



Strasbourg, 23 September 2025

**CDL-REF(2025)038**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**OF THE COUNCIL OF EUROPE**  
**(VENICE COMMISSION)**

**SPAIN**

**PROPOSAL FOR REFORM OF THE SYSTEM FOR ELECTING JUDICIAL  
MEMBERS OF THE GENERAL COUNCIL FOR THE JUDICIAL POWER  
(PREPARED IN ACCORDANCE WITH THE ADDITIONAL PROVISION  
OF ORGANIC LAW NO. 3/2024 OF 2 AUGUST 2024)**



Consejo General  
del Poder Judicial

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***PROPOSAL  
ADDITIONAL PROVISION ORGANIC LAW 3/2024***

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## **GENERAL COUNCIL OF THE JUDICIARY**

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### **INTRODUCTION**

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Organic Law 3/2024 of 2 August amending Organic Law 6/1985 of 1 July on the Judiciary and amending Law 50/1981 of 30 December regulating the Organic Statute of the State Prosecution Service, published in the "Official State Gazette" on the 5th of that month, which entered into force the day after its publication in accordance with the Second Final Provision thereof, included an Additional Provision with the following wording:

"Within six months of the entry into force of this Organic Law, the General Council of the Judiciary shall prepare a report examining the European election systems for members of Judicial Councils similar to the Spanish Council, and a reform proposal for the election system for members designated from among lower-court and senior judges, adopted by a three-fifths majority of its members, in accordance with Article 122 of the Constitution, which guarantees the independence thereof and which, with the direct participation of judges to be determined, can be positively assessed by the European Commission's Rule of Law Report, establishing a General Council of the Judiciary in line with the highest European standards.

This proposal shall be submitted to the Government, the Congress of Deputies and the Senate, for the holders of the legislative initiative, on the basis thereof, to prepare and submit to the Spanish Parliament a government bill or non-government bill to reform the election system for the judicial members, to be debated and, if appropriate, processed and approved".

In compliance with this legal provision, this Council has adopted a reform proposal for the election system for members designated from among lower-court and senior judges, with two options, thereby taking account of the suggestion made by the former European Commissioner for Justice Didier Reynders during his visit to the Council on 18 September.



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### **FIRST PROPOSAL**

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**PROPOSAL PRESENTED, IN COMPLIANCE WITH THE MANDATE OF THE ADDITIONAL PROVISION OF ORGANIC LAW 3/2024 OF 2 AUGUST, BY THE MEMBERS OF THE GENERAL COUNCIL OF THE JUDICIARY (CGPJ): JOSÉ LUIS COSTA PILLADO, JOSÉ ANTONIO MONTERO FERNANDEZ, MARÍA PILAR JIMÉNEZ BADOS, JOSÉ EDUARDO MARTÍNEZ MEDIAVILLA, GEMA ESPINOSA CONDE, JOSÉ MARÍA PÁEZ MARTÍNEZ-VIREL, MARÍA PILAR ESTHER ROJO BELTRÁN, JOSÉ CARLOS ORGA LARRÉS, ISABEL REVUELTA DE ROJAS AND ALEJANDRO ABASCAL JUNQUERA.**

### **FOREWORD**

#### **I**

#### **MANDATE OF THE ADDITIONAL PROVISION OF ORGANIC LAW 3/2024 OF 2 AUGUST ON THE NEW CGPJ CONSTITUTED ON 25 JULY 2024**

The Additional Provision of Organic Law 3/2024 of 2 August amending Organic Law 6/1985 of 1 July on the Judiciary and amending Law 50/1981 of 30 December, regulating the Organic Statute of the State Prosecution Service, established a mandate of the organic legislative body on the new General Council of the Judiciary that was constituted following the renewal of the members of said Council brought about by this Law.

The mandate on the new Council is twofold: it shall produce a report and a proposal within six months of the Law entering into force.

The report must examine the European election systems for members of Judicial Councils similar to the Spanish Council.

The proposal must present a reform of the election system for lower-court and senior judges, approved by three-fifths of the members, in accordance with Article 122 of the Constitution, which guarantees their independence.

As regards the proposal, the organic legislative body imposes limits: which with the direct participation of judges to be determined; can be positively assessed by the European Commission's Rule of Law Report; and that establishes a General Council of the Judiciary in line with the highest European standards.

This specific and clear legal framework excludes a proposal of a speculative or doctrinal nature, or a proposal based on recommendations or case-law relating to EU Member States that do not have Judicial Councils similar to that set out in Article 122 of the Spanish Constitution, as is the case for Germany,



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where judges are governed by the Executive Branch through the Ministry of Justice, with the assistance of advisory body formed of judges.

The three-pronged limitation established by the Law in its mandate to the Council incorporates an unprecedented qualitative step forwards in the election system for judicial members of the General Council of the Judiciary, introducing into a positive law provision the highest European standards, on which the European Commission bases its annual Rule of Law Report, and which are used as a parameter for the Commission to make a positive assessment. As such, the Legislator makes the aforementioned "highest European standards" binding in the mandate on the new Council.

This provides an exceptional opportunity to comply, at the request of the organic legislative body, with the recommendations issued for Spain, which have been consistently reiterated, without being heeded to date, by the European Commission, since its 2021 Rule of Law Report for Spain, and by the Council of Europe's Group of States against Corruption (GRECO), since its Fourth Evaluation Round "Corruption prevention in respect of members of parliament, judges and prosecutors" in 2013.

The European Commission notes in its 2024 Rule of Law Report for Spain:

***"when there is a mixed composition of judicial councils, for the selection of judge members, judges should be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and political authorities, such as Parliament or the executive, should not be involved at any stage of the selection process".***

(Note 12, page 6, of the Rule of Law Report, Spain 2024).

This Note, as it indicates itself, reflects the European standard articulated by GRECO in the Addendum to the Second Compliance Report, December 2022, paragraph 16, of the Recommendations for Spain in the Fourth Evaluation Round.

The Rule of Law Report for Spain 2024 concludes this point by referring to the European standards articulated in "*Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) on Council for the Judiciary at the service of society, para. 27 and 31, as well as Opinion No. 24 (2021) of the Consultative Council of European Judges (CCJE) on Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, p. 4.*"

CCJE Opinion No. 10 (2007) establishes as a European standard regarding the election of judge members of Councils for the Judiciary:

***"Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels". (paragraph 27)***



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***"The CCJE does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process. All interference of the judicial hierarchies in the process should be avoided. All forms of appointment by authorities internal or external to the judiciary should be excluded". (paragraph 31)***

And CCJE Opinion No. 24 (2021) insists on establishing as a European standard for the election of judges to Councils for the Judiciary:

***"Judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary. If direct elections are used for selection, the Council for the Judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system". (paragraph 8)***

To address the task entrusted to this Council by the Additional Provision, at the proposal of its President, the Plenary Session of the General Council of the Judiciary approved the creation of a working group, composed of four members, at its meeting of 25 October 2024.

In order to compile "the highest European standards" for the appointment of judicial members, the working group met with, at the European Union level, Mr Julian Mousnier, European Commission Director for Rule of Law, and Mr Ignacio Signes de Mesa, Legal Secretary at the Court of Justice of the European Union, along with, at Council of Europe level, Ms Simona Granata-Menghini, Director/Secretary of the Commission for Democracy through Law, Venice Commission, and Mr José Igreja Matos, expert appointed by the Group of States against Corruption GRECO and member of the Consultative Council of European Judges CCJE, and with Ms Livia Stoica Becht, Executive Secretary of GRECO.

The working group also met with the presidents and/or spokespersons of the four Spanish judicial associations, whose members make up 57.82% of the judiciary, and with the President of the National Court and its Governing Chamber.

A decision was also adopted to hear the views, presented in a written report, of all the Governing Chambers of the seventeen High Courts of Justice in Spain and that of the Supreme Court.

In addition, with the collaboration of the Counsels to the General Council of the Judiciary, the working group conducted a study divided into three parts: Spanish legislative history and the relevant case-law of the Constitutional Court; European election systems for members of Judicial Councils similar to the Spanish Council; and the highest European standards for the composition of Judicial Councils.

The results of all these tasks carried out by the working group are included in the "Report on Additional Provision of Organic Law 3/2024", which fulfils the first of the mandates on the new Council under the Additional Provision:



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preparing “*a report examining the European election systems for members of Judicial Councils similar to the Spanish Council*”.

### **II**

#### **THE TWELVE LOWER-COURT AND SENIOR JUDGES SITTING ON THE SPANISH GENERAL COUNCIL OF THE JUDICIARY (CGPJ) ARE ELECTED BY PARLIAMENT**

Although the systems of governance of the Judiciary existing in the various European countries also include some where judges are governed through the Ministry of Justice, advised by bodies formed of judges as is the case for Germany, as seen above, which was the model for nineteenth-century Spanish constitutionalism, and states that assign organisational and operational tasks to internal bodies of the Judiciary itself, of an administrative nature, as is the case for the Netherlands, Sweden and Denmark, the systems that must be examined under the Additional Provision are those of “*Judicial Councils similar to the Spanish Council*”, that is, those that assign the governance of the Judiciary to a constitutional body that is independent from the other Branches of Government and is not part of the Judiciary.

This is the system in France, Italy, Portugal and Belgium, analysed in the aforementioned Report. It is worth highlighting that in all of them, without exception, judicial members are elected by their peers, as opposed to the election in Spain of members of judicial origin, not by their peers, but by the two Chambers of Parliament.

Article 122.3 of the Spanish Constitution sets out:

*“The General Council of the Judiciary shall be formed of the President of the Supreme Court, who shall chair it, and twenty members appointed by the King for a period of five years. Of these, twelve from among lower-court and senior judges of all judicial categories, in the terms set out in the organic law; four proposed by the Congress of Deputies, and four proposed by the Senate, elected in both cases by a majority of three-fifths of the members, chosen from lawyers and other jurists, all of recognised competence, who have exercised their profession for more than fifteen years.”*

The election of the twelve judges by the Chambers, in contrast to the procedure in the case of the eight jurist members, who must be elected by the Chambers by constitutional mandate, is a choice by the organic legislative body, introduced in Organic Law 6/1985 of 1 July on the Judiciary, which remains in place today, with the two amendments implemented in this respect by Organic Law 2/2001 of 28 June and Organic Law 4/2013 of 28 June.

These amendments introduced the indirect participation of lower-court and senior judges in the election system for the two [sic] judicial members, which remains the exclusive responsibility of the Chambers. This indirect participation consists of submitting candidatures, with the Chambers subsequently electing six judicial members each, by a three-fifths majority.



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Organic Law 2/2001 stipulated that the candidatures, up to a maximum of 36, were to be submitted by judicial associations or by a number of lower-court and senior judges representing at least two percent of those in active service, in accordance with the strict proportionality criteria set out in the Law.

Organic Law 4/2013 modified the submission of candidatures, stipulating that they may be submitted, without a maximum limit, by any lower-court or senior judge in active service in the judiciary, endorsed by twenty-five active members of the judiciary or a judicial association. It also stipulated that the Chambers, when making the selection that remains their exclusive responsibility, must take into consideration the number of unaffiliated and affiliated lower-court and senior judges and respect, as a minimum, the ratio of three Supreme Court justices, three senior judges with more than twenty-five years' experience in the judiciary and six lower-court or senior judges, with no length of service requirement, each vacancy being added to the quota for the next category if there are no candidates for members under one of the aforementioned headings. This system of submitting candidatures to the Parliament is still in use today.

The election of the lower-court and senior judges on the General Council of the Judiciary by a political body, such as Parliament, is not laid down in the Constitution, Article 122.3 of which provides for a mixed composition of the General Council of the Judiciary, with twelve judicial members and eight jurists, plus the President of the Supreme Court, who shall chair it, and, accordingly, is an "*ex officio*" member of the Council. Election of the jurist representatives by Parliament is, however, required by the Constitution. Election of the judge members by Parliament is a choice by the Legislator, different to the option that was initially in force, from Organic Law 1/1980 of 10 January on the General Council of the Judiciary, the first legislative development of this matter, until it was repealed by Organic Law 6/1985 of 1 July, under which the Congress of Deputies and the Senate each elect half of the total number of members of the Spanish General Council of the Judiciary.

The Legislator of Organic Law 1/1980 opted for all the judicial members of the Council to be elected by judges, which, *a priori*, would have complied with the fundamental part of the European standards indicated in the European Commission's Rule of Law Report for Spain, that the judicial members "*should be elected by their peers*", although it did not comply with another part of these European standards, that the election of judges by their peers should be undertaken "*following methods guaranteeing the widest representation of the judiciary at all levels*".

The problem of over-representation of the higher categories of the judiciary and the issue of associations of judges representing less than fifteen percent of the judiciary not being able to submit candidatures led to the reform of the election system for the judicial members, implemented by Organic Law 6/1985 on the Judiciary, and, although the draft organic law when it entered Congress was limited to correcting the election method to ensure the broadest representation of the Judiciary at all levels, it was transformed during the



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parliamentary process into a pure system of designation of the judicial members exclusively by Parliament, which in turn violates the fundamental standard that "*political authorities, such as Parliament or the executive, should not be involved at any stage of the selection process*".

This process gave rise to a dispute between State constitutional bodies before the Constitutional Court, between the General Council of the Judiciary and the Congress of Deputies, which was settled by Constitutional Court Judgment 45/1986 of 17 April. In turn, fifty-five Deputies lodged an application for constitutional review of Organic Law 6/1985 in its entirety, which was resolved by the Constitutional Court in its Judgment 108/1986 of 29 July.

Considering the interpretative possibilities presented by the wording of Article 122.3 of the Constitution, the Constitutional Court stated in its Judgment 108/1986 (Legal Ground 13):

*"A somewhat analogous result is reached when attempting to interpret the requirement set out in Article 122.3 in accordance with its spirit and purpose. The aim is, on one hand, to ensure the presence on the Council of the main views and strands of opinion existing among the group of lower-court and senior Judges themselves, i.e. without regard to their political preferences as members of the public and, on the other, to balance out this presence with that of other jurists who, in the opinion of both Chambers, can articulate the influence on the world of Law of other currents of thought existing in society".*

Moreover, as regards the constitutionality of the legislative option of assigning the election of judicial members of the General Council of the Judiciary to Parliament, this ruling goes on to say, in the same Legal Ground 13:

*"As such, the purpose of the requirement, in brief, is to ensure that the composition of the Council reflects the pluralism existing in society and, in particular, in the Judiciary. That this objective is more easily achieved by assigning to the Judges themselves the power to elect twelve of the members of the CGPJ gives rise to few doubts; but we can neither overlook the risk, also articulated by some members of the Parliament that approved the Constitution, that the electoral process may transfer the ideological divisions existing in society to the Judiciary (making the effect achieved different from the one sought) nor, above all, can it be maintained that this objective is absolutely negated by adopting another procedure, in particular that of also conferring on Parliament the power to propose the members of the Council from the Bench of Judges, all the more so when the Law adopts certain precautions, such as requiring a qualified majority of three-fifths in each Chamber (Article 112.3 Organic Law on the Judiciary). Undoubtedly, there is a risk of undermining the stated purpose of the constitutional requirement if, when the Chambers make their proposals, they disregard the objective pursued and, acting with criteria that are admissible in other areas but not this one, focus solely on the division of forces existing in their midst and distribute the positions to be filled among the various parties, in proportion to their parliamentary strength. The logic of the party-based state urges*



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*actions of this kind, but that same logic makes it necessary to maintain certain spheres of power, including, most notably, the judiciary, separate from party politics".*

### **III**

#### **THE INDEPENDENCE AND THE "PERCEPTION" OR "APPEARANCE OF INDEPENDENCE" OF THE JUDICIARY**

Forty years have passed since the Legislator opted for the election of judicial members of the General Council of the Judiciary by Parliament, with the approval of Organic Law 6/1985 on the Judiciary.

These forty years have seen intense doctrinal debates, legislative reforms (only the two mentioned above directly affect the election method for judicial members), political deadlocks, a decline in public and business confidence in judicial independence, as noted by European institutions, and six Council terms of office; all against the backdrop of the development of this unique but complex Power that is the Judiciary in Spain.

Spain also joined the European Communities during these forty years. Membership of the current European Union has permeated the sphere of justice, even the issue of renewal of the Council and the method of electing judicial members, leading to the approval of the Additional Provision of Organic Law 3/2024, from which this proposal arises, in the context of the Structured Dialogue led by the European Commission on this matter for Spain.

With regard, naturally, to the legal framework established by the Organic Law for this proposal to reform the election system for the members designated from among lower-court and senior judges, under the requirement set out in the Additional Provision, this must be "*in accordance with Article 122 of the Constitution*" and "*guarantee their independence*".

The independence of the judiciary underpins the very existence of the division of powers and therefore of the rule of law established in Articles 1 and 9 of the Constitution, of which the separation of powers is, and continues to be, the prime manifestation in the evolutionary development of Spanish democracy and its parliamentary system based on a flexible separation between Parliament and Government.

As such, judicial independence, in its ad intra and ad extra dimensions discerned by the Spanish Constitutional Court, is established as a constitutional principle of the Judiciary in Article 117 of the Spanish Constitution.

The European Union underscores that "*Judicial independence is an essential element of the right to an effective remedy before a court or tribunal, as enshrined in Article 47 of the Charter of Fundamental Rights of the EU, and indispensable for ensuring effective judicial protection, as required under*



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*Article 19 of the Treaty on European Union. It is a fundamental element of an effective justice system and essential for upholding the rule of law". (2024 Justice Scoreboard. 3. 3. 3. Summary on Judicial Independence. pp. 100-101).*

And the Consultative Council of European Judges, under the Council of Europe, states that: "*The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law*". (Consultative Council of European Judges (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. Paragraph 8).

The case-law of the Court of Justice of the European Union (CJEU) links judicial independence to the election method for judicial members of Councils for the Judiciary, as these Councils are entrusted with a discretionary power to appoint judges to the highest courts. The CJEU, like the European Commission and the Council of Europe, not only raises doubts about the possible impact that election by political powers may have on the real independence of the judicial members of Councils for the Judiciary or Judicial Councils, but also expresses concern about the effect that their "*appearance of independence*", due to the manner in which they are appointed, may have on the perception of independence in respect of the appointments of senior judges made by the Council, and the direct negative impact thereof on the prevention of corruption.

As such, since its Judgment of 27 February 2018, Trade Union of Portuguese Judges, C 64-16, and in light of Articles 2 and 19 of the Treaty on European Union, the case-law of the CJEU on judicial independence has developed from an initial study of its facet as a subjective right of the subject of the law to focus on its role as a statutory guarantee for the judge and conclude by currently addressing the impact of the degree of autonomy that Councils for the Judiciary should enjoy, due to their composition, in Member States where this is the model of governance of the Judiciary, as is the case in Spain, and its direct impact on the real independence of the Judiciary and/or that perceived by the public - "*appearance of independence*".

In the judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. v Krajowa Rada Sądownictwa and Penal Code, and DO v Sąd Najwyższy, C-518/18, C-624/18 and C-628/18, paragraphs 73 and 74 stress that the CJEU has jurisdiction to rule on the independent status of Councils of the Judiciary by way of preliminary ruling: "*An interpretation of that nature clearly falls within the jurisdiction of the Court under Article 267 TFEU*". And paragraphs 137 and 138 state: "*The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective*" and "*However, that is only the case provided, inter alia, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal*". And paragraphs 152 and 153 highlight



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the risk that an assessment may “*find that that body lacks independence in relation to the legislature and the executive*” and that this “*may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law*”.

In the Judgment of the CJEU (Grand Chamber) of 24 June 2019, *Commission v Poland* (Independence of the Supreme Court), C-619/18, paragraph 100 states: “*the 15 members of that Council who, out of the 27 members of which it is composed, must be elected from amongst the judges, would henceforth be elected not by their peers as previously but by the lower chamber of the Polish Parliament, so that doubt may be cast on their independence*”. And paragraph 116 highlights, in respect of its power to appoint Supreme Court justices, the requirement that “*that body is itself independent of the legislative and executive authorities*”.

The European Court of Human Rights (ECHR) also notes in its case-law on Article 6.1 of the European Convention on Human Rights that this article requires the Courts to be independent, both from the parties and from the legislative and executive authorities. (ECHR, judgment of 18 May 1999, *Ninn-Hansen v Denmark*, CE:ECHR:1999:0518DEC002897295, p. 19).

Since the appointment of judges is an essential role of the Councils for the Judiciary, if there is only one source of legitimacy in the appointment of all Council members, there is a risk of transferring the perception of a lack of independence, whether real or otherwise, to the judges appointed by the Council.

This issue was also addressed, highlighting Spain's non-compliance, by the Group of States against Corruption of the Council of Europe, GRECO, in its Second Interim Compliance Report on Spain in June 2019:

“*When the governing structures of the judiciary are not perceived to be impartial and independent, this has an immediate and negative impact on the prevention of corruption and on public confidence in the fairness and effectiveness of the country's legal system. Six years later the situation is the same and, therefore, recommendation v cannot be considered implemented. GRECO reiterates its view that political authorities shall not be involved, at any stage, in the selection process of the judicial shift*”. (Paragraph 35)

And again at a later date, in 2021, the Second Compliance Report on Spain, adopted by the same Council of Europe body, states:

“*GRECO notes that the information provided by the authorities does not bring anything new to what was already analysed in the Fourth Round Evaluation Report back in 2013. Today, the situation is exactly the same, and the concerns expressed by GRECO in the light of it remain as prevalent, if not more, than before. At the time, GRECO stressed that one of the most notable aims of a judicial council, whenever established, is that of better safeguarding the independence of the judiciary, both in appearance and in practice. It further noted that the result in Spain had been the opposite, as evidenced by*



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*recurrent public disquiet in this domain. GRECO pointed at the applicable Council of Europe standards regarding the election of the judicial shift in judicial councils: when there is a mixed composition of judicial councils, for the selection of judge members, it is advised that judges are elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as the Parliament or the executive, are not involved at any stage of the selection process". (Paragraph 40)*

Regarding the relationship between the independence of the judiciary and the composition of the Judicial Councils or Councils for the Judiciary, the European Commission's 2024 Justice Scoreboard states in section 3.3.2: "*Councils for the Judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system*" and "*Councils for the Judiciary are essential bodies for ensuring the independence of justice. It is for the Member States to organise their justice systems, including deciding on whether or not to establish a Council for the Judiciary. However, European standards, in particular Recommendation of the Council of Ministers of the Council of Europe CM/Rec (2010)12, recommend that 'not less than half the members of [Councils for the Judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary' (p. 77), and Note 126 refers to the European standards in these sources: "Recommendation CM/Rec(2010)12, para. 27; see also 2016 CoE action plan, C item (ii); Opinion no.10(2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, para. 27; and ENCJ, Councils for the Judiciary Report 2010-11, para. 2.3".*

Again in relation to the importance of this perception of the independence of the judiciary, linked to the governing structures of the judiciary, the European Commission's latest Rule of Law Report for Spain (2024) begins its reference to the independence of the Judiciary by stating: "*The level of perceived judicial independence in Spain continues to be low among both the general public and companies*". (Independence, p. 3)

## **IV**

### **THE HIGHEST EUROPEAN STANDARDS FOR THE ELECTION OF THE JUDICIAL MEMBERS OF COUNCILS FOR THE JUDICIARY**

Returning to the legal framework of this proposal, having established that it should conform to the provisions of Article 122 of the Spanish Constitution and guarantee their independence, the Additional Provision then demarcates for it a three-pronged requirement, calling on the Council to present a proposal which "*with the direct participation of judges to be determined, can be positively assessed by the European Commission's Rule of Law Report,*



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*establishing a General Council of the Judiciary in line with the highest European standards".*

*The European Commission's Rule of Law Report is part of the European Rule of Law Mechanism, a preventive tool, aiming to promote the rule of law, considered one of the fundamental values of the European Union, which guarantees democracy and citizens' rights and freedoms. Its aim is to prevent challenges from emerging or deteriorating. Other tools of this Mechanism include the Justice Scoreboard and the European Semester, with country-specific recommendations.*

*The European Commission explains that the Rule of Law Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this process and it aims to identify challenges as soon as possible and with mutual support from the Commission, other Member States, and stakeholders including the Council of Europe and the Venice Commission, seeks to help Member States find solutions to safeguard and protect the rule of law. It covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.*

*To prepare its Annual Rule of Law Report, which includes a section referring to each individual Member State, the European Commission uses the "Methodology for the preparation of the Annual Rule of Law Report", section 2 of which is called "**Standards for the assessment**", bringing together what the document itself defines as "**Well established European principles**", which are used for the assessment:*

### *"2. Standards for the assessment*

*As explained in the Communications on "Further strengthening the rule of law in the Union - State of play and possible next steps", and "Strengthening the rule of law in the Union - A blueprint for action", the rule of law is a well-established principle, well-defined in its core meaning. The assessment in the European Rule of Law Mechanism will be carried out by the Commission against EU law requirements and well established European standards, including:*

- (i) Relevant obligations under EU law and European Court of Justice case law (e.g. Art. 2 TEU, 19(1) TEU, 47 Charter of Fundamental Rights of the European Union, 325 TFEU on the Protection of the EU's financial interests), rule of law-relevant EU secondary legislation such as EU criminal law, Directive on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) or the Audiovisual Media Services Directive (AVMSD)<sup>4</sup>;*
- (ii) European Court of Human Rights case law;*
- (iii) Council of Europe standards such as the Recommendation of the Committee of Ministers on judges: independence, efficiency and responsibilities, the Recommendation of the Committee of Ministers*



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*on the role of public prosecution in the criminal justice system, Criminal Law Convention on Corruption, Civil Law Convention on Corruption, Resolution of the Committee of Ministers on the twenty guiding principles for the fight against corruption, the Recommendation of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, the Recommendation of the Committee of Ministers on media pluralism and transparency of media ownership, the Recommendation of the Committee of Ministers on public service media governance.*

*A list of relevant standards can also be found in the standards section of Venice Commission Rule of Law Check List. The Check List can help to identify specific risks and weaknesses. In its assessment the Report will make reference to the specific standards relevant for the situation assessed".*

Of this specific list of "Well established European standards", the following make prominent reference to the object of this proposal, the election system for judge members of Judicial Councils or Councils for the Judiciary:

- Court of Justice of the European Union case-law, most notably the CJEU Judgments: of 27 February 2018, Trade Union of Portuguese Judges, C-64/16; of 24 June 2019, Commission v Poland, Independence of the Supreme Court, C 619/18; of 5 November 2019, Commission v Poland, Independence of ordinary courts, C-192/18; of 19 November 2019, AK and others, C-518/18, C-624/18 and C-625/18; of 26 March 2020, Miasto Lowicz and others, C-558/18 and C-63/18; of 2 March 2021, AB and others, C-824/18; of 15 July 2021, Commission v Poland, Failure of a Member State to fulfil obligations, C-791/19; and of 5 June 2023, Commission v Poland, Failure of a Member State to fulfil obligations, C-204/11.
- European Court of Human Rights case-law, most notably the ECtHR judgments: of 1 December 2020, case of Guðmundur Andri Ástráðsson v. Iceland, no. 26374/18; of 7 May 2021, case of Xero Flor w Polsce v. Poland, no. 4907/18; of 23 July 2021, case of Reczkowicz and Ozimek v. Poland, nos. 49868/19 and 57511/19; of 3 February 2022, case of Advance Pharma sp zoo v. Poland, no. 1469/20; and of 6 October 2022, case of Juszczyszyn v. Poland, no. 35599/20.

Council of Europe standards:

- a) Committee of Ministers, prominently and specifically cited in the list of "Well established European standards": Recommendation CM/Rec(2010)12 of the Committee of Ministers on Judges: Independence, Efficiency and Responsibilities, in addition to Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges, and the Framework Global Action Plan for Judges in Europe, of the Committee of Ministers, of 7 February 2001.
- b) Consultative Council of European Judges (CCJE), most notably Opinions no. 10 of 2007 and no. 24 of 2021, but also Opinions no. 18 of 2015 and no.



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23 of 2020, along with the Magna Carta of Judges, Fundamental Principles, of 17 November 2010.

- c) Group of States against Corruption, GRECO: Fourth Evaluation Round recommendations "Corruption prevention in respect of members of parliament, judges and prosecutors", Recommendation V for Spain, 62nd plenary meeting of 6 December 2013, First Compliance Report, 72nd plenary meeting of 7 June to 1 July 2016, Interim Compliance Report, 83rd plenary meeting of 17 to 21 June 2019, Second Compliance Report, 87th plenary meeting of 2021, and Addendum to the Second Compliance Report, 92nd plenary meeting of 28 November to 2 December 2022.
- d) The European Commission for Democracy through Law, Venice Commission: the following contain European standards on the election method for judicial members of Councils for the Judiciary: Opinion 904/2017, Opinion 977/2020, Report on Judicial Appointments, 70th plenary session, Venice, 16 and 17 March 2007, Report on the Independence of the Judicial System, 82nd plenary session, Strasbourg, 16 March 2010, Report on the role of the opposition in a democratic Parliament, Venice, 2010, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, 119th plenary session, Venice, 21-22 June 2019, and the Conclusions of the International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022.

The following also contain standards that have a direct bearing on the object of this proposal: the Budapest Resolution of 2008, the Dublin Declaration of 2012 and the Compendium on Councils for the Judiciary of 2021, of the European Network of Councils for the Judiciary (ENCJ); the Kyiv Recommendations of 2010 and two 2017 Opinions of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE); and the Report of the Special Rapporteur on the independence of judges and lawyers of 2018.

These "well-established European standards" are also referred to in Preamble 16 of Regulation (EU-Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the protection of the Union budget. This Regulation, together with the Annual Rule of Law Report, the European Semester and the European Union Justice Scoreboard, underpins the effectiveness of such standards for Member States within the European Rule of Law Mechanism, indirectly but robustly, since it sets out the consequences for the release of EU funds of a negative assessment of compliance with said standards by the European Union.



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### **ELECTION BY PARLIAMENT OF THE JUDICIAL MEMBERS OF THE SPANISH CGPJ IN THE EUROPEAN COMMISSION'S RULE OF LAW REPORT AND GRECO COMPLIANCE REPORTS**

Given that it is an inescapable condition that the proposal presented by this Council, *“can be positively assessed by the European Commission's Rule of Law Report”*, as set out in the Additional Provision, it is essential to analyse the statements of the European Commission in its Rule of Law Report for Spain regarding the election system for judicial members of the General Council of the Judiciary.

In its 2021 Rule of Law Report for Spain, the European Commission noted that the Council of Europe recalls:

*“that the European standards provide that at least half of the Council's members should be judges elected by their peers from all levels of the judiciary. It is important that these European standards are taken into account and that all relevant stakeholders are consulted”*. (Justice System, Independence. Paragraph two)

And Note 20 of the Report referred to the standard in Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, which states:

*“Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary”*. (Paragraph 27)

In its 2022 Rule of Law Report, the European Commission issued the following recommendation for Spain:

*“...initiate, immediately after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards”*. (Second Recommendation p. 2).

And later in the same report, it indicated:

*“calls to modify the appointment process of its judges-members, so their peers elect them, have been reiterated. Calls by stakeholders have been reiterated to change the system of appointment of the members of the Council for the Judiciary, in line with European standards, so that no less than half of its members be judges chosen by their peers”*. (Justice System, Independence, p. 4)

And Note 19 of the 2022 Report again referred to the European standard in Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, which states with regard to the election of judicial members:

*“Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary”*. (Paragraph 27)



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In its 2023 Rule of Law Report for Spain, the European Commission states again on this issue:

*"It is recommended to Spain to:*

*...Initiate, immediately after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards on Councils for the Judiciary". (Second Recommendation, p. 2)*

*"no steps have been taken to adapt the appointment procedure of its judges-members taking into account European standards".*

*"there has been no progress in the implementation of the recommendation made in the 2022 Rule of Law Report". (Justice System, Independence, pp. 2 to 5)*

And Note 20 of the 2023 Report, as in the 2021 Report and the 2022 Report, again referred to the European standard in Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, which states with regard to the election of judicial members:

*"Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary". (Paragraph 27)*

And in Note 21 of the 2023 Report, the European Commission says:

*"GRECO, Fourth Evaluation Round: Addendum to the Second Compliance Report, December 2022, para. 16. GRECO refers to the standards of the Council of Europe regarding the election of the judicial shift in judicial councils: when there is a mixed composition of judicial councils, for the selection of judge members, judges should be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and political authorities, such as Parliament or the executive, should not be involved at any stage of the selection process. See Opinion No. 10 (2007) of the Consultative Council of European Judges (CCJE) on Council for the Judiciary in the Service of Society, paras 27 and 31, as well as Opinion No. 24 (2021) of the Consultative Council of European Judges (CCJE) on Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, p. 4".*

And in its latest Rule of Law Report, for 2024, the European Commission, reiterating once again the recommendation on the election of judicial members in the 2022 and 2023 Reports, recommends for the third time:

*"taking forward the process in view of adapting the appointment procedure of its judges-members, taking into account European standards on Councils for the Judiciary". (Second Recommendation, p. 2)*

And in Note 12 on page 4, as analysed at the beginning of this proposal, the 2024 Report reiterates the standard of the Group of European States against Corruption of the Council of Europe, which had already been reiterated in the 2023 Report:



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*"When there is a mixed composition of judicial councils, for the selection of judge members, judges should be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and political authorities, such as Parliament or the executive, should not be involved at any stage of the selection process".*

As seen at the beginning of this proposal, the Commission then refers to the European standard set out in paragraphs 27 and 31 of CCJE Report no. 10 of 2007 and paragraph 8 of CCJE Report no. 24 of 2021:

*"Without imposing a specific election method, the CCJE considers that judges sitting on the Council for the Judiciary should be elected by their peers following methods guaranteeing the widest representation of the judiciary at all levels".*

*"The CCJE does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process. All interference of the judicial hierarchies in the process should be avoided. All forms of appointment by authorities internal or external to the judiciary should be excluded".*

*"Judge members should be elected by their peers, without any interference from political authorities or judicial hierarchies, through methods guaranteeing the widest representation of the judiciary. If direct elections are used for selection, the Council for the Judiciary should issue rules aimed at minimising any jeopardy to public confidence in the justice system".*

In view of the European Commission's Rule of Law Reports for Spain, in which the Commission repeatedly reiterates the same highest standards and Spain's lack of compliance, there is no ground for doubt that, in order to be favourably assessed on this point by the Commission in its next Rule of Law Report, the proposal presented by the General Council of the Judiciary must make provision to ensure that:

- 1. At least half of the members of the Council**
- 2. Shall be judges elected by their peers**
- 3. Without the involvement of Parliament or the Executive at any stage of the selection process**
- 4. Ensuring the broadest possible representation of the Judiciary at all levels.**

The European standards contained in the Rule of Law Report are consistent with those reiterated to Spain by the Council of Europe's Group of States against Corruption (GRECO) since 2013.

As such, in the Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors, 62nd plenary meeting, 6 December 2013, GRECO stated with regard to the election of judicial members:



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*"The GET also draws the attention of the authorities to Opinion no. 10(2007) of the Consultative Council of European Judges (CCJE) which more explicitly stresses that political authorities such as the Parliament or the executive should not be involved, at any stage, in the selection process. The GET further notes that the establishment of judicial councils is generally aimed at better safeguarding the independence of the judiciary - in appearance and in practice, the result in Spain seeming to be the opposite as evidenced by recurrent public disquiet in this domain". (Paragraph 78)*

*"This issue having been a major point of contention for years, and in the particular context for Spain, the GET considers it deserves close follow-up. GRECO recommends carrying out an evaluation of the legislative framework governing the General Council of the Judiciary (CGPJ) and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified". (Paragraph 80 and Recommendation V)*

In its First Compliance Report Spain, 72nd session, 7 June to 1 July 2016, GRECO noted:

*"GRECO recommended carrying out an evaluation of the legislative framework governing the General Council of the Judiciary (CGPJ) and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified". (Paragraph 26)*

*"That said, GRECO expressly stressed that political authorities shall not be involved, at any stage, in the selection process of the judicial shift (see paragraph 78, Fourth Round Evaluation Report). GRECO notes that while the appointment of the CGPJ is a constitutional matter, the Constitution does not specify the way in which judicial members of the CGPJ are to be selected. GRECO reiterates its view that it is crucial that the CGPJ is not only free, but also seen to be free from political influence". (Paragraph 29)*

*"GRECO concludes that recommendation v has not been implemented". (Paragraph 26)*

In the Second Interim Compliance Report Spain, 83rd plenary session, 17-21 June 2019, GRECO again noted with regard to recommendation v:

*"GRECO recommended carrying out an evaluation of the legislative framework governing the General Council of the Judiciary (CGPJ) and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified". (Paragraph 29)*

*"In the Interim Compliance Report, GRECO regretted the lack of decisive action in this area and concluded that recommendation v had not been implemented". (Paragraph 30)*

*"Having said that, GRECO regrets that the important work carried out by the Subcommittee of Justice in the Congress concerning the issue of the*



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*composition of the CGPJ had failed in Parliament, in particular, the need to remove the selection of the judicial shift from politicians. GRECO considers that this has been a missed opportunity to remedy what has proven to become, in citizens' eyes, the Achilles' heel of the Spanish judiciary: its alleged politicisation". (Paragraph 32)*

*"Six years later the situation is the same and, therefore, recommendation v cannot be considered implemented. GRECO reiterates its view that political authorities shall not be involved, at any stage, in the selection process of the judicial shift". (Paragraph 35)*

*"GRECO concludes that recommendation v has not been implemented." (Paragraph 36)*

And in its Second Compliance Report Spain, 87th plenary session, March 25, 2021, GRECO again reiterated:

*"GRECO notes that the information provided by the authorities does not bring anything new to what was already analysed in the Fourth Round Evaluation Report back in 2013. Today, the situation is exactly the same, and the concerns expressed by GRECO in the light of it remain as prevalent, if not more, than before. At the time, GRECO stressed that one of the most notable aims of a judicial council, whenever established, is that of better safeguarding the independence of the judiciary, both in appearance and in practice. It further noted that the result in Spain had been the opposite, as evidenced by recurrent public disquiet in this domain. GRECO pointed at the applicable Council of Europe standards regarding the election of the judicial shift in judicial councils: when there is a mixed composition of judicial councils, for the selection of judge members, it is advised that judges are elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as the Parliament or the executive, are not involved at any stage of the selection process". (Paragraph 40)*

*"GRECO concludes that recommendation v has not been implemented." (Paragraph 44)*

And in its Addendum to the Second Compliance Report, 92nd plenary session, 28 November to 2 December 2022, the latest GRECO Report on Spain published to date, GRECO once again reiterates:

*"GRECO regrets the lack of any positive outcome to implement this recommendation. GRECO refers again to the standards of the Council of Europe regarding the election of the judicial shift in judicial councils: when there is a mixed composition of judicial councils, for the selection of judge members, the standards provide that judges are to be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as Parliament or the executive, are not involved at any stage of the selection process" (Paragraph 16)*

*"GRECO concludes that recommendation v has not been implemented." (Paragraph 17)*



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These European standards are firmly established, and consistently reiterated, in the European Commission's Rule of Law Report, in the Recommendations of the Committee of Ministers of the Council of Europe, and in the evaluations by the Group of States against Corruption, GRECO, as analysed above.

They are also repeated, without variation, by the Venice Commission, the European Network of Councils for the Judiciary, and the Consultative Council of European Judges:

- *"In these circumstances the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary"*

(Point 2.3. Network of Councils for the Judiciary Report 2010-2011).

- *"It must be stressed that members of certain collective bodies are not to be elected solely by Parliament. For example, at least half of the members of the Judicial Councils should be judges elected by their peers".*

(Note 94. Venice Commission, Parameters on the Relationship between the parliamentary majority and the opposition in a democracy: a checklist, 119th plenary session, Venice, 21-22 June 2019).

- *"A substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications".*

(Paragraph 50. Venice Commission. Report on Judicial Appointments. 70th Plenary Session, Venice, 16-17 March 2007).

- *"The Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition, with a substantial part if not the majority of the members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers".*

(Paragraphs 32 and 82 and Conclusion 4. Report on the Independence of the Judicial System part 1. Venice Commission. 82nd plenary session, Venice, 12-13 March 2010).

- *"The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers".*

(Paragraph 29. CCJE Opinion no. 24 2021).

- *"The Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers."*

(Paragraph 13. Magna Carta of European Judges (Fundamental Principles), Strasbourg, 17 November 2010).



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- "In order to insulate judicial councils from external interference, politicization and undue pressure, international standards discourage the involvement of political authorities, such as parliament, or the executive at any stage of the selection process."

(Report of the Special Rapporteur on the Independence of judges and lawyers, Diego García Sayán, 2 May 2018, pp. 16 and 17).

## **VI**

### **CONFORMITY OF THIS PROPOSAL TO REFORM THE ELECTION OF JUDICIAL MEMBERS OF THE CGPJ WITH THE HIGHEST EUROPEAN STANDARDS**

In view of the above, and in compliance with the mandate of the Additional Provision of Organic Law 3/2024, in accordance with the highest European standards articulated in the European Commission's Rule of Law Report, the undersigned members of the CGPJ present a proposal to reform the election system for members designated from among lower-court and senior judges, which establishes the following form of direct participation by said judges:

#### **1. No participation of Parliament or the Executive at any stage of the selection process for judicial members.**

The twelve judicial members who, under Article 122.3 of the Spanish Constitution, form the General Council of the Judiciary (together with eight jurist members and the President of the Supreme Court) shall be elected by their peers, **without the participation of Parliament or the Executive at any stage of the selection process.**

The involvement of Parliament at a stage of the selection process following the electoral process conducted by the members of the judiciary, in which Parliament ratified the suitability of the candidates chosen by the judges, or selected from among the candidates chosen by the judges those whom Parliament considered most suitable, in a kind of second, political selection round, would be political in nature and would render the prior electoral process conducted by the members of the judiciary meaningless. To this end, it would be sufficient to have a system involving the submission of candidatures by judges, and subsequent election by Parliament, such as the one currently in use in Spain, in respect of which the Additional Provision of Organic Law 3/2024 mandates the new General Council of the Judiciary to submit a proposal for reform.

The participation assigned to Parliament in a genuine electoral process is to pass the Law regulating said process, establishing the grounds for ineligibility in said law, in advance and on an objective basis.



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Candidates participating in an electoral process must meet the eligibility requirements previously set out in the Law.

The results of an electoral process cannot, under any circumstances, be subject to subsequent review or reconsideration by a political body such as Parliament or the Executive, otherwise resulting in the invalidation of the choice made by the judges.

When a candidate is elected in accordance with the electoral process regulated by law, only the courts, as the holders of judicial authority, may declare null and void the electoral process or the declaration of elected candidates, solely on grounds of unlawfulness.

European standard:

***“When there is a mixed composition of judicial councils, for the selection of judge members, judges should be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and political authorities, such as Parliament or the executive, should not be involved at any stage of the selection process”.***

Sources:

- 2024 Rule of Law Report for Spain, European Commission, Note 12; 2021, 2022 and 2023 Rule of Law Reports for Spain; GRECO, *Council of Europe, Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, 62nd plenary meeting, 6 December 2013 (Paragraph 78); First Compliance Report Spain, 2016 (Paragraphs 26 and 29), Second Interim Compliance Report Spain, 2019 (Paragraphs 29, 30, 32, 35 and 36), Second Compliance Report Spain, 2021 (Paragraphs 40 and 44) and Addendum to the Second Compliance Report, 2022 (Paragraphs 16 and 17); Opinions no. 10, of 2007 (Paragraphs 27 and 31) and no. 24, of 2021 (Paragraph 28) of the Consultative Council of European Judges of the Council of Europe; Councils for the Judiciary Report, Network of Councils for the Judiciary 2010-2011 (Point 2.3); Report on the Independence of the Judicial System part 1. Venice Commission. 82nd plenary session, Venice, 12-13 March 2010 (Paragraphs 32 and 82 and Conclusion 4); Magna Carta of European Judges (Fundamental Principles), Strasbourg, 17 November 2010 (Paragraph 13); Opinions 904/2017 and 977/2020 of the Venice Commission; Report on Judicial Appointments, Venice Commission, 70th plenary meeting, Venice, 16-17 March 2007 (Paragraph 50); Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, 119th plenary session, Venice, 21-22 June 2019 (Note 94); Venice Commission. International Round Table “Shaping Judicial Councils to meet contemporary challenges”, Sapienza University, Roma, 21 to 23 March 2022; and Report of the Special Rapporteur on the Independence of judges and lawyers, Diego García Sayán, 2 May 2018, pp. 16 and 17.

## **2. Single constituency.**



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There shall be a single constituency for the entire national territory.

Source:

The Constitution provides for a single Judiciary in Title VI, Articles 117 to 127. No judiciary exists in the Autonomous Regions (Constitutional Court Judgment 31/2010), in which, under Article 152 of the Constitution, "a High Court of Justice, without prejudice to the jurisdiction of the Supreme Court, shall occupy the most senior position in the judicial hierarchy of the Autonomous Region".

### **3. Right to vote: all lower-court and senior judges of all judicial categories.**

All lower-court and senior judges, belonging to all judicial categories, who are in active service at the time the election is announced, shall be eligible to vote.

European standards:

*"for the selection of judge members, judges should be elected by their peers"*

*"It is important that all judges should have the right to vote and to be elected to judicial councils. Their election should be fair and transparent. For this reason, political authorities should not be involved, at any stage, in the selection process"*

Source:

- Venice Commission. International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022.

### **4. Right to stand for election: all lower-court and senior judges of all judicial categories who are not subject to legal grounds for ineligibility.**

All lower-court and senior judges, belonging to all judicial categories, who are in active service at the time the election is announced and are not subject to legal grounds for ineligibility, shall be eligible to stand for election.

European standards:

*"Eligibility criteria should be designed taking into account the functions the members of the judicial council are to carry out"*

*"It is important that all judges should have the right to vote and to be elected to judicial councils. Their election should be fair and transparent. For this reason, political authorities should not be involved, at any stage, in the selection process"*



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Source:

- Venice Commission. International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022.

### **5. Legal grounds for ineligibility.**

Any individual who, in the previous five years, has been appointed as a Cabinet Minister or Minister of State or as a Regional Minister or elected leader of a local Council, or has held the post of Senator or Member of Parliament, the European Parliament or a Legislative Assembly of an Autonomous Region, shall be ineligible. Members of the outgoing Council cannot be elected under any circumstances.

European standards:

*"Ineligibility criteria contribute to avoiding politicisation"*

*"by whatever means members are selected and appointed, this should not be done for political reasons"*

*"a requirement that a candidate may not have 'political affiliations' may be too vague, so that referring to party memberships or official positions in government and the legislature or other concrete examples may be preferable"*

Sources:

- Venice Commission. International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022. (Conclusions)
- Opinion no. 24 (2021), Consultative Council of European Judges (Paragraph 32)

### **6. Submission of candidatures by individual judges, whether associated or not, as well as by any legally recognised judicial association.**

All lower-court or senior judges may submit their candidature individually, with twenty-five endorsements, or the endorsement of a judicial association. Each judicial association may present a candidature for all twelve members. Each lower-court or senior judge or judicial association may endorse a maximum of twelve candidates. Each candidate shall stand with an alternate.

This very broad criterion for the submission of candidatures is the almost unanimous preference of the Governing Chambers and judicial associations, as stated in their reports to the General Council of the Judiciary during the



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study phase of this proposal, and it remedies the legislative defects of Organic Law 1/1980 on the General Council of the Judiciary.

European standards:

*"The influence of the associations of judges should be taken into account in the choice of the electoral system"*

*"The participation of both categories of judges (members and non-members of associations) in a pluralist formation of the Council for the Judiciary would be more representative of the courts"*

*"All the appointment processes for the councils should be transparent and participative so to avoid and prevent corporatism and appropriation of the process by the de facto powers"*

Sources:

- Venice Commission. International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022. (Conclusions)
- Opinion no. 10 (2007), Consultative Council of European Judges (Paragraph 28).
- Report of the Special Rapporteur on the Independence of judges and lawyers. Diego García Sayán. 2 May 2018. Section VIII Recommendations (Paragraph 109).

## **7. In-person or postal voting.**

The election shall be held by free, personal, equal, direct and secret vote, which may be cast in person or by registered post.

The methods of voting envisaged in the Organic Law on the Spanish General Electoral System are: in-person and postal.

Source:

- Articles 68 and 69 of the Spanish Constitution.
- Organic Law 5/1985 of 19 July on the General Electoral System.

## **8. Ballot paper with a single open list.**

The ballot paper shall contain a single open list, enumerating all the candidates with their professional category and post, and indicating their status as independent candidates or the name of the association that endorses them.



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European standard:

"The selection process should be transparent"

"All the appointment processes for the councils should be transparent and participative"

Sources:

- Report no. 24 (2021). Consultative Council of European Judges. (Paragraphs 27 and 34)
- Report of the Special Rapporteur on the Independence of judges and lawyers. Diego García Sayán. 2 May 2018. Section VIII Recommendations. (Paragraph 106)

## **9. Limited voting system.**

Under the open list system, electors can vote on a single ballot paper for a maximum of eight candidates out of the twelve to be elected.

The majority system, severely restricted by reducing the right to vote by one-third of the total vacancies to be filled, along with the provision of a single open list of candidates, ensures the broadest representation of the judiciary, on the part of both judges who do not belong to an association and members of all the legally recognised judicial associations.

European standard:

*"following methods guaranteeing the widest representation of the judiciary at all levels"*

Sources:

- Same as point 1.

## **10. Voting at the Governing Chambers of the High Courts of Justice of the Autonomous Regions.**

In-person voting and partial vote counting shall take place at the offices of the Governing Chambers of the High Courts of Justice.

Source:

- Article 151 of Organic Law 6/1985 of 1 July on the Judiciary. Based on polling in elections for the Governing Chambers of Spanish courts.

## **11. Guaranteed representation of all judicial categories and parity.**



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The Election Committee, formed of the most senior Presiding Judge of the Supreme Court and the most senior and most junior Supreme Court justices, shall conduct the general vote count and draw up a list of the twelve lower-court and senior judges who have received the largest number of votes, taking the following rules into account:

- a) Three shall be Supreme Court justices, three shall be senior judges with more than twenty-five years' experience, and six shall be lower-court or senior judges, with no length of service requirement. If there are no candidates in any of the aforementioned categories, the vacancy shall be added to the quota for the next one, following the same order.
- b) Gender parity criteria shall be applied to the candidates with the most votes in each of the categories indicated above. If there is an odd number, the remaining candidate who received the most votes shall be declared elected, regardless of gender.
- c) In the event of a tie, preference shall be given to the candidate with the longest service in the grade.

European standards:

*"Not less than half the members of the councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".*

*"States should enact appropriate measures to ensure a gender perspective in the council"*

Sources:

Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe.

- Report of the Special Rapporteur on the Independence of judges and lawyers. Diego García Sayán. 2 May 2018. Section VIII Recommendations (Paragraph 106).
- Organic Law 2/2024 of 1 August on equal representation and balanced participation of women and men.

## **12. Functions of the Election Committee.**

The Election Committee shall be responsible for organising the electoral process, resolving any queries, complaints or claims raised during the process and issuing binding instructions for the conduct of the election, under the Organic Law on the Judiciary and the regulations governing the electoral process, which shall be approved by the General Council of the Judiciary.

European standard:

*"competition for elections should comply with the rules set out by the Council for the Judiciary itself so as to minimise any jeopardy to public confidence in the judicial system".*



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Source:

- Opinion no. 10 (2007), Consultative Council of European Judges. Selection of judge members. (Paragraph 29)

### **13. Judicial review of the declaration of candidates and the declaration of elected members.**

The Supreme Court shall resolve any appeals lodged against the declaration of candidates and the declaration of elected members.

Source:

- Articles 49 and 109 of Organic Law 5/1985 of 19 July on the General Electoral System.

### **14. Anti-deadlock clause.**

If, on the day of the constituent session of the new General Council of the Judiciary, the Congress of Deputies or the Senate, or both, have not yet completed the election of the jurist members corresponding to them, the General Council of the Judiciary shall be constituted with the judicial members elected by the lower-court and senior judges and, where appropriate, with those elected by one of the Chambers and with the members of the outgoing General Council of the Judiciary who were elected at an earlier date by the Chamber that has missed the election deadline. From that point onwards, it may exercise all its powers, with the exception of the election of the President, who, in such a case, may only be elected thirty working days after the constituent session is held if the Chambers have not elected all the jurist members.

European standard:

*"A staggered system of renewal of the composition of the judicial council may be considered".*

Sources:

- Venice Commission. International Round Table "Shaping Judicial Councils to meet contemporary challenges", Sapienza University, Roma, 21 to 23 March 2022 (Conclusions).
- Constitutional Court Judgment 191/2016: *"Article 122.3 of the Spanish Constitution makes no mention of the method of renewal, either partial or total, of the Council"* (Legal Ground 7) *"No constitutional objection can be raised against the Legislator determining subsidiary provisions for the case where, while both Chambers are required to designate separately the members that they are responsible for proposing, only one of them is able to perform its task, irrespective of the reason."* (Legal Ground 8).



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### **PROPOSED WORDING**

#### **Single article. Amendment to Organic Law 6/1985 of 1 July on the Judiciary.**

Chapters I and II are amended and a new Chapter II bis is created in Title II of Book VIII of Organic Law 6/1985 of 1 July on the Judiciary, worded as follows:

**One.** The title of Chapter I is amended as follows, and it shall consist of Articles 566 to 570, inclusive:

“Chapter I

Concerning the composition of the General Council of the Judiciary”.

**Two.** Article 566 is amended and should read as follows:

“The General Council of the Judiciary shall be composed of the President of the Supreme Court, who shall chair it, and twenty members, twelve of whom shall be lower-court or senior judges in active service in the judiciary, elected by lower-court and senior judges, and eight jurists of recognised competence elected by the Congress of Deputies and the Senate”.

**Three.** Article 567 is amended and should read as follows:

“The composition of the General Council of the Judiciary shall have regard to the principle of balanced participation of men and women”.

**Four.** Article 568 is amended and should read as follows:

“1. The General Council of the Judiciary shall be replaced in its entirety every five years, to be counted from the date of its constitution.

2. The early withdrawal of a member of the General Council of the Judiciary shall result in the corresponding alternate being appointed immediately as a member by Royal Decree, which shall be published in the Official State Gazette. The term of office of the new member shall expire on the same date as that of the replaced member would have expired”.

**Five.** Article 569 is amended and should read as follows:

“1. The Members of the General Council of the Judiciary shall be appointed by the King, via Royal Decree, shall take office with an oath or promise before the King and shall subsequently hold the constituent session.

2. The swearing-in and the constituent session shall take place within five days of the expiry of the term of office of the previous Council.

3. The calculation of deadlines in procedures to elect Members of the General Council of the Judiciary and elect the President of the Supreme Court and of the General Council of the Judiciary, and the Vice-President of the Supreme Court, shall use working days, where the deadline is expressed in days, to be counted from the next day, and from date to date, where expressed in months



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or years. Where the month in which the deadline expires does not have a day equivalent to the day on which the count began, the deadline shall be understood to expire on the last day of the month.

**Six.** Article 570 is amended and should read as follows:

“1. If, on the day of the constituent session of the new General Council of the Judiciary, the Congress of Deputies or the Senate, or both, have not yet completed the election of the jurist members corresponding to them, the General Council of the Judiciary shall be constituted with the judicial members elected by the lower-court and senior judges and, where appropriate, with those elected by one of the Chambers and with the members of the outgoing General Council of the Judiciary who were elected at an earlier date by the Chamber that has missed the election deadline. From that point onwards, it may exercise all its powers, with the exception of the election of the President.

2. If, thirty working days after the constituent session is held, the Chambers have not elected all the jurist members, the new judicial members, and the acting jurist members who served on the previous Council, shall elect the President of the General Council of the Judiciary.

3. The appointment of members subsequent to the legally established deadline for their election shall not, under any circumstances, entail an extension of the duration of their post in excess of the term of office of five years corresponding to the General Council of the Judiciary for which they were elected.

4. After the members have been elected by the Chamber or Chambers that missed the election deadline, the outgoing Members who formed part of any of the legally prescribed Council Committees shall be replaced. The new members of these Committees shall be elected by a Plenary Session of the Council, taking into account whether the outgoing members were elected as judges or jurists, and they shall form part of the respective Committee until it is renewed.

5. The fact that the members were elected after the new Council was formed shall not, in any event, constitute a justification for a review of the decisions adopted up to that point”.

**Seven.** Article 570 bis is deleted.

**Eight.** The title of Chapter II is amended as follows, and it shall consist of Articles 571 to 574, inclusive:

“Chapter II

Concerning the election of jurist members”.

**Nine.** Article 571 is amended and should read as follows:

“1. Eight members of the General Council of the Judiciary shall be elected by Parliament from among jurists, in the manner established in the Constitution,



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in the Regulations of the Congress of Deputies and the Senate, and in this Law.

2. Each Chamber shall elect, by a three-fifths majority of its members, four members, chosen from jurists of recognised competence, who have exercised their profession for more than fifteen years.
3. The Chambers shall elect an alternate for each of the permanent members.
4. Before they are elected, the candidates and alternates shall appear before the Appointments Committee of the relevant Chamber for an evaluation of the qualifications that evidence their recognised standing and suitability. Candidates shall submit a statement of qualifications and objectives. These appearances shall be conducted in conditions that ensure equality and shall take place in open session".

**Ten.** Article 572 is amended and should read as follows:

"Each Chamber shall elect the four jurist members corresponding to it by the date on which the five-year term of the previous Council expires. The Presidents of the Congress of Deputies and the Senate shall take the necessary measures to ensure that the election of the members by the Chambers is completed before the deadline".

**Eleven.** Article 573 is amended and should read as follows:

"In the election of jurist members, the principle of balanced participation of women and men shall be guaranteed in such a way that at least 40 percent of the eight members elected by both Chambers are of each gender".

**Twelve.** Article 574 is amended and should read as follows:

"1. Jurists of recognised competence with more than fifteen years of experience in any of the legal professions, who evidence outstanding qualifications in the exercise thereof, may be elected as members.

Members of the judiciary are not eligible for election as jurists unless they have held an administrative status other than active service for at least one year prior to their election. Ineligibility for election as a jurist member is also applicable to any individual who, in the previous five years:

- a) has been appointed as a Cabinet Minister or Minister of State or as a Regional Minister or elected leader of a local Council; or
- b) has held the post of Senator or Member of Parliament, the European Parliament or a Legislative Assembly of an Autonomous Region.

2. Members of the outgoing Council cannot be elected under any circumstances".

**Thirteen.** A new Chapter II bis is created, comprising Articles 575 to 578 inclusive, and the title should read as follows:

"Chapter II bis



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Concerning the election of judicial members".

**Fourteen.** Article 575 is amended and should read as follows:

"In the election of the twelve judicial members of the General Council of the Judiciary:

1. All lower-court and senior judges, belonging to all judicial categories, who are in active service at the time the election is announced, shall be eligible to vote.
2. Any individual who is eligible to vote shall also be eligible to stand for election, unless he or she is subject to the following grounds for ineligibility:
  - a) he or she has been appointed as a Cabinet Minister or Minister of State or as a Regional Minister or elected leader of a local Council; or
  - b) has held the post of Senator or Member of Parliament, the European Parliament or a Legislative Assembly of an Autonomous Region.

Members of the outgoing Council cannot be elected under any circumstances.

3. An alternate shall be elected for each of the members.
4. The members shall be elected in the following ratio:
  - a) Three shall be Supreme Court Justices.
  - b) Three shall be senior judges with more than twenty-five years' experience.
  - c) Six shall be lower-court or senior judges, with no length of service requirement.
5. In the election of judicial members, the principle of balanced participation of women and men shall be guaranteed in such a way that at least 40 percent of the twelve members elected are of each gender".

**Fifteen.** Article 576 is amended and should read as follows:

- "1. The election shall be held by free, personal, equal, direct and secret vote, which may be cast in person or by registered post.
2. There shall be a single constituency for the entire national territory".

**Sixteen.** Article 577 is amended and should read as follows:

- "1. The electoral process for judicial members shall be conducted in accordance with the following rules:
  1. The election shall be called by the President of the General Council of the Judiciary three months before the end of the term of the outgoing Council and shall be published in the Official State Gazette the following day, with effect from the date of publication.
  2. The electoral roll shall be closed on the day the election notice is published.



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3. All lower-court and senior judges may submit their candidature individually, and each judicial association may submit a candidature for all twelve members.
4. Lower-court or senior judges shall submit their individual candidature in writing to the Chair of the Election Committee, stating their intention to be elected as a member, accompanied by twenty-five endorsements or the endorsement of a legally constituted and registered professional association of lower-court and senior judges.
5. Each candidate shall stand with an alternate.
6. Professional associations of lower-court and senior judges may endorse a single candidature for all the members or a maximum of twelve individual candidates. Each lower-court or senior judge, irrespective of whether they belong to a judicial association, may also endorse up to a maximum of twelve candidates.
7. Candidates shall submit their curriculum vitae and a brief statement defending the courses of action they believe the General Council of the Judiciary should pursue. These documents shall be made public on a website established by the General Council of the Judiciary for this purpose, under the supervision of the Election Committee.
8. The deadline for submitting applications shall be twenty working days from the publication of the election notice.
9. Once the deadline for the submission of candidatures has passed, within the next two working days, the Election Committee shall order the publication of the list of candidates who meet the legal requirements on the website established for this purpose by the General Council of the Judiciary, under the supervision of the Election Committee.
10. Candidates may lodge complaints during the three working days following the publication of the list of eligible election candidates. Once this deadline has passed, the Election Committee shall resolve within the next three working days any claims that may have been submitted and, on the same day, shall order publication of the decision announcing the candidates in the Official State Gazette.
11. The definitive announcement of candidates is subject solely to administrative appeal, to be lodged within a period of two working days from publication of the decision. Any allegations deemed appropriate shall be presented together with the appeal, accompanied by relevant evidence. Administrative appeals shall be heard by the Section of the Chamber for Contentious Administrative Proceedings of the Supreme Court set out in Article 638.2, which shall rule within a period of three days from the lodging thereof. The State Prosecution Service shall be a party to the proceedings in the interests of the law.
12. The ballot paper shall contain a single open list enumerating all the candidates, arranged in alphabetical order by first surname within each of the



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three categories set out in Article 575.4. The ballot paper shall list the professional category and current post of each candidate. In the case of candidates standing with the endorsement or in the candidature of a judicial association, the endorsing association shall be identified by its initials. Otherwise, they shall be marked with the word "independent".

13. Electors shall vote on a single ballot paper for a maximum of eight candidates out of the twelve to be elected.

14. In-person voting and partial vote counting shall take place at the offices of the Governing Chambers of the High Courts of Justice in the manner to be determined by regulation. Postal votes shall be sent in all cases to the Election Committee, which shall be in charge of receiving and counting them. The General Council of the Judiciary shall determine the requirements and procedures for postal votes, which shall ensure that they are received by the Election Committee before voting day. The record of the partial vote count and the in-person votes counted shall be submitted to the Election Committee for safekeeping and for it to conduct the general vote count.

15. The partial vote count shall be conducted on the same day as the election and notified to the Election Committee. On the following working day, the Election Committee shall conduct the general vote count, after counting the votes received by registered post. A list of the twelve lower-court and senior judges who received the most votes shall then be produced, taking the following rules into account:

a) Consideration shall be given to each of the categories of the judiciary in the ratio set out in Article 575.4. If there are no candidates in any of the aforementioned categories, the vacancy shall be added to the quota for the next one, following the same order.

b) Gender parity criteria shall be applied to the candidates with the most votes to determine the candidates elected in each of the categories set out in Article 575.4. If there is an odd number, the remaining candidate who received the most votes shall be declared elected, regardless of gender.

c) In the event of a tie, preference shall be given to the candidate with the longest service in the grade.

16. The Election Committee shall immediately order the immediate publication of the list with the total results of the general vote count and, separately, the list of the twelve lower-court and senior judges who received the largest number of votes in accordance with the rules indicated, on the website designated to this end by the General Council of the Judiciary, under its supervision. Candidates may submit duly substantiated claims during the three working days following the publication of these lists on the website. Once this deadline has passed, the Election Committee shall resolve within the next three working days any claims that may have been submitted and, on the same day, shall order publication of the decision announcing the members elected in the Official State Gazette.



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17. The definitive announcement of the members elected is subject solely to administrative appeal, to be lodged within a period of two working days from publication of the decision. Any allegations deemed appropriate shall be presented together with the appeal, accompanied by relevant evidence. Administrative appeals shall be heard by the same Section indicated for claims in respect of candidatures, which shall rule within a period of six working days from the lodging thereof, after hearing the interested parties.

18. After any appeals lodged against the announcement of elected members have been resolved, if applicable, the Election Committee shall notify the list of the twelve lower-court and senior judges declared elected to the Minister of Justice, for submission to the King for appointment.

19. The Royal Decree appointing the judicial members shall be published in the Official State Gazette even if the Chambers have not elected the jurist members of recognised competence.

2. The General Council of the Judiciary shall adopt the regulations implementing this electoral process by a three-fifths majority. Organic Law 5/1985 of 19 July on the General Electoral System shall apply in a supplementary manner".

**Seventeen.** Article 578 is amended and should read as follows:

"1. An Election Committee shall be formed, comprising the most senior Presiding Judge of the Supreme Court, who shall chair it, and two members, the most senior and most junior Supreme Court justices. The Senior Court Registrar of the Supreme Court shall act as secretary, with speaking but not voting rights.

2. The Election Committee shall be responsible for organising the entire electoral process, resolving, *sua sponte* or at the request of a party, with binding effect, any queries, complaints or claims raised therein, and issuing any binding instructions required for the conduct of the election, within the framework laid down in this Law and in the implementing regulation for the electoral process.

3. Specifically, the Election Committee shall be responsible for: ordering the publication of the list of candidates seeking election who meet the eligibility requirements and resolving any claims that may be submitted; making the definitive announcement of candidatures and ordering publication of the decision; receiving postal votes before voting day and counting them; resolving any de facto or de jure issues raised by the Governing Chambers where the in-person voting will take place and receiving from them the records of the partial vote count and the in-person votes counted by them; conducting the general vote count and drawing up and ordering publication of the total results and the list of the twelve lower-court and senior judges who received the highest number of votes, in accordance with the provisions of rule 15 of Article 577.1, resolving any complaints that may be presented; making the announcement of members elected, ordering publication of the decision and notifying it to the President of the Supreme Court and the



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General Council of the Judiciary, for communication to the Minister of Justice and submission to the King.

4. The Election Committee shall be formed on the day following publication in the Official State Gazette of the announcement of the process for the election of the twelve members of the Council elected by lower-court and senior judges and shall be dissolved following the definitive conclusion of the process, after the elected members have been announced and any administrative appeals that were lodged have been resolved.

5. The Chair is responsible for convening the Election Committee, which must have all its members or alternates in attendance to be validly constituted and adopt decisions.

6. In his or her absence, the Chair may be replaced by the next most senior President of the Supreme Court, and the other two members of the Committee may be replaced by the next most senior and most junior Supreme Court justices, respectively. The secretary may be replaced in his or her absence by the most senior Supreme Court registrar.

7. The decisions of the Election Committee shall be adopted by simple majority".

General Council of the Judiciary, 5 February 2025



**SECOND PROPOSAL**

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**FOREWORD**

**POSITION OF LUCÍA AVILÉS PALACIOS, ARGELIA QUERALT JIMÉNEZ, INÉS HERREROS HERNÁNDEZ, CARLOS H. PRECIADO DOMÉNECH, JOSÉ MARÍA FERNÁNDEZ SEIJO, ESTHER ERICE MARTÍNEZ, LUIS MARTÍN CONTRERAS, ÁNGEL AROZAMENA LASO, RICARDO BODAS MARTÍN AND BERNARDO FERNÁNDEZ PÉREZ, MEMBERS OF THE EIGHTH TERM OF THE GENERAL COUNCIL OF THE JUDICIARY (CGPJ) IN RESPECT OF THE CONVENING OF AN EXTRAORDINARY PLENARY SESSION OF THE COUNCIL SET FOR 5 FEBRUARY 2025, IN CONSEQUENCE OF THE REQUIREMENT SET OUT IN THE SINGLE ADDITIONAL PROVISION OF ORGANIC LAW 3/2024 OF 2 AUGUST AMENDING ORGANIC LAW 6/1985 OF 1 JULY ON THE JUDICIARY AND AMENDING LAW 50/1981 OF 30 DECEMBER REGULATING THE ORGANIC STATUTE OF THE STATE PROSECUTION SERVICE.**

Additional provision. Report and proposal by the General Council of the Judiciary.

Within six months of the entry into force of this Organic Law, the General Council of the Judiciary shall prepare a report examining the European election systems for members of Judicial Councils similar to the Spanish Council, and a reform proposal for the election system for members designated from among lower-court and senior judges, adopted by a three-fifths majority of its members, in accordance with Article 122 of the Constitution, which guarantees the independence thereof and which, with the direct participation of judges to be determined, can be positively assessed by the European Commission's Rule of Law Report, establishing a General Council of the Judiciary in line with the highest European standards.

Said proposal shall be submitted to the Government, the Congress of Deputies and the Senate, for the holders of the legislative initiative, on the basis thereof, to prepare and submit to the Spanish Parliament a government bill or non-government bill to reform the election system for the judicial members, to be debated and, if appropriate, processed and approved.

**1. SCOPE AND PURPOSE OF THE Additional Provision**

Firstly, it is necessary to establish the content and scope of the Additional Provision of Organic Law 3/2024 of 2 August amending Organic Law 6/1985 of 1 July on the Judiciary and amending Law 50/1981 of 30 December regulating the Organic Statute of the State Prosecution Service (hereinafter, LO 3/2024) and thereby determine what is requested by the General Council of the Judiciary (hereinafter, CGPJ).



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It is clear from a reading of this provision that the CGPJ is tasked, firstly, with examining the European election systems for members of Judicial Councils similar to the Spanish Council; secondly, with drafting a proposal to reform the election system for members designated from among lower-court and senior judges (3/5 majority), in accordance with Article 122 of the Spanish Constitution (hereinafter, CE), which guarantees the independence thereof and with the direct participation of judges to be determined; thirdly, said proposal is required to be in line with the highest European standards; fourthly, and lastly, the proposal must be capable of being positively assessed by the European Commission's Rule of Law Report.

It appears, as such, that the Legislator's mandate on the Council is twofold: to draft a report and to prepare a proposal. This twofold task was assigned by a plenary session decision of 25 September 2024 to a Working Group formed of the members Bernardo Fernández Pérez, José Carlos Orga Larrés, Argelia Queralt Jiménez, and Isabel Revuelta de Rojas. This Working Group held its constituent session on 7 October 2024, on which date it began its work.

As regards the Report, it should be a kind of comparative study of countries with systems similar to that of Spain, a mandate that has already been elaborated in the Working Group by the Counsels to the Council.

As for the proposal, it should provide for a possible reform of the election system for judicial members, that is, 12 of the 20 provided for in Article 122 of the CE. In our view, this proposal should envisage the direct participation of members of the judiciary in said election, without pre-establishing the manner in which it should be conducted; as such, the Additional Provision does not posit the form, procedure or degree of this participation. The purpose of the Additional Provision is to lay the groundwork for an election system for the judicial members of the Council that guarantees the independence of the judicial office. As such, the issue at hand is not the submission of a comprehensive proposal, since the Council has no recognised legislative initiative as an external body. The proposal should therefore be limited to making a series of recommendations or considerations on the specific task entrusted. The CGPJ is neither a parliament, nor does it have the legal and regulatory framework to produce, amend and debate a proposed wording.

The proposal must satisfy two conditions. On the one hand, an internal and immediate condition: achieving a qualified majority of 3/5 in a Plenary Session of the Council. In this regard, we should draw attention to the impression that would be caused among the public if this Council submitted a report to the executive and to parliament with the backing of only a majority of the Council and the opposition of a not inconsiderable minority. As such, we believe that, if a lack of agreement on the reform positions clearly emerges, the two legally reasoned proposals could be submitted to the requesting bodies in a single report. This is the only way to optimise the work conducted by the Working Group and the CGPJ counsels who have worked with it, and the exemplary collaboration of the judicial associations and the governing chambers of the High Courts of Justice, the National High Court,



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and the Supreme Court. In addition, naturally, to the involvement of various international institutions and organisations in the process through hearings.

In line with the above, the CGPJ does not have judicial powers and, as such, it is not its role to make a judgement of legality on the scope or the correct interpretation of the Additional Provision of LO 3/2024. It must rather prepare a proposal, in accordance with the legal mandate, which can give impetus, where appropriate and in due course, to a possible legal reform that should, indispensably, be undertaken by the body that has the legitimacy to do so (the government, through a government bill, or the parties represented in parliament, through a non-government bill).

As for the second condition of the Additional Provision, it is external in nature: it will be the task of the European Commission to subsequently assess whether the proposal submitted, or even the resulting reform, meets the highest European standards and - crucially, it would seem - whether it serves to guarantee judicial independence, the real concern of these reports as a key guarantee of the rule of law.

## **2. CONTEXT**

Before expanding upon the arguments in our proposal, attention should be drawn to the context from which the Additional Provision arose, from a legal and political perspective.

### **2.1. Internal context**

The concern about the current system of election by parliament arises from the European Commission's Rule of Law Reports in recent years (from 2021 onwards). These reports highlighted the deadlock in the renewal of members faced by the CGPJ during its seventh term. It can therefore be said that the Additional Provision addresses the commitments made by the two main Spanish parties, PSOE and PP, to the European Commission in July 2024 to break the deadlock in the appointment of the 20 Council members. This provision is thus part of a broader context in which PSOE and PP agreed on the names of the candidates to form the new CGPJ and, in addition, Parliament passed Organic Law 3/2024 of 2 August amending Organic Law 6/1985 of 1 July on the Judiciary and amending Law 50/1981 of 30 December regulating the Organic Statute of the State Prosecution Service, which contains measures designed to keep the CGPJ free from partisan interference in its workings through a system of ineligibility.

As such, the Additional Provision of Organic Law 3/2004 is not a rule that stems from the lack of independence of the judicial office, or even of the members of the seventh term of the CGPJ. It is, however, an element that aims to avoid future situations of political deadlock in a constitutional body that has essential functions in Spain for the correct functioning of the judiciary and, therefore, the provision of an essential public service, through which the



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exercise of the fundamental right to effective judicial protection is put into effect (Article 24 CE).

### **2.2. European Union context**

It is also essential to understand the context in which the European Commission prepares its reports and what drives it to produce them and to be more incisive: the legal and constitutional crises in Poland and Hungary, two states in which the survival of the democratic rule of law has been in jeopardy.

This should not obscure the importance of the deadlock faced by the Council, but it does explain - along with other, more domestic considerations - the Commission's particular sensitivity to such issues.

In fact, during the sessions and hearings conducted by the Working Group, neither the European courts nor the bodies consulted questioned the independence of Spanish lower-court and senior judges in the exercise of their judicial functions. Or, indeed, that of the members of the Council. At the very most, the Council of Europe's Group of States against Corruption (GRECO) notes with regard to offences of corruption and as a preventive measure that some doubts could arise regarding appointments to the most senior courts, namely, the Supreme Court and the National High Court. That is all.

The backdrop of the serious rule of law crisis in Poland and Hungary and ever greater political integration in the European Union are the factors that can be identified behind the greater awareness among European institutions of the need to bring to the fore and guarantee the values of the rule of law, in particular the independence of the judiciary, as essential values of the European legal area.

However, the principles of institutional autonomy and mutual trust, which are also core values of the constitutional system of the European Union, should not be overlooked or downplayed.

Reconciling these principles is what pervades the case-law of the Court of Justice of the European Union (hereinafter, CJEU) in relation to the rule of law and the guarantee of judicial independence. As such, in the judgment of 15 July 2021, resolving the appeal for failure to fulfil obligations, C-791/19, **case Commission v Poland**, the CJEU states that although "the organisation of justice in the Member States admittedly falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU" (paragraph 56).

The CJEU reached a similar conclusion in its judgment on **Euro Box Promotion and Others**, joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, of 21 December 2021: "Although neither Article 2



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TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences, Member States must nonetheless comply, *inter alia*, with the requirements of judicial independence stemming from those provisions of EU law (see, by reference to the case-law of the European Court of Human Rights on Article 6 ECHR, judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 130)" (paragraph 229).

Within this legal framework, as indicated above, there has been an increase in the interest and relevance of the rule of law and judicial independence, in addition to the impact on them of the election system for members of judiciary governing bodies.

However, we should distinguish between the legal and political dimensions.

The strictly legal dimension is driven by the CJEU, in its interpretation and application of Article 19 and Article 2 of the Treaty on European Union (hereinafter, TEU) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter, CFREU)<sup>1</sup>.

The dimension that can be called political occurs in the context of sincere cooperation between the EU and Member States, comprising the dialogue on rule of law begun in 2020, which gives rise to the annual Reports by the European Commission. This dialogue, the reports and their recommendations are occurring, for now at least, in areas where the EU itself does not have competence or where direct involvement as a legislator or judge would violate the institutional autonomy of the states. It is however the case that the CJEU has acknowledged the Commission's responsibility for ensuring respect for the rule of law and guaranteeing compliance with EU rules, values and principles.

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<sup>1</sup> Article 2 of the Treaty on European Union (TEU) "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Article 19(1). TEU: Paragraph one: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

Paragraph two: "[...]Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

Article 47 CFREU: "Right to an effective remedy and to a fair trial.

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".



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It should be clarified, in any event, that the European Union does not have a model of judicial governance and administration; in other words there is no European model of judicial governance, or, therefore, of judicial councils. Different systems coexist in Europe, reflecting the various legal and constitutional cultures and the distinctive character of each state. There are states where the executive selects the highest court judges (such as Germany, incidentally with a high level of perceived independence); others where they are chosen by administrative bodies within the judiciary itself; and others, like Spain, where there are judicial councils (where, incidentally, the level of perceived independence is low).

To begin with the work of the CJEU, while it respects the constitutional models of the Member States, it is the case that it has extended the reach of EU law to the structure of the judiciary in the Member States. However, it has always done so from an instrumental perspective, that of preserving the independence of the judicial bodies with the role of applying and interpreting European Union law. As such, the object of its decisions is not the judicial functioning and structure of the courts *per se*, but only as appliers of EU law.

This is the tendency in case-law initiated with case **Portuguese judges** (C-64/16), judgment of 27 February 2018, to which the CJEU also assigned direct effect in the judgment of case **AB and others**, C-824/18, judgment of 2 March 2021: "It follows from the foregoing that the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and that that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law" (paragraph 146).

Also in relation to the application of the principle of judicial independence, the CJEU has developed the principle of non-regression, in relation to the values enshrined in Article 2 TEU which States embrace when they join the European Union, laid down for the first time in case **Repubblika**, C-896/19, of 20 April 2021: "The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary" (paragraph 64). In this specific case, it was held that there was no regression because the judicial appointments committee had a set of criteria in place that guaranteed independence from the Legislative and Executive: "[...] the rules, contained in Article 96A(1) to (3) of the Constitution, relating to the composition of that committee and the prohibition on politicians sitting in that committee, the obligation imposed on members of that committee by Article 96A(4) of the Constitution to act on their individual judgment and not to be subject to direction or control by any person or authority, and the obligation for that committee to publish, with the consent of the Minister responsible for justice, the criteria which it has drawn up, and also its assessments, something which was, moreover, done, as the Advocate General observes in point 91 of his Opinion" (paragraph 67).

The CJEU has ruled on judiciary governing bodies, primarily in connection with the reforms implemented in the Polish system, and has done so to protect judicial independence. Specifically in the judgment in case **AK and**



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**others**, consolidated cases C-585/18, C-624/18 and C-625/18, of 19 November 2019, and in the judgment that resolved the appeal for failure to fulfil obligations, **Commission v Poland**, C-791/19, of 15 July 2021.

In the judgment **Commission v Poland**, relating to a new disciplinary regime applicable to members of the judiciary, the CJEU stated that "*It is true that, as has been argued by the Republic of Poland, the Court has previously held that the fact that a body, such as a national council of the judiciary, which is involved in the process for appointing judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the independence of the judges appointed at the end of that process*" (paragraph 109). This follows the line adopted earlier in case **Land Hessen**, C-272/19, of 9 July 2020, albeit in respect of a different judicial governance system. The CJEU previously cautioned that the independence of a national court, from the perspective of the conditions under which its members are appointed, must be assessed in light of all the relevant factors and the specific case because what is relevant is whether, after being appointed, the judge acts without being subjected to any pressure or receiving instructions in the exercise of his or her functions.

The application of this line of case-law is clearly seen, as stated above, in cases such as **AK and others** and **Commission v Poland**, as well as in others relating to Poland, where the CJEU, in relation to the Polish judicial council, concluded that the reform carried out in said council and in the system for the exercise of disciplinary power, had compromised judicial independence, compromised by the combination of circumstances. Specifically, in **AK and others**, the CJEU concludes in its analysis of the independence of the Polish judicial council that the combination of circumstances in this case do indeed lead it to conclude that there has been a breach of the principle of independence: "although one or other of the factors thus pointed to by the referring court may be such as to escape criticism *per se* and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable" (paragraph 142).

In **Commission v Poland**, in the same vein, the CJEU concludes that "Those factors, taken in the context of an overall analysis including the important role played by the KRS – a body whose independence from the political authorities is questionable, as is apparent from paragraph 108 of the present judgment – in appointing members of the Disciplinary Chamber, are such as to give rise to reasonable doubts in the minds of individuals as to the independence and impartiality of that Disciplinary Chamber" (paragraph 110).

After this brief overview of the CJEU rulings on the subject matter under analysis, it can be concluded that this case-law is characterised by its case-by-case nature, taking into account the set of circumstances prevailing in



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each case analysed, without anything that leads to the conclusion that judicial independence is compromised if a comprehensive approach is adopted.

In short, the case-law of the CJEU does not contain a clear legal standard regarding the specific elements that must be present to discern that judicial independence has been compromised. As such, it cannot be concluded from said case-law that, from the perspective of guaranteeing judicial independence, only one form of election system for members of judicial councils is admissible, and that this excludes the notification of said members by Parliament.

As regards the **Rule of Law Report**, as indicated above, we are addressing a political dimension.

It should not be overlooked that the Court of Justice has recognised that the European Commission has a responsibility to ensure respect for the rule of law and to guarantee compliance with EU rules, values, and principles, aligning its activities with other political instruments such as Article 7 TEU (expulsion from the European Union, the operability of which has been shown to be highly limited in practice).

As such, it is a soft law mechanism, which has been criticised for being somewhat invasive. It began in 2020. It is designed as an annual cycle to promote the rule of law and prevent problems from arising or worsening, including in relation to the pillar of the independence of national judicial systems, and takes the form of recommendations to the various Member States.

Within the area of the judicial system, the Commission has commented on the systems for electing members of the judicial councils in several Member States, including Spain. The Commission adopts recommendations that are aligned with the positions expressed within the Council of Europe, in particular the European Commission for Democracy through Law, known as the Venice Commission, and the GRECO Reports on corruption, which do clearly incline towards the aforementioned councils, if reformed, being composed in whole or in part of judges elected by their peers.

In the case of Spain, the latest report of July 2024 noted that the agreement on renewal and reforms to strengthen the independence of judges in the bill that crystallised in Organic Law 3/2024, along with a commitment to study a reform of the CGPJ to strengthen its independence, means that significant progress can be discerned on the recommendations of previous years.

However, it is not possible to extract from the Commission's successive rule of law reports a single or unambiguous European standard for the election of members of the governing council of the judiciary that guarantees judicial independence.

In short, there is no CJEU ruling on the General Council of the Judiciary and, given that the system of election by parliament is the same as when we joined the European Union, we can assume that we have not violated the principle of non-regression.



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### **2.3. Council of Europe**

Within the Council of Europe, the 1950 European Convention on Human Rights (hereinafter ECHR) and the additional protocols to which Spain is a party, along with the case-law of the European Court of Human Rights (hereinafter ECtHR), are binding in the area of judicial independence. As such, neither the ECHR nor the case law of the ECtHR establish any mandate laying down that Judicial Councils must exist or, naturally, what they should look like. Again, the point is to guarantee judicial independence and, to that end, ensure that there are objective appointment procedures.

In this regard, attention should be drawn, as a representative example, to ECtHR judgment in case **Guðmundur Andri Ástráðsson against Iceland**, of 1 December 2020, "The Grand Chamber is similarly not called upon to review the judicial appointment system that is in place in Iceland. As pointed out by the Venice Commission and the CCJE [Consultative Council of European Judges], there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. The Court reiterates in this connection that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, the appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role. [...] The question is always whether, in a given case, the requirements of the Convention are met" (paragraph 207).

In the same vein, the ECtHR clarified its concepts of an independent and impartial judge established by law. With regard to independence, it established that this "refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties" (paragraph 234).

As regards the European Union, although the European Commission's Rule of Law Report appears, implicitly and tangentially, to accept the Venice Commission and GRECO standard that "judges elect at least half of the judges" as a parameter, it is the case that we entered the European Union with a system of election by parliament, we have continued with the same parliamentary system since the law of 1985, it has not been directly challenged and no change has ever been demanded of us that would result in judges electing the judicial members. That would go against the principle of institutional autonomy.



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The same conclusion is drawn upon reviewing the test set by the ECHR to establish judicial independence through appointments: (i) judges shall display conduct free from external pressure as a matter of moral integrity, (ii) clear and predictable rules that provide for an appointment procedure that ensures the independence of judges and with selection criteria based on merit; and (iii) they shall be endowed with effective resources to counter the influence of other branches of government, both in their selection and during their term of office. Nothing would suggest that Spain does not meet these requirements.

### **3. HIGHEST STANDARDS**

The regulatory situation in the European Union with regard to the Council provides an opportunity to move on to the next pillar of this reasoning: the highest standards referred to in the Additional Provision. As we have held since the first day of the Working Group meetings, this wording is undoubtedly disconcerting as it is difficult to talk about better or worse standards when a standard is something that should be equally applicable in different situations. First, however, we should address what the standards are.

Our position is that standards should stem from binding rules and decisions; the rest, without downplaying their value, are something else: recommendations, guides to good practice, cooperation tools, etc., but they cannot be called standards from a legal perspective. In this regard, we add that we are not in favour of allowing incorporation by reference through the Additional Provision: if they are not duly endorsed, they are not binding.

In fact, problems persist today in the judiciary to embrace as binding the judgments of the ECtHR, an international body whose decisions have binding force (Article 46 ECHR). This non-acceptance also applies to the opinions of United Nations Human Rights Committees (Constitutional Court Judgment 61/2024 of 9 April). As such, it is curious that it is readily accepted that recommendations from political bodies, deliberative and advisory institutions, and even organisations that are highly valued for their work but have no state-level or similar legal status, can be used to tell a State how its constitutional governing body of the judiciary should be structured.

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#### **4.1. The CGPJ: governing body of the Judiciary**

Before we develop a proposal for a possible reform of the CGPJ, we must be clear as to what the CGPJ is, its legal status and its functions.

Firstly, it should be noted that the CGPJ is a constitutional body, which means that its creation is provided for in the Constitution itself, with constitutionally established functions and a composition that is also outlined in the



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constitutional text itself. The CGPJ is a body that stems directly and immediately from the constitution. It is an autonomous body and is not dependent on other constitutional bodies of the State. As our Constitutional Court recently recalled in Constitutional Court Judgment 128/2023, Legal Ground 4, the Council "was established by mandate of the authors of the constitution, as the autonomous constitutional governing body of the Judiciary, exercising certain functions - appointments, promotions, inspection and the disciplinary regime of the members of the judiciary - that were removed from the Executive with the aim of strengthening judicial independence (Constitutional Court Judgment 108/1986, Legal Grounds 7 and 8)".

It is important to stress that the Council is the governing body of the Judiciary, but it is not part of the Judiciary. In other words, it does not carry the adjudicatory authority conferred on judicial bodies, which the Constitution recognises as having the right to exercise "adjudicatory authority in all types of proceedings, judging and enforcing judgments" (Article 117.3 CE). These bodies that make up the Judiciary are, as indicated above, in charge of exercising the judicial function derived from the people and administered in the name of the King. It is the function entrusted to them that requires judges and courts to be independent, irremovable, accountable and subject solely to the rule of law. Independence - and, incidentally, responsibility - is conferred on the members of the judiciary (Article 117. 1 CE). No mention of this is made, by contrast, in respect of the members of the CGPJ. However, that does not mean that the members of the CGPJ are politically or hierarchically dependent on any other body or institution. It was stated above that the Council is a constitutional body which exercises its powers with autonomy and responsibility, meaning that it is accountable to the authority of the state that appoints it, the legislative authority, as the representative of the people. If not, to whom should it be accountable?

With regard to the position of the CGPJ, the Constitutional Court has recognised that it is the governing (Article 122 CE), therefore political, body of the Judiciary. It should be noted that, on some occasions, a governing body is equated with a self-governing body, which is the diametric opposite of the nature of the Council. This is because, and it is important to underscore this factor, the CGPJ governs an authority of the state, not its members considered individually; in other words, it is not the governing or self-governing body of judges. This constitutional body must ensure the proper functioning of the judiciary, of jurisdiction, which cannot be achieved without judicial independence and also, it is worth reiterating, responsibility, as shown by the fact that it is assigned disciplinary functions in respect of the most serious unlawful conduct by lower-court and senior judges.

The Constitutional Court has had scarce opportunity to rule on the nature of the CGPJ. In the judgments in which it has done so, it has stressed, as indicated above, that the CGPJ is not a self-governing body for lower-court and senior judges. As such, in Constitutional Court Judgment 108/1986, Legal Ground 9, "neither said autonomy and power of self-government are recognised by the Constitution nor do they logically derive from the existence,



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composition and functions of the Council. The first conclusion can be drawn by merely reading the Constitutional Text, which, as indicated above, enshrines the independence of each Judge when administering justice, and the role of 'members' of the Judiciary attributed to them in the aforementioned provisions has no other scope than to indicate that only Judges, individually or grouped in collegiate bodies, can exercise jurisdiction, 'judging and enforcing judgments'. Likewise, the existence of a self-government of Judges cannot be logically deduced from the constitutional provisions regulating the Council".

Closely related to the foregoing, it was held that "likewise, it cannot be accepted that the Council has a supposed representative nature; this nature is neither recognised in the constitutional text, nor does it necessarily flow from the nature of the Council, since it is not, as indicated above, a supposed self-organisation body for judges", also Constitutional Court Judgment 108/1986, Legal Ground 9.

This line had previously been taken in Constitutional Court Judgment 45/1986, Legal Ground 5, which stated that the CGPJ does not represent lower-court and senior judges, "as it is constitutionally structured as their 'governing body', it could not, even for procedural purposes, be a 'representative' of the Judiciary, since this would be in conflict with the constitutional principle of 'independence of lower-court and senior judges' (Article 117.1 CE) and this supposedly representative nature would also have to be accepted on the part of the members of the Judiciary, thereby subjecting them to the judicial actions or requisitions of the Council itself".

More recently, in Constitutional Court Judgment 128/2023, Legal Ground 4, the Court reiterated that "it is necessary to recall our earlier ruling regarding both what the Council is not - an organisational manifestation of judicial self-governance of a representative nature - and what it is in constitutional terms - an autonomous constitutional body governing the Judiciary and a guarantor of judicial independence".

In short, the CGPJ is a constitutional body with political and administrative functions (political, but not partisan), which is not part of the Judiciary, that is, it does not exercise jurisdiction. Its function is to guarantee the principle of independence in the exercise of judicial authority, as a public authority and in the service of the people. In respect of this judicial independence, the Constitution assigns to the General Council of the Judiciary a role of guarantor (Constitutional Court Judgment 108/1986, Legal Ground 7), which does not require it "to be the self-governing body of judges but rather to occupy a position of autonomy from and not subordination to the other public authorities" (Constitutional Court Judgment 108/1986, Legal Ground 10).

As such, independence is conferred on the lower-court and senior judges who form the Judiciary and who exercise judicial authority. As indicated above, the Council exists specifically to guarantee this independence by removing certain powers from the Executive, in particular the Ministry of Justice.



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As a constitutional governing body of an authority of the state, it is comprehensible that the selection of its members is carried out with the participation of Parliament, a participation that gives effect to the democratic principle and represents the pluralism of society and the judiciary.

### **4.2. Independence is conferred on the judicial office, not the CGPJ**

Article 117. 1 CE establishes that justice emanates from the people and is administered on behalf of the King by Judges who are members of the judiciary and are independent, irremovable, responsible and subject only to the rule of law. Independence is therefore one of the factors that define the judicial office.

It should be noted that the Judiciary is the only authority identified as such by the Constitution, since when it refers to the legislative and the executive [authorities], it uses the terms Parliament, Title III of the CE, and the Government and the Administration, Title IV of the CE, respectively. The reason for underscoring the nature of the judicial structure as an authority of the state is, surely, to guarantee its statutory and functional independence from the other two authorities, the legislative and the executive, to which it had been subordinate through various instruments, when it was not directly a dependent organisation (under the king at first, and then the Government).

The judiciary presents an additional complexity to the legislative and executive authorities, it being the case that the CE 1978 confers on each lower-court and senior judge the judicial authority to dispense justice. For this reason, each of the lower-court and senior judges that comprise the judiciary are independent, irremovable, responsible and subject only to the rule of law (Article 117.1 CE). In addition, judicial authority is accorded to courts (Article 117.3 CE) since that is the structure in which lower-court and senior judges exercise their public power in accordance with the law.

Therefore, the bearers of independence are the members of the judiciary who undertake their functions in courts when they exercise judicial authority. Accordingly, by way of example, the Constitutional Court found that lower-court and senior judges assigned to public registries have no standing to seek a declaration of unconstitutionality because they are not exercising judicial authority therein. As such, following the introduction of same-sex marriage into our legislation through the amendment to Article 44 of the Civil Code by Law 13/2005 of 1 July, the *magistrados-jueces* [senior judges who preside over a lower court] assigned to various Civil Registries, with responsibility for matrimonial files, sought a declaration of unconstitutionality from the Constitutional Court in relation to the new wording of Article 44 of the Civil Code, which states: "Marriage shall have the same requirements and effects whether the two partners are of the same sex or of different sexes".

The Constitutional Court rejected these declarations of unconstitutionality, under the consideration that "in our legal system, to counter the risk of radically distorting the institution created by Article 163 CE, a declaration of



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unconstitutionality can only be sought by courts when they exercise jurisdiction (Article 117.3 and 4 CE), vested, as such, with the corresponding guarantees and occupying the institutional position laid down in the Constitution itself for the exercise of said function (Article 117, paragraphs 1 and 2 CE)" (Constitutional Court Ruling 505/2005 of 13 December, Legal Ground 5). In respect of judges assigned to Registries, the Constitutional Court concluded that "[T]he fact that they are part of the administrative structure of the Civil Registry and, as such, functionally under the Ministry of Justice through the Directorate-General of Registries and Notaries, precludes, with regard to the rulings made by Civil Registry Judges as part of the actions corresponding to them as the person responsible for said Registries, the independence inherent in the performance of judicial functions. As such, without entering into the academic debate on the specific nature of the role of registries, Judges, in their capacity as the person in charge of a Civil Registry, exercising the functions assigned to them in that regard, do not exercise jurisdiction and, consequently, their actions cannot be characterised as judicial. Naturally, this quality likewise cannot be attributed to any decisions or rulings that judges may issue in the exercise of their functions as the person in charge of the Civil Registry, since these are not an exercise of jurisdiction, and, clearly, it is not possible to characterise as judicial any decisions or rulings, even if issued by the presiding judge of a court, which are capable of challenge, and therefore review, before administrative bodies" (Constitutional Court Ruling 505/2005, Legal Ground 5; in the same vein, Constitutional Court Ruling 508/2005 of 13 December, Legal Ground 6; and Constitutional Court Ruling 59/2006 of 15 February, Legal Ground 6).

In short, the aforementioned Constitutional Court Judgment 128/2023 reiterated, as indicated above, that the CGPJ is, by mandate of the authors of the constitution, the autonomous constitutional governing body of the Judiciary, exercising certain functions - appointments, promotions, inspection and the disciplinary regime of the members of the judiciary - that were removed from the Executive with the aim of strengthening judicial independence (Constitutional Court Judgment [108/1986](#), Legal Grounds 7 and 8)". However, judicial independence is not determined by the CGPJ, a body that does not exercise a judicial function, but refers rather to "each and every judge in so far as they exercise a judicial function, who specifically comprise the judiciary or are members of it because they are responsible for exercising said function under Article 117.1 CE (Constitutional Court Judgment [108/1986](#), Legal Ground 6)["]. This independence of the judiciary "entails that, in the exercise of this function, they are subject solely and exclusively to the rule of law, signifying that they are not bound by orders, instructions or indications from any other public power, in particular from the legislature and the executive" (Constitutional Court Judgment [238/2012](#), Legal Ground 7, with a direct quotation from Constitutional Court Judgment [37/2012](#), of 19 March, Legal Grounds 4 and 5). The scope of judicial independence is inextricably linked to subjection to the rule of law, in other words, "judges and courts are independent because they are governed solely by law. Judicial independence and submission to the rule of law are, in short, two sides of the same coin" (as echoed in Constitutional Court Judgment 128/2023, Legal



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Ground 4). In order to ensure the independence of each judge or court in the exercise of their jurisdiction, "[t]he Constitution itself makes provision for various guarantees [...] Firstly, irremovability, which is their essential guarantee (Article 117.2); but also the assignation of regulation to determine the constitution, functioning and governance of courts, in addition to the legal status of lower-court and senior judges, solely to organic laws (Article 122.1), and the incompatibility rules applying to them (Article 127.2)"; although we note that this independence "is counterbalanced by the responsibility and strict cantonisation of lower-court and senior judges in their judicial function and any other functions expressly assigned to them by law in defence of any right (Article 117.4), this last provision being focused on ensuring the separation of powers" (Constitutional Court Judgment [108/1986](#), Legal Ground 6).

In short, independence is conferred on judges and courts in the exercise of judicial authority.

### **4.3. The election system for judicial members**

In Spain, the intention of the authors of the constitution regarding the election method for the members of the CGPJ is not entirely clear. Article 122 CE left open the decision on how judicial members should be elected, allowing the Legislator to determine the specific arrangements. This article does however establish that the members of non-judicial origin, lawyers and other legal professionals, must be elected, four by Congress and four by the Senate.

Since 1985, no parliamentary majority has implemented a reform to dispense with the participation of Parliament in the election of judicial members. Indeed, the first composition of the CGPJ was chosen by peer election and, for the second renewal, the system was changed to election by parliament.

The Constitutional Court ruled on the election method for judicial members in two judgments in 1986. The first, Constitutional Court Judgment 45/1985 of 17 April, resolved three joined disputes relating to competence submitted by the CGPJ itself against certain provisions included in the drafts of the Organic Law on the Judiciary, adopted in plenary session by the Congress of Deputies and in plenary session by the Senate, and subsequently ratified by the former in plenary session, and included in Organic Law 6/1985 of 1 July on the Judiciary. Specifically, the Council contested the provisions relating to the exercise of regulatory powers to implement the legal status of lower-court and senior judges and the appointment of the twelve judicial members of the Council. The second, Constitutional Court Judgment 108/1986 of 29 July, resolved the application for constitutional review submitted by José María Ruiz Gallardón, backed by 55 deputies, against the whole of Organic Law 6/1985 of 1 July on the Judiciary, on grounds of procedural irregularities, and, alternatively, against certain provisions of said law.

As regards the specific issue of the election of judicial members, the Constitutional Court has not expressed a preference for one or the other



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method of election, that is, by peers or by Parliament, and, as indicated above, both models have been in force in our country.

The Organic Law on the Judiciary of 1986 set out that the election of judicial members of the CGPJ should also be undertaken by Parliament. In Judgment 45/1986, the Constitutional Court denied the status of the Council as the representative of the Judiciary in legal proceedings. As such, "the bodies in which the Judiciary (which is a branch of government with a plural structure to exercise judicial functions by judging and enforcing judgments 'in the name of the King') finds expression do not have access to disputes relating to competence, since the courts, considered as such, are not 'constitutional bodies' for the purposes of submitting a dispute relating to competence under Article 59.3 of the Organic Law on the Constitutional Court, and, for potential disputes between Courts and other State bodies, provision is made for other procedural channels in which the Council itself has no place. In addition, as it is constitutionally structured as their 'governing body', it could not, even for procedural purposes, be a 'representative' of the Judiciary, since this would be in conflict with the constitutional principle of 'independence of lower-court and senior judges' (Article 117.1 CE) and this supposedly representative nature would also have to be accepted on the part of the members of the Judiciary, thereby subjecting them to the judicial actions or requisitions of the Council itself" (Legal Ground 5).

Elaborating on the difference between judges of the judiciary and the CGPJ, the Constitutional Court concluded that the competences relating to the election of judicial members of the Council, "albeit referring to the manner in which the body itself is formed, are not demanded for the Council itself, or even for the Judiciary as such, as an exercise of judicial authority, but rather with regard to the participation of career Judges in the process of appointing said members and, therefore, as a voting right attributed to subjects who preside over courts to partially form a body of the State, through the exercise thereof. In exercising this right, judges would not be deploying "constitutional" public competences or functions, which are attributable to the State as such state bodies, but rather a personal, subjective right to vote, activation of which would not entail the exercise of official authority. As such, it would be a subjective position, linked to their status as members of the Judiciary, but entirely outside the scope of constitutional conflicts" (Constitutional Court Judgment 45/1986, Legal Ground 5 *in fine*).

In Constitutional Court Judgment 108/1986, the Court went into greater detail to examine the constitutionality of the option chosen by the Legislator, that the election of judicial members should remain in the hands of Parliament.

Legal Ground 13 of Constitutional Court Judgment 108/1986 stated that the 1978 Constitution does not posit a procedure for the election of judicial members: "it would seem that there was an implicit consensus regarding the need for the twelve members drawn from the Judiciary to embody not only different degrees of experience arising from their role and age, but also the various schools of thought existing within it, but this consensus does not appear to extend to establishing the appropriate procedure to achieve this



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result, in such a manner that a definitive procedure was not laid down in the constitution, but rather the authors thereof confined themselves to deferring it to a future Organic Law".

There is, however, a constitutional mandate that the election method for the judicial members must represent the pluralism of Spanish society (Legal Ground 13): "as such, the purpose of the requirement, in brief, is to ensure that the composition of the council reflects the pluralism existing in society and, in particular, in the judiciary".

It should be noted at this point that the wording of Legal Ground 13 of Constitutional Court Judgment 108/1986 could be construed as indicating a preference on the part of the Constitutional Court for judicial members to be elected by their peers, given that said legal ground states that the objective of pluralism sought by the provision "is more easily achieved by assigning to the Judges themselves the power to elect twelve of the members of the CGPJ gives rise to few doubts". However, immediately afterwards, with only a semi-colon separating this statement from the next, it is pointed out that "we can neither overlook the risk, also articulated by some members of the Parliament that approved the Constitution, that the electoral process may transfer the ideological divisions existing in society to the Judiciary (making the effect achieved different from the one sought) nor, above all, can it be maintained that this objective is absolutely negated by adopting another procedure, in particular that of also attributing to Parliament the power to propose the members of the Council from the Bench of Judges, all the more so when the Law adopts certain precautions, such as requiring a qualified majority of three-fifths in each Chamber (Article 112.3 Organic Law on the Judiciary). As such, both systems would therefore present a risk of politicisation in a negative sense.

It ends by adding that it is true that "[T]he existence and even the probability of this risk, created by a provision that makes possible, although not necessary, an action at odds with the spirit of the constitution, appears to counsel that it be replaced, but these are not sufficient grounds to declare it invalid, given that the consistent case-law of this Court holds that the validity of a law must be preserved when the text thereof does not preclude an interpretation in line with the Constitution". This statement does not dispute the validity of the system of election by parliament, it is an *obiter dicta* and is made after acknowledging that election by peers is not without risks.

As such, no system is infallible as regards politicisation of the election of judicial members. Other factors will need to be considered to establish the most suitable election system for the members of a constitutional body, whose role is to represent pluralism and ensure the independence and responsibility of lower-court and senior judges in the exercise of jurisdiction, in a system that claims to be democratic.



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### **5. REGARDING THE PROPOSAL UNDER THE ADDITIONAL PROVISION**

As indicated above, the Additional Provision permits various non-monolithic interpretations. It should be noted that since 1986 no parliamentary majority in Spain has chosen to embrace the mantra of "judges appoint judges" and, conversely, election by parliament has been maintained. Moreover, this was the point made by, for example, the Governing Chamber of the Supreme Court in the report obtained by the Additional Provision Working Group.

As we also said at the beginning of this proposal, this Council has been asked to:

- a) examine the European election systems for members of Judicial Councils similar to the Spanish Council;
- b) draft a proposal to reform the election system for members designated from among lower-court and senior judges (3/5 majority), in accordance with Article 122 CE, which guarantees the independence thereof and with the direct participation of judges *to be determined*,
- c) which can be positively assessed by the European Commission's Rule of Law Report,
- d) establishing a General Council of the Judiciary in line with the highest European standards.

Regarding these four points:

#### **5.1. There is no *European model of judicial governance***

In Europe, whether referring either to the European Union or the Council of Europe, there is no European model of judicial administration, let alone of governance of the judiciary.

The case-law and the various international instruments, of both hard law and soft law, concur that different models of governance of the Judiciary exist side by side in Europe - as explained at length in the Report preceding this proposal - which, in summary, are usually grouped into three systems:

- a) external governance systems, which confer these powers on the executive through the Ministry of Justice; known as the *Ministry of Justice model*. No doubts have been raised about their compliance with European standards, the legality and legitimacy of the decision-makers on the appointment of Supreme Court justices, the selection and training of judges or their disciplinary regime, and they have high levels of satisfaction for independence (Germany or Austria);
- b) internal governance systems in which the aforementioned functions are allocated to internal administrative bodies of the Judiciary itself; known as the *courts service model*;



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c) institutional governance systems: powers are conferred on a constitutional body, independent from the other branches of government, which is not part of the Judiciary.

The four councils studied by the Working Group (Italy, Belgium, Portugal and France) are mixed bodies. The judicial members are elected by their peers; in Italy, the majority are judicial members elected by their peers, although the President of the Republic is also an ex officio member of the Council; the election of members by their peers, however, does not remedy *correntismo* (politicisation through internal tendencies within the associations, which has led to several reforms; the latest resulted in a Council with 30 members). However, in the other Judicial Councils, judicial members do not outnumber non-judicial members: in Belgium, 50%; in France, below 50%; and in Portugal (9 lay, 8 judicial).

Only Spain provides for a five-year term of office as a correcting factor.

### **5.2. Direct participation does not mean that judges elect judges**

The Additional Provision refers to "the direct participation of judges *to be determined*": participation does not mean that they must be elected directly, but that they must participate in the election, as indicated in the Additional Provision when it says "to be determined", that is, the decision shall be made by law.

The legal reforms that gave rise to the sixth, seventh and eighth terms of the CGPJ ensured the participation of the judiciary in the election of members of judicial origin, either by means of a system of minimum endorsements or through a proposal from judicial associations, a proposal made following a direct vote by their members, a vote that allows a number of candidates, the ones receiving the largest number of votes, to be proposed to the Congress and the Senate by the associations. As such, the current term of the CGPJ reckoned with the participation of the judiciary in the nomination of candidates.

The rule of law reports for various countries, produced at the initiative of the European Commission, refer to the need to ensure the direct or indirect participation of members of the judiciary in the election of judicial members. The condition: their independence must be guaranteed.

It was clarified above that independence must be conferred on judicial authority, not the CGPJ. In any event, there should be a presumption of independence for all members elected by Parliament in the exercise of their constitutional, legal and regulatory functions. This must ensure that they act in accordance with the law and in a professional manner.

Judicial independence is not necessarily guaranteed if judges elect judge members; moreover, this reinforces corporatism and moves the CGPJ away from its role as a constitutional body guaranteeing the independence of the judicial office to ensure public service. It should be noted that once elected,



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by one method or another, it is the good practice and professionalism of the members that will prevent them falling prey to any pressures they may receive, wherever they may originate from.

In this same vein, it is important to point out the role that judicial associations would have in a potential election of judicial members by their peers, taking into account the part they currently play in the candidate selection stage. Three key aspects should be taken into consideration from a democratic perspective. Firstly, unlike political parties, judicial associations, the backbone of election candidatures in the judiciary, are not required to have democratic internal organisation by constitutional mandate (Article 6 CE). Furthermore, they are not politically accountable to the body representing popular sovereignty where parliamentary groups are present and where one of the essential functions of the legislature is performed: scrutiny of government action by parliament; there is no system of democratic accountability for judicial associations. Lastly, and closely linked to independence, as highlighted in the international documents studied by the Working Group, they have access to private financing.

One final point: it is worth underscoring that the demonization of parliamentary elections can be confused with a kind of inherent corruption and bias, which is typical of populist movements: mistrust of politics.

### **5.3. Positive assessment by the Rule of Law Report and the highest standards**

Having outlined above the role of the European Commission's Rule of Law Report, we consider that a proposal defending a system for the election of the judicial members of the General Council of the Judiciary by parliament, with robust legal arguments, which explains the rationale for this choice in line with European and constitutional standards, is quite capable of passing the European Commission's assessment. There is evidence that election by parliament does not necessarily connote partisanship and, therefore, a lack of independence in the activity of Council members, irrespective of their origin, or in their work relating to the appointments to be made, or in the discharge of the other functions and powers conferred on them. In any event, the important issue for the independence [of] the lower-court and senior judges who exercise judicial power is the proper functioning of the Council, through clear and pre-established procedures and due regard for the principles of transparency and good governance.

## **6. ELECTION OF JUDICIAL MEMBERS BY PARLIAMENT**

In view of all the above, we consider that the election of judicial members should remain within the remit of Parliament.



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In Spain, justice emanates from the people. Independence in the exercise of judicial activity is attained through the application of the law, as set out in Article 122 CE. The application of the law also democratically legitimises the judiciary as a provider of justice. However, it is the only branch of government that is not legitimised by direct or indirect election by the people.

Nonetheless, the General Council of the Judiciary is a constitutional body that should reflect social and judicial diversity. Our opinion is that judicial diversity is represented through the judicial members; however, social diversity is broader and requires the participation of Parliament to be reflected in the composition of the CGPJ. In a parliamentary system like ours, the will of the people and, in a way, that of the regions, is represented in Parliament. That social diversity (diversity of society and of citizens) arises, by representation, from Parliament. For this reason, the constitutional governing body of the Judiciary must act from a standpoint of due regard for that diversity in its composition. Congress and the Senate democratically legitimise the composition and actions of the Council.

Furthermore, rejecting election by parliament, because it is partisan, can lead to populist stances where all politics is seen as negative and contentious, if not corrupt. It is necessary to highlight the value of politics and the political as the activity of defending the common good through democratic institutions.

In addition, the election of members by their peers, without the participation of parliament, can reinforce corporatism in the judicial system, in a body that should be the guardian of independence in judicial activity but also uphold accountability.

It should not be overlooked that we are discussing a mixed Council. Against this backdrop, rejecting the election of judicial members by parliament because it amounts to party political influence over the individuals appointed represents placing non-judicial members, who must be elected by Parliament by constitutional mandate, in a clearly disadvantageous starting position; the judicial members, elected by their peers, are unburdened by obligations of any kind, while the non-judicial ones may be pointed out as party mouthpieces, rather than legal professionals attempting to contribute towards the proper functioning of justice as a public service.

In their case, there should be a presumption of independence for all members elected by Parliament in the exercise of their constitutional, legal and regulatory functions.

It is also worth reiterating that the issue of substance is not the independence of the judiciary (or of the Council), but rather the perception of a lack of independence on the part of the public; we must undoubtedly change this perception, but it is the independence of the judicial office that is being called into question in society, above all by casting doubt on some appointments made in the past, but also by the irresponsible actions of some judges.

The appointment process within the Council should be subject to the principle of transparency in the selection procedure, establishing the profiles for each



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position with great stringency, perhaps with the possibility of awarding points for some qualifications, although a certain margin of discretion should always be left to establish the [criteria] for each post, based on the needs of the various bodies. In any event, an open, transparent procedure with safeguards ensures that the appointment process can progressively recover from past misuse.

There is another side to this independence: judicial responsibility, which ultimately also falls under the remit of the CGPJ. Responsibility in the exercise of judicial authority and, failing this, rigorous disciplinary action will also make it possible to restore public confidence in the justice system.



## **7. FRAMEWORK FOR A PROPOSAL TO IMPROVE THE ELECTION OF JUDICIAL MEMBERS IN LINE WITH EUROPEAN PARAMETERS AND THE SPANISH CONSTITUTIONAL CONTEXT**

In accordance with the mandate set out in the Additional Provision of Organic Law 3/24, a proposal is made to Parliament and the National Government to promote an amendment to the Organic Law on the [Judiciary] to facilitate the direct participation of the judiciary in the appointment of the 12 judicial members - over half of the total number - of the General Council of the Judiciary.

In this task, there is considerable latitude to arrange the building blocks of the electoral system, to the extent that, as concluded in the International Seminar organised by the Venice Commission on 21-23 March 2022, under the topic "Shaping judicial councils to meet contemporary challenges":

"Standards relating to judicial councils [should provide parameters rather than strict regulations, and rules referring to councils of the judiciary] should be developed with a view to ensuring the ultimate goal of protecting and strengthening the independence of the judiciary, while providing specific solutions adapted to the prevailing context in each state".

In the Spanish context, an electoral system in line with our constitutional framework would be structured as a two-phase process - participation and election - with the following core components.

### *I. Participation phase:*

- Electorate: the right to vote is recognised for all lower-court and senior judges in any grade of the judiciary who hold the administrative status of active service.
- The right to vote is recognised for members of the electorate who are not subject to any grounds for ineligibility. The grounds for ineligibility shall be determined on the basis of two factors in conjunction, time and membership of governments or legislative bodies. As such, electors who formed part of the National Government or the Government of an Autonomous Region in the previous five years or held the post of Senator or Member of Parliament, the European Parliament or a Legislative Assembly of an Autonomous Region during the same period, would not be eligible.
- The term of office is five years, with no possibility of re-election.
- The presence of all categories of the judiciary in the election shall be ensured in the following ratio:



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- Supreme Court Justices: 2
- Senior Judges: 6
- Lower-Court Judges: 4
- Geographical structure of the election: there shall be one single constituency.
- Candidatures may be proposed by legally constituted judicial associations and groupings of senior and lower-court judges. Individuals may also stand for election by submitting a candidature endorsed by 30 electors.
- Candidatures shall be formed with a balanced participation of men and women.
- The vote shall be free, personal, equal, direct and secret, and may be cast in person, by registered post or electronically, with the relevant guarantees.
- The electoral formula shall be the limited voting system. As such, the number of votes allotted to each elector shall be lower than that of the candidates to be elected, a number that shall be set at a minimum of 6 and a maximum of 8.
- Voting shall be arranged using one of the following two methods:
  - i) Open lists, with each elector voting for the candidates he or she chooses on the ballot paper/sheet containing the individual candidatures and lists submitted, or
  - ii) The casting of votes by judiciary category, with 1 vote to elect Supreme Court Justices, 4 votes to elect Senior Judges and 2 votes for Lower-Court Judges.
- The election shall be organised by the General Council of the Judiciary. To act as an election oversight body, it is proposed that an Election Committee be created specifically for electoral processes of this type, supervising the preparation of lists, the election, the vote count, the declaration of elected candidates and the resolution of complaints.
- After the votes have been counted, the Election Committee shall announce the results, listing the candidates by category and number of votes received, and draw up a list of candidates containing the 6 Supreme Court Justices with the most votes, the 24 Senior Judges with the most votes and the 12 Lower-Court Judges with the most votes.
- The reference legislation shall be the Organic Law on the Judiciary, and the General Council of the Judiciary shall draw up an implementing regulation for the electoral process.

### ***II. Election phase***

After the lists of results have been compiled with the candidatures for the three categories of the judiciary, certified by the Election Committee, they



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shall be submitted to Congress and the Senate for each chamber to select six members of the General Council of the Judiciary from among the candidates.

To this end, all candidates shall appear at a public hearing where they shall present their curriculum vitae and a programme of action within the Council.

When electing them, the Congress and the Senate shall have regard for the principle of balanced participation of women and men and shall maintain a balance between the various associations, avoiding exclusion and over-representation, as well as the candidatures of non-associated persons; geographical diversity shall also be taken into account.

General Council of the Judiciary, 5 February 2025