

¹⁵ CORDERO V., Luis. Panorama para la construcción constitucional de un gobierno judicial. In: *Judicatura y Nueva Constitución*. p. 279.

¹⁶ The Compendium on Councils for the Judiciary prepared by the European Network of Councils for the Judiciary (2021) states: "The Council can be composed either exclusively of members of the judiciary or members and non-members of the judiciary. (...) When the composition is mixed, the Council should be composed of a majority of members of the judiciary, but not less than 50 %". The ENCJ Compendium on Councils for the Judiciary (2021), Section C "Composition and Structure". The Universal Statute of the Judge, adopted by the Central Council of the International Union of Judges (updated in Santiago, Chile on November 14, 2017) states, "The Council of the Judiciary must be completely independent from the other branches of government. It must be composed of a majority of judges elected by their peers, in accordance with procedures that ensure their greater representation." The Magna Carta of Judges drafted by the Consultative Committee of European Judges (November 17, 2010) says: "The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers." The Report on the Independence of the Judicial System of the European Commission for Democracy through Law (Venice Commission) (Study No. 494/2008 of 16 March 2010) states: "In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers". Finally, regarding the debate held during the Chilean constituent process of 2022, the Venice Commission recommended to the Chilean Constituent Convention that the Council of Justice "should have a pluralistic composition, with a substantial part and at least half of its members being judges."

culture of consultation, by virtue of which judges may turn to a specialized body to consult on how to proceed in situations in which conflicts of interest may be involved.

These conflict of interest management mechanisms seek to reduce opacity and the risk of corruption in the exercise of jurisdiction, thus safeguarding the independence and impartiality of judges

CONTENTS

1. Appointments of magistrates, judges and other members of the Judicial Branch's Primary Judicial Service Scale

It is proposed to create an autonomous body, called the Judicial Appointments Council, which will be in charge of managing the selection processes, and new rules are introduced for judicial appointments, based on processes based on the merit of the candidates and through effective competition mechanisms.

a. Judicial Appointments Council

The Judicial Appointments Council will have a mixed composition, which considers a majority of female and male judges and, within this, a broad representation of the different classes of courts in the country.

The following is thus proposed for the Judicial Nominating Council

- i) a minister of the Supreme Court;
- ii) a minister of a Court of Appeals;
- iii) a judge of the Judicial Branch;
- iv) one representative appointed by the Council of Rectors of Chilean Universities, from among persons who have served as dean of one of its law schools; and
- v) a lawyer of recognized professional and academic trajectory, who must have at least twenty years of law degree, appointed by the President of the Republic, upon proposal of the High Public Management Council.

The members of the Judicial Branch shall be appointed by lot from lists drawn up by the Judicial Appointments Council, composed of persons with at least ten years of experience in the exercise of the judicial function and who have not been disciplinarily sanctioned during said period. These councilors may not exercise judicial functions during their term of office and shall return to their functions upon completion of their term of office, in the manner determined by law.

The Council shall have the function of proposing to the President of the Republic shortlists of candidates for the positions of ministers and judicial prosecutors of the Supreme Court, ministers and judicial prosecutors of the Courts of Appeals, judges and other members of the Judicial Branch's primary hierarchy.

This hierarchical proposal will be the result of processes based on objective, technical and professional principles of independence and non-discrimination, based on the merit of the candidates and through effective competition mechanisms.

The members of the Board shall serve for a term of five years, without the possibility of reelection.

b. New judicial appointment procedure

A two-stage procedure is proposed: the first, before a Judicial Appointments Council; the second, before the President of the Republic.

The Judicial Appointments Council shall be responsible for the preparation of shortlists of candidates, which shall be submitted to the President of the Republic for appointment.

Upon receipt of the short list, the President of the Republic shall have short period of time to make the appointment. If the appointment has not been made after this period has elapsed, the person who occupies the first place on the short list shall be deemed to have been selected, and the appointment shall be made.

For the rest, a constitutional organic law shall determine the regulation of the judicial appointments procedure, as well as the administrative procedures that serve as the basis for the competitions, the mechanisms of effective opposition and the specific functions that the Judicial Appointments Council may entrust to the body in charge of the training and improvement of judges and civil servants.

2. Creation of an autonomous body responsible for the administration and management of the resources of all the courts of the Nation, with the exception of the Constitutional Court, the Election Qualifying Court, the regional electoral courts and the other courts determined by an organic constitutional law.

It is proposed the creation of an autonomous body in charge of the administration and management of the resources of all the courts of the Nation, with the exception of the Constitutional Court, the Election Qualifying Court, the regional electoral courts and the other courts determined by the respective constitutional organic law. A constitutional organic law shall determine the organization, integration, operation, procedures and other attributions of this body.

In addition, this body is granted the regulatory power necessary to ensure the proper administrative functioning within its competence, subjecting itself to the accountability mechanism before the Office of the Comptroller General of the Republic in the exercise of its attributions.

3. Other modifications

The constitutional reform bill introduces other relevant amendments, among which the following may be highlighted:

a. Suppression of the directive, correctional and economic superintendence of the Supreme Court.

The proposal abolishes the directive, correctional and economic superintendence of the Supreme Court and, in its place, confers on it a limited power to issue such orders as may be necessary for the proper administration of justice.

b. Discipline and control of conflicts of interest

The Judicial Prosecutor's Office, composed of the judicial prosecutors of the Supreme Court and the Courts of Appeals, shall oversee the correct actions of judges and officials of all the courts of the Nation, with the exception of the Constitutional Court, the courts of electoral justice and the other courts determined by the respective constitutional organic law.

In the exercise of this function, it shall carry out investigations for disciplinary and probity offenses of the persons indicated and shall bring charges, if appropriate, before the courts established by an organic constitutional law.

It shall also have the power to prevent conflicts of interest, and may issue opinions on matters related to these matters, which shall be binding on the members of the Judicial Branch.

c. Suppression of lawyers members

It is proposed to incorporate a new second paragraph to Article 76 of the Constitution, by virtue of which the exercise of jurisdiction by the courts may only be exercised by judges or magistrates legally vested as such, with the exception of arbitration tribunals.

Thus, any external lawyer who intends to join a court for the exercise of jurisdiction must join the court as a judge or magistrate and be subject to the same incompatibilities for the exercise of the profession to which they are subject.

d. Professional ethics

It is proposed to amend the twentieth transitory provision of the Political Constitution of the Republic, referring to the ethical conduct of professionals who do not belong to professional associations.

On the one hand, it is proposed that the ordinary courts may declare an ethical violation and impose the following sanctions: a fine for tax benefits equivalent to a lump sum of up to 10 annual tax units, and suspension from the profession for two months to three years.

On the other hand, professional associations are recognized as having standing to bring actions and complaints before the courts for serious breaches of professional ethical conduct.

4. Transitional regime

Finally, a series of transitory provisions are contemplated, which are in charge of the entry into force of the aforementioned constitutional amendments. Particularly, those that introduce modifications to the form of appointments, that create the Judicial Appointments Council and that reform the administration and management of the courts are subject to the enactment of the organic laws that, respectively, develop their normative regulation.

Notwithstanding this necessary period of legal vacancy, and in accordance with the grounds that justify this constitutional reform, a transitory regime is contemplated to carry out the appointments to the positions of magistrates of the superior courts of justice in the interim period, which allows for the application of the new procedure under the principles of probity, transparency and merit that inspire this amendment

Transitory rules are also established so that, in the interim period between the publication of the constitutional reform in the Official Gazette and its full entry into force, the Superior Council of the Administrative Corporation of the Judicial Branch is modified and the is required to report to the Office of the Comptroller General of the Republic.

It also incorporates a transitory regime for the exercise of the new powers entrusted to the Judicial Prosecutor's Office.

Finally, the President of the Republic is ordered to send to Congress the corresponding constitutional organic law projects within one year from the publication of the constitutional reform in the Official Gazette; it is provided that in the procedures of appointments, the provisions in force at the time of their initiation will be applicable until they are fully processed; and it is established that the agreed orders issued by the superior courts will remain in force until they are expressly annulled.

II. Text of the draft amendments (translation provided by the Chilean authorities)

Amendment to the Political Constitution of the Republic

The Political Constitution of the Republic, whose consolidated, coordinated, and systematized text was established by Supreme Decree No. 100 of 2005, issued by the Ministry General Secretariat of the Presidency, is hereby amended as follows:

1) Article 32 is amended as follows:

a) Paragraph 12 is replaced with the following:

“12. To appoint the judicial prosecutor of the Supreme Court, judges and judicial prosecutors of the Courts of Appeal, and trial court judges, upon proposal of the Judicial Appointments Council; to appoint justices of the Supreme Court, upon proposal of said Council and with the agreement of the Senate; to appoint the members of the Constitutional Court whom it is incumbent upon the President to designate; and to appoint the National Prosecutor, upon proposal of the Supreme Court and with the agreement of the Senate, all in accordance with the provisions of this Constitution.”

b) Paragraph 13 is replaced with the following:

“13. To oversee the professional conduct of judges and other employees of the Judiciary, and to request, for such purpose, that the judicial prosecutor's office conduct investigations into breaches of discipline and probity, and, if sufficient grounds exist, to file the corresponding accusation before the competent courts.”

2) A new paragraph 11 is added to the first paragraph of Article 57, as follows:

“11. Members of the Judicial Appointments Council.”

3) A new second paragraph is added to Article 76, as follows:

“The power referred to in the preceding paragraph may only be exercised by judges or magistrates who are lawfully invested as such, except in the case of arbitral tribunals.

4) The following new Articles 76 bis and 76 ter are added after Article 76:

“Article 76 bis. An autonomous body, under the name Judicial Appointments Council, shall be responsible for managing the processes for the selection of judges. This function shall be based on objective, technical, and professional criteria, ensuring independence and non-discrimination, grounded in the merit of the candidates and conducted through effective competitive mechanisms.

This Council shall be entrusted with proposing to the President of the Republic the lists of candidates for the positions of justices and the judicial prosecutor of the Supreme Court; justices and judicial prosecutors of the Courts of Appeal; trial court judges; and other members of the Primary Judicial Hierarchy.

The Judicial Appointments Council shall be composed of the following members:

- a) One justice of the Supreme Court.
- b) One justice of a Court of Appeal.
- c) One trial judge of the Judiciary.

- d) One representative designated by the Council of Rectors of Chilean Universities, chosen among persons who have served as dean of one of its faculties of law.
- e) A lawyer of recognized professional or academic standing, with no fewer than twenty years since admission to the bar, appointed by the President of the Republic upon proposal of the Senior Public Management Council (*Consejo de Alta Dirección Pública*).

Members of the Judicial Appointments Council shall serve for a term of five years and may not be reappointed, except in cases where a member was appointed as a substitute and served for less than two years. The staggered renewal of members shall be determined by law.

Persons referred to in paragraphs a), b), and c) shall be selected by lot from lists prepared by the Judicial Appointments Council, composed of individuals with at least ten years of judicial experience and who have not been subject to disciplinary sanctions during that period. These members shall not exercise judicial functions while serving on the Council and shall return to their previous roles upon the conclusion of their term, in the manner provided by law.

The individuals referred to in paragraphs d) and e) shall be subject to the provisions of Articles 58 and 59, and may not engage in the practice of law, including holding judicial office or performing any of the activities referred to in the second and third paragraphs of Article 60.

The Judicial Appointments Council shall have a technical secretariat, appointed by the Senior Public Management Council, which may delegate the execution of selection processes to the entity responsible for the training and professional development of judges and judicial officers.

An organic constitutional law shall establish the organization, operation, procedures, and other powers of the Judicial Appointments Council, and shall determine its staffing, remuneration system, and the legal status of its personnel.

Article 76 ter. There shall be an autonomous body responsible for the administration and management of resources for all courts of the Nation, with the exception of the Constitutional Court, the Electoral Qualification Tribunal, regional electoral courts, and any others that may be excluded by an organic constitutional law. This body shall be accountable to the Office of the Comptroller General of the Republic.

An organic constitutional law shall determine the organization, composition, operation, procedures, and other powers of the autonomous body referred to in the preceding paragraph, and shall establish its staffing, remuneration system, and the legal status of its personnel. Among its powers, the body shall possess regulatory authority to ensure the proper administrative functioning within its scope of competence.”

- 5) The second paragraph of Article 77 is amended inserting the phrase, “, insofar as it relates to the jurisdictional powers of the courts of justice,” between the expressions “powers of the courts,” and “may only be amended.”**

- 6) Article 78 is amended as follows:**

- a) The third paragraph is replaced with the following:**

“Justices of the Supreme Court shall be appointed by the President of the Republic, chosen from a ranked shortlist proposed by the Judicial Appointments Council, with the agreement of the Senate after a public hearing. The Senate shall adopt its decisions by a two-thirds majority of its sitting members, in a session specially convened for that purpose. If the Senate rejects the President’s nominee, the Council must complete the shortlist by

proposing a new candidate in replacement of the rejected one, and the process shall be repeated until an appointment is approved.”.

b) The fifth and sixth paragraphs are replaced with the following:

“When the appointment concerns a position to be filled by a member of the Judiciary, the Judicial Appointments Council shall draw up the shortlist exclusively from members of the Judiciary.

The Judicial Prosecutor of the Supreme Court, the justices and judicial prosecutors of the Courts of Appeal, and the trial judges and other members of the Primary Judicial Hierarchy shall be appointed by the President of the Republic from a ranked shortlist proposed by the Judicial Appointments Council.”.

c) The seventh paragraph is replaced with the following:

“The shortlists of candidates submitted to the President of the Republic shall be arranged in descending order based on the Council’s assessment of the results obtained through merit evaluation tools. If ten days have passed since the Council’s notification without the President selecting a candidate, the candidate ranked first on the shortlist shall be deemed appointed, and the appointment shall proceed accordingly.”.

d) Paragraphs eight and nine are repealed.

e) The following new final paragraph is added:

“An organic constitutional law shall regulate the judicial appointments procedure, as well as the administrative processes underlying the competitive examinations, the effective competitive mechanisms, and the specific functions that the Council may delegate to the body in charge of the training and professional development of judges and judicial officers.”.

7) Article 80 is amended as follows:

a) The third paragraph is replaced with the following:

“In any case, the Judicial Prosecutor’s Office, upon request of the President of the Republic, at the request of an interested party, or ex officio, may, in accordance with the law, bring the corresponding accusation before the competent court and request removal, following a declaration that the respective judges have not exhibited good conduct.”.

b) The final paragraph is replaced with the following:

“The Judicial Appointments Council, in a session specially convened for that purpose and by an absolute majority of its members, may authorize or order, with due justification, the transfer of judges and other officials and employees of the Judiciary to another position of equal rank.”.

8) The following new Article 80 bis is added after Article 80:

“Article 80 bis. The Judicial Prosecutor’s Office, composed of the judicial prosecutors of the Supreme Court and the Courts of Appeal, shall be responsible for overseeing the proper conduct of judges and staff of all courts of the Nation, with the exception of the Constitutional Court, the electoral justice tribunals, and other courts as determined by an organic constitutional law. It shall also oversee the conduct of judicial auxiliary personnel as defined by law.

In the exercise of this function, it shall carry out investigations into disciplinary and probity-related breaches committed by the aforementioned individuals and, where appropriate, shall bring accusations before the courts designated by an organic constitutional law.

It shall also have authority to prevent conflicts of interest and to investigate breaches of probity, and may issue opinions on matters related to such issues, which shall be binding on members of the Judiciary.

An organic constitutional law shall determine the organization, functions, and additional powers of the Judicial Prosecutor's Office.”.

9) Article 82 is replaced with the following:

“Article 82. The Supreme Court may issue, in accordance with this Constitution and the law, the necessary binding resolutions for the proper administration of justice across all courts of the Nation, with the exception of the Constitutional Court and those that constitute the electoral justice system.”

10) The twentieth transitory provision is amended as follows:

a) The following phrase is added between the word “ordinary” and the period that follows:

“, and may declare an ethical violation and impose the following sanctions:

- i. A fine for the benefit of the public treasury, equivalent to a total amount of up to ten annual tax units.
- ii. Suspension of the professional license for a period ranging from two months to three years.”.

b) The following new second paragraph is added:

“For these purposes, professional associations shall ensure ethical professional conduct and, in defense of this interest, shall have standing to take legal action and file complaints before the courts for serious violations of professional ethical conduct.”.

TRANSITIONAL REGIME

Article One. This constitutional reform shall enter into force as follows:

- a. The amendments to Articles 32, paragraph 12, 57, paragraph 11, 78, and 80, final paragraph, and the new Article 76 bis, relating to the rules that introduce modifications to the manner of appointment of ministers, judges, judicial prosecutors, and other members of the Primary Judicial Roster, and that create the Judicial Appointments Council and grant it powers, shall enter into force concurrently with the entry into force of the organic constitutional laws that must be enacted pursuant to the eighth paragraph of Article 76 bis and Article 78.
- b. The new Article 76 ter, concerning the body responsible for the administration and management of resources for all courts of the Nation, except for the Constitutional Court, the Electoral Tribunal, regional electoral courts, and other courts as determined by an organic constitutional law, shall enter into force concurrently with the entry into force of the organic constitutional law that must be enacted pursuant to the final paragraph of Article 76 ter.

- c. The new second paragraph added to Article 76 shall enter into force on January 1 of the year following the publication of this constitutional reform in the Official Journal.
- d. The amendments made to Article 80 bis, concerning the powers of the Judicial Prosecutor's Office, shall enter into force from the date of publication of this constitutional reform in the Official Journal, with the following exceptions:
 - i. As regards officials from the Secondary Hierarchy and the Judiciary Employees' Hierarchy, the reform shall take effect two years after the publication date, and
 - ii. As regards judges and officials of courts that are not part of the Judiciary, the reform shall take effect five years after the publication date.
- e. All other amendments introduced by this constitutional reform shall enter into force on the date of its publication in the Official Journal.

Article Two. 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 eighth and final paragraphs of Article 76 bis and the final paragraph of Article 78.

Article Three. The first Judicial Appointments Council shall be established within ninety days from the publication of this constitutional reform in the Official Journal.

In the initial composition of the Council, the members referred to in letters (a), (b), and (c) of Article 76 bis shall be appointed by a lottery conducted by the Judicial Academy, based on lists created by the Administrative Corporation of the Judiciary, within thirty days from the publication of this constitutional reform in the Official Journal. These members shall not exercise judicial functions while serving in this capacity and shall return to their judicial duties once their term has concluded.

Moreover, the President of the Republic, within ninety days following the publication of this constitutional reform in the Official Journal and without being subject to the provisions of Title VI of Law No. 19,882, which regulates new public employee policies, shall appoint the member referred to in letter (e) of Article 76 bis. The remaining member shall be appointed by the Council of Rectors of Chilean Universities, as established in letter (d) of Article 76 bis.

The members of the first Judicial Appointments Council shall carry out their functions until the corresponding vacancy is filled, in the manner and within the timeframes determined by law. For these purposes, individuals who are members of the Judiciary at the time of their appointment as members of the Council shall receive the same salary as their judicial position while serving in this capacity.

The President of the Republic, within ninety days following the publication of this constitutional reform in the Official Journal and without being subject to the provisions of Title VI of Law No. 19,882, shall appoint the first technical secretary of the Judicial Appointments Council for the purposes regulated in the previous transitional article. The appointed secretary shall assume the position immediately and carry out their duties until the corresponding selection process is completed.

Article Four. During the period between the establishment of the first Judicial Appointments Council and the entry into force of the provisions referred to in Articles 76 bis and 78, the processes for the appointment of vacant positions of ministers of the superior courts of justice, for which a call for applications is made during this period, shall be governed by the rules set forth

in these articles. For the execution of these selection processes, the Council shall set the criteria and may delegate the execution of the selection process to the Judicial Academy.

Within ninety days from the publication of this constitutional reform in the Official Journal, the Senate shall regulate the public hearings for the appointment processes in which it is required to provide or deny its consent.

Article Five. In the appointment procedures, the provisions in force at the time of initiation shall apply until their full completion.

Article Six. Until the law regulating the body referred to in the final paragraph of Article 76 ter is enacted, the functions of this body shall be carried out by the Administrative Corporation of the Judiciary, under the following rules:

- a) Its Superior Council shall be composed of the President of the Supreme Court, who shall preside over it; a former Minister of Justice or former Undersecretary of Justice, appointed by the President of the Republic; and a representative appointed by the Judicial Appointments Council, from individuals who have served as dean of a faculty of civil engineering, economics, or administration. This Council shall begin its duties within ninety days from the publication of this constitutional reform in the Official Journal. The term of office for the members of the Council shall be governed by the provisions of Article 508 of the Organic Code of Tribunals. In case of a vacancy, members shall be replaced according to the appointment rules established in this subsection.
- b) As of January 1 of the year following the publication of this constitutional reform in the Official Journal, it shall be required to report to the Comptroller General of the Republic.

Article Seven. Notwithstanding the provisions of Article 82, the internal orders issued by the superior courts of justice prior to the publication of this constitutional reform in the Official Journal shall remain in effect until expressly revoked by the competent body.