



## REPORT (CONSULTATION 4/2022) OF 20 JANUARY 2023

### I. QUERY

*'In September of this year I read in various media outlets that some members of the General Council of the Judiciary had indicated which senior judges from the Supreme Court had expressed "their desire" to be selected for positions in the Constitutional Court, seemingly through having put themselves forward and "having had contact with members". Different newspapers considered them as candidates to be evaluated in the ongoing "negotiation", at the same time naming the "negotiators" from the "progressive" and "conservative" wings. Some newspapers, when reporting on the provided CVs, also wrote that "they had presented themselves to the progressives or the president of the Council". (All quotations are taken from the corresponding press articles).*

*Article 159 of the Constitution establishes that members of the Constitutional Court will be appointed from among senior judges and prosecutors with more than 15 years' professional practice. Article 599.1.1 of the Organic Law on the Judiciary, triggering the activity described in the first paragraph, has no provision for a public call for applications, as occurs with candidates for international courts, either in its original wording or in the amendment implemented by Organic Law 8/2022 of 27 July.*

*This is not the case with the procedure for selecting candidates to the shortlist of ad hoc judges for cases determined before the European Court of Human Rights (Resolution of the Secretary of State for Justice of 18 February 2019) nor with Royal Decree 972/2020 of 10 November, regulating the selection procedure for the nomination of candidates by the Kingdom of Spain in the appointment of members of the Court of Justice of the European Union and the European Court of Human Rights.*

*In view of the opinion issued on Consultation 12/19 of 30 September 2019, concerning visits to members of the General Council of the Judiciary by candidates for a discretionary appointment to be made by this body, I cannot find an answer to my next question.*



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*The question is: if there is no established procedure for the selection of candidates, does it affect any of the Principles of Judicial Ethics if a senior judge who meets the requirements of Article 159 of the Constitution makes a telephone call to or visits a member of the General Council of the Judiciary (whether or not they are “negotiators”) or all the members, or the President of the General Council, in order to express their interest in being proposed as a judge to the Constitutional Court as part of the quota corresponding to the General Council?’*

### II. PURPOSE OF THE CONSULTATION

1. The Committee’s opinion is sought with respect to the appropriateness - from an ethical standpoint and in the absence of a regulated process for the selection of candidates - of a senior judge using direct means, whether telephone calls or visits, to approach all or any of the members of the General Council of the Judiciary with the aim of being proposed as a judge to the Constitutional Court as part of the quota corresponding to the General Council.

2. The query fundamentally concerns principles related to judges’ integrity. Specifically, the following principles are relevant:

*22. Integrity requires that judges adhere to conduct that reaffirms public confidence in the administration of justice, not only in the exercise of justice but also in all circumstances in which they are recognisable as judges or which call on their status as such.*

*24. Judges should avoid any risk of projecting an appearance of favouritism in their personal relationships with professionals connected to the administration of justice.*

*29. Judges must be mindful of the fact that the dignity of the judicial function requires them to behave accordingly.*

*31. As citizens, judges are entitled to freedom of expression, which they should exercise with prudence and moderation in order to preserve their independence and*



*appearance of impartiality, and to maintain public confidence in the judicial system and the courts.*

3. With respect to the Bangalore Principles, this would correspond to the principle of integrity, understood as *'the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality'*. More specifically, paragraph 3.1 states: *'A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer'*.

4. It also indirectly concerns Principle 8 on impartiality, which establishes that: *Judges who hold public positions by virtue of their membership of the judiciary will exercise their powers and make their decisions objectively and, where appropriate and in all cases, in matters related to the selection, appointment and promotion of members of the Judicial Service, with complete respect for the principles of merit and ability.*

### III. ANALYSIS OF THE ISSUE

1. In order to offer a response, we must start from the premise indicated in the query: there is no regulated procedure in Spanish legislation for nominating the members of the Constitutional Court. According to Article 159 of the Constitution, their appointment by the King is made through the nomination of four senior judges at the proposal of Congress, four at the proposal of the Senate, two at the proposal of the Government, and two at the proposal of the General Council of the Judiciary.

2. Nor does the legislation impose any other requirement for admission to the Court beyond the content of the second paragraph of this provision, which establishes the minimum requirements for eligibility, namely that they are appointed from among senior judges and prosecutors, university professors, public officials and lawyers who are jurists of recognised competence with more than fifteen years' professional experience.

3. This is not the case with proposals for appointments in other European bodies with a similar function. The Council of Ministers issued two agreements establishing guidelines for proposing candidates for judges and advocates general in the Court of Justice and



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members of the General Court of the European Union (Agreement of 16 January 2015), and for compiling a shortlist of candidates for the selection of judges assigned to the European Court of Human Rights (Agreement of 20 January 2017).

4. At the Plenary Session of the General Council of the Judiciary on 8 September 2022, it was agreed to establish rules of procedure for nominating the two judges for the Constitutional Court whose proposal corresponds to the Council. To the extent that it is of relevance to this opinion, the rules provide only that the candidates are to be proposed by the members, once the plenary session has been convened for the appointment process, and proposals must be accompanied by the candidate's curriculum vitae. Nothing is stated about how to obtain this curriculum vitae for the purpose of evaluation.

5. The Agreement of 25 February 2010 of the Plenary Session of the General Council of the Judiciary, approving Regulation 1/2010, governing discretionary appointments to judicial bodies, does not apply to this case. While Article 1 provides for the publication of calls for applications, the bases for the procedure and the form in which applications should be submitted, it does not apply since, as the body responsible for interpreting the Constitution (Article 1 of the Organic Law on the Constitutional Court), the Constitutional Court is not part of the judiciary.

6. This is neither an anomaly nor anything exceptional compared with other constitutional bodies with similar missions. Neither are there any regulations governing how to promote candidates nor how to submit applications for consideration as a candidate to hold the position of senior judge on the Constitutional Court, with respect to the nominations to be made by Congress, the Senate and the Government. There is one exception in the procedure followed in the Senate, whereby the regional parliaments propose up to two candidates each; however, these candidates are selected without any prior regulated procedure.

7. This lack of regulation has been called into question in legal scholarship. After critiquing the system, one author has highlighted the need to make public calls for nominations which are transparent and easily accessible, enabling anyone who can meet the legal requirements to submit their candidacy, thus avoiding opportunities for mere co-optation by the judges themselves or by the political authorities.



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8. Under these circumstances, the legitimate expectation of a senior judge who meets the legally established requirements, and whose competence and integrity to access the position may be well recognised, should not be frustrated due to the absence of a suitable channel for submitting their candidacy. Moreover, this situation affects not only senior judges but extends to prosecutors, university professors, public officials and lawyers, among others, with the same legitimate aspiration.

9. The fact that there is no regulated way to submit their candidacy impels those who, in the exercise of their legitimate right to participate in the selection process, seek a means of participating and of having the opportunity to aspire to hold a position which, legally and based on their experience and merits, they may be entitled to hold, or at least, for which they may be considered eligible. Such conduct would be protected by the individual right to participate in the selection process without undermining any ethical principle.

10. The public's perception of the selection process may be tarnished by the interpretation that the absence of regulation, whether intentional or not, entails a lack of transparency. This cannot prevent or limit a judge's right to apply for the position and the same applies equally to any other professionals.

11. Furthermore, senior judges have a duty to participate in those areas or bodies in which they are eligible to serve as such, providing a service to society and offering their technical knowledge, in compliance with their active commitment to the proper functioning of the judicial system, as advocated by Principle 5 of the Principles of Judicial Ethics.

12. Nevertheless, if, in order to gain access to the members responsible for the selection process and apply as a candidate, it is necessary to make use of a personal or professional relationship with one of the members, or with people in their inner circle, who might not only be able to facilitate access to the selection process on an equal footing but also offer some advantage through this circumstance, this could violate the principle of integrity and correctness referred to in the Commentary on the Bangalore Principles of Judicial Conduct (paragraph 11): *Propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. What matters*



*more is not what a judge does or does not do, but what others think the judge has done or might do.*

**13.** While the method of submitting a curriculum vitae for evaluation is not regulated, it should be noted that the opinion on Consultation [12/19](#) of 30 September, concerning visits to members of the General Council of the Judiciary by candidates for a discretionary appointment to be made by this body, states: 6. *While the visit by one of the candidates to the members of the Council may correspond in intent to a mere courtesy in the form of the candidate making themselves known personally, it generates suspicion and may result in unequal treatment between those who make these visits and those who do not.*

#### **IV. CONCLUSION**

In view of the above, the Committee's opinion is as follows:

- The selection process for senior judges of the Constitutional Court is not regulated, in contrast to the system for appointing the members of the Supreme Court.
- It does not violate any ethical principle if a senior judge participates in a selection process that is unregulated, using the means that are available to all potential candidates of non-judicial origin in order to make the candidate's merits known to the body responsible for the appointment.
- From the standpoint of judicial dignity, a senior judge must take into account that whatever the form of their application as a candidate to the Constitutional Court, they must in no case compromise the principles of impartiality and integrity, in line with the opinion issued on Consultation [12/2019](#) of 30 September.