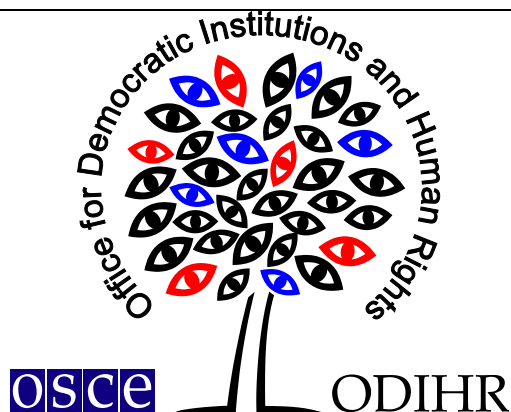


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OPINION

ON CERTAIN PROVISIONS OF THE DRAFT ACT ON THE SUPREME COURT OF POLAND (AS OF 26 SEPTEMBER 2017)

**based on an unofficial English translation of certain provisions of the Draft Act
commissioned by the OSCE Office for Democratic Institutions and Human Rights**

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*This Opinion is also available in Polish.
However, the English version remains the only official version of the document.*

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I. INTRODUCTION

1. *On 20 September 2017, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the First President of the Supreme Court of Poland to review the Draft Act on the Supreme Court being prepared by the President of the Republic of Poland (hereinafter “the Draft Act”). This draft Act was submitted by the President to the Sejm (lower house of the Parliament of Poland) on 26 September 2017.¹*
2. *On 18 October 2017, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights and rule of law standards and OSCE human dimension commitments.*
3. *Given the short timeline to prepare this legal review, the present Opinion will focus on the most significant changes that the Draft Act intends to introduce to the current Act on the Supreme Court of 23 November 2002 (hereinafter “the 2002 Supreme Court Act”),² where these changes raise concerns in terms of their compliance with international standards. The OSCE/ODIHR stands ready to review other provisions of the Draft Act upon request, should this be deemed useful to inform on-going discussions on the reform of the judiciary in Poland.*
4. *The OSCE/ODIHR has already reviewed certain provisions of a previous Draft Act on the Supreme Court of Poland submitted to the Sejm on 12 July 2017. This previous Draft Act was adopted by the Sejm and the Senate on 20 July and 22 July 2017 respectively, but was vetoed by the President of the Republic of Poland on 24 July 2017.³ The OSCE/ODIHR published its Opinion on certain provisions of this previous Draft Act on 30 August 2017 (hereinafter “August 2017 Opinion”, also available in Annex 1).⁴*
5. *The present Opinion will make reference to the findings and recommendations contained in the August 2017 Opinion whenever the provisions under review are identical or comparable and raise similar concerns in terms of compliance with international human rights and rule of law standards, and OSCE human dimension commitments.*
6. *This Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

7. *The scope of this Opinion covers only certain provisions of the Draft as mentioned in par 3 *supra*, except for cases where the OSCE/ODIHR deemed it necessary to refer and analyse other provisions in the interests of comprehensiveness, including key provisions*

¹ See <<http://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=PROJNOWEUST&Nrkadencji=8&Kol=D&Typ=UST>>.

² For the Polish version of the Act on the Supreme Court of 23 November 2002, as last amended on 22 July 2016, see <<http://www.legislationline.org/documents/id/21175>>. For an English version of the 2002 Supreme Court Act as of 8 February 2013, see <<http://www.legislationline.org/documents/id/21174>>.

³ See <<http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1727>>.

⁴ OSCE/ODIHR, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (30 August 2017), available at <<http://www.legislationline.org/documents/id/21259>> (English version) and <<http://www.legislationline.org/documents/id/21260>> (Polish version).

- of the Constitution of the Republic of Poland⁵ (hereinafter “the Constitution”). Thus limited, the Opinion does not constitute a full and comprehensive review of the Draft Act or of the entire legal and institutional framework regulating the judiciary in Poland.
8. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as the relevant country context and political culture.
 9. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women⁶ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality⁷ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion’s analysis seeks to take into account the different impact that the Draft Act may have on women and men, as judges or as lay persons.
 10. This Opinion is based on an unofficial English translation of certain provisions of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as Annex 2. Errors from translation may result. The Opinion is also available in Polish. However, the English version remains the only official version of the document.
 11. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary in Poland in the future.

III. EXECUTIVE SUMMARY

12. The Draft Act under review makes some changes to the jurisdiction and structure of the Supreme Court of Poland and introduces new provisions regarding the eligibility criteria, status, retirement and discipline of Supreme Court judges, among others. The executive branch will also have enhanced prerogatives, in particular the power to determine the Rules of Procedure of the Supreme Court, as well as great influence with respect to the discipline and career of judges.
13. As already stated in the OSCE/ODIHR’s August 2017 Opinion, every State is entitled to reform its judicial system and the legal framework in which its courts and judges operate. Nevertheless, reforms of the judiciary must respect longstanding international

⁵ *Constitution of the Republic of Poland of 2 April 1997, as last amended in 2009*, <<http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>> (in Polish) and <<http://legislationline.org/documents/action/popup/id/16683/preview>> (in English).

⁶ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Poland ratified this Convention on 30 July 1980.

⁷ See par 32 of the *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

standards on the independence of the judiciary, the separation of powers and the rule of law. These aspects are crucial, especially when considered in the context of the most recent findings and recommendations made by various human rights monitoring bodies concerning the reform of the judiciary in Poland.⁸

14. In that respect, the OSCE/ODIHR concludes that some of the provisions reviewed are inherently incompatible with international standards and OSCE commitments on the independence of the judiciary and should therefore be set aside completely, as they would undermine the separation of powers and the rule of law in Poland.
15. The wide scope of the Supreme Court's "extraordinary appeals" jurisdiction and the mechanism by which it is to be exercised raise serious concerns as to their compatibility with key rule of law principles, in particular the principles of legal certainty and access to justice. Moreover, having a new body of Supreme Court lay judges elected by the Senate would risk politicizing such appointments, and would call into question these judges' independence. Additionally, the powers given to the President of the Republic of Poland concerning certain key aspects of the administration of justice, such as disciplining Supreme Court judges or determining the Supreme Court's Rules of Procedure are not in line with the principles of judicial independence and of the separation of powers. Any changes to the retirement age of Supreme Court judges should only apply to judges appointed after the entry into force of the Act and not to those already sitting on the Supreme Court, who should be able to remain in office until 70 years old (pursuant to the law currently in place). Finally, the automatic retirement of all judges of the Military Chamber should also be reconsidered as it is inherently incompatible with the principles of security of judicial tenure.
16. The OSCE/ODIHR would also like to reiterate that when initiating fundamental reforms of the judicial system, the judiciary and civil society should be consulted and should play an active part in the process, as specified in key OSCE commitments (1990 Copenhagen Document, par 5.8 and 1991 Moscow Document, par 18.1). Any legislative proposals on judicial reform should be subject to inclusive, extensive and effective consultations at all stages of the law-making process, from the early stages through the parliamentary discussions, up until the law is adopted. The OSCE/ODIHR stands ready to further assist and make available its expertise, if requested, in any comprehensive and participatory reform process of the judiciary in Poland.
17. In light of international human rights and rule of law standards, the Draft Act should not be adopted as it is, as this would seriously undermine the separation of powers and the rule of law in Poland, particularly in light of the following key recommendations:
 - A. to remove all provisions concerning extraordinary appeals, as they are inherently incompatible with key rule of law principles; [pars 22-57, particularly par 57]
 - B. to delete the provisions introducing lay judges at the Supreme Court level; [par 79]

⁸ See, particularly, UN Special Rapporteur on the Independence of Judges and Lawyers, *Preliminary Observations on the Official Visit to Poland (23-27 October 2017)*, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E>>; Recommendations 120.84 to 120.101 of the *Third Cycle Report of the Working Group on the Universal Periodic Review (UPR) for Poland*, A/HRC/36/14, 18 July 2017, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/14>; and UN Human Rights Committee, *Concluding Observations on the 7th Periodic Report of Poland*, 23 November 2016, pars 33-34, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en>.

- C. to reconsider granting the President of the Republic extensive powers to determine the Rules of Procedure of the Supreme Court (Articles 4 and 110), and instead retain the current system; [par 89]
 - D. to remove sole Polish citizenship as a new eligibility requirement for all judicial positions; [par 96]
 - E. to ensure that any change to the retirement age of judges shall only apply to judges appointed after the entry into force of the Act and not to those already sitting on the Supreme Court bench and hence delete Article 108, while also removing provisions concerning possible extensions of service and the earlier optional retirement age for women Supreme Court judges, as the latter risks perpetuating and entrenching inequality; [pars 112 and 115]
 - F. to delete all provisions pertaining to the roles of Disciplinary Proceedings Representatives of the President of the Republic of Poland and of the Minister of Justice in disciplinary proceedings against judges, while also removing the President of the Disciplinary Chamber from the list of persons who may initiate disciplinary proceedings against Supreme Court judges in Article 75 par 1; [pars 120-124]
 - G. to reconsider the provisions conferring oversight of the Minister of Justice over disciplinary courts for cases against prosecutors and military judges; [pars 127-128] and
 - H. to remove the provision concerning the *ex lege* retirement of all judges currently sitting on the Military Chamber (Article 108 par 3). [par 131]
18. Regarding the Draft Amendments to the 2011 Act on the National Council of the Judiciary,⁹ given their potential effect on the operation on the Draft Act under review, the OSCE/ODIHR also reiterates its recommendation to reconsider the principle of election of judge members to the National Council of the Judiciary by the *Sejm*, and instead ensure that they continue to be chosen by the judiciary, as stated in the 2017 *OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland* (5 May 2017).¹⁰

Additional Recommendations, highlighted in bold, are included in the text of the Opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards and OSCE Commitments on the Independence of the Judiciary

19. For a detailed and concise overview of international standards and OSCE commitments on the independence of the judiciary, the OSCE/ODIHR hereby refers to the Section on the International Standards and OSCE commitments on the independence of the judiciary of its August 2017 Opinion, attached to this Opinion as Annex 1 (pars 25-34).

⁹ See <<http://www.prezydent.pl/prawo/ustawy/zgloszone/art.18.projekt-nowelizacji-ustawy-o-krajowej-radzie-sadownictwa.html>>.

¹⁰ OSCE/ODIHR, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, <<http://www.legislationline.org/search/runSearch/1/type/2/country/10/topic/9>>.

2. Changes to the Supreme Court’s Jurisdiction and Reorganization of its Chambers

20. The current role and status of the Supreme Court were already outlined in the August 2017 Opinion (pars 18-19 of Annex 1). The main changes introduced by the Draft Act in comparison to the 2002 Supreme Court Act relate primarily to the re-organization of the four existing Chambers of the Supreme Court¹¹ into five Chambers.¹² This will notably include the establishment of two new chambers i.e., the Extraordinary Control and Public Affairs Chamber, which would also take over the “public affairs” jurisdiction of the former Labour Law, Social Security and Public Affairs Chamber and a new special Disciplinary Chamber (Article 3 of the Draft Act). Additionally, the two new chambers, and particularly the Disciplinary Chamber, possess several features which distinguish them from other Supreme Court chambers (see Sub-Sections 2.1, 2.3 and 2.4 *infra*). While the Civil and Criminal Chambers are retained, the Military Chamber will be abolished, with its jurisdiction now falling under the Criminal Chamber (Articles 23 and 112 par 3). The new Disciplinary Chamber within the Supreme Court will deal with disciplinary cases against Supreme Court judges and other legal professionals where this is provided by separate legislation (Article 26), a responsibility already falling within the competence of the Supreme Court under the current system (see par 74 of Annex 1).
21. Overall, the jurisdiction of the Supreme Court provided in Article 1 of the Draft Act remains largely the same as the existing jurisdiction prescribed in the 2002 Supreme Court Act currently in force, with two notable differences, i.e., the introduction of so-called “extraordinary appeals” (see Sub-Section 2.1 *infra*) and the narrowing down of the Supreme Court’s power to review draft legislation and provide opinions.¹³

2.1. The New Extraordinary Control and Public Affairs Chamber and Extraordinary Appeals

22. Article 1 par 1 (b) of the Draft Act introduces a completely new jurisdiction for the Supreme Court, by which it will “exercise extraordinary control over final judicial decisions to ensure the rule of law and social justice by hearing extraordinary complaints”. This so-called “extraordinary appeal” (in Polish “*skarga nadzwyczajna*”), will fall within the jurisdiction of the newly established Extraordinary Control and Public Affairs Chamber. The rules concerning “extraordinary appeals” and the procedures by which they may be brought before the Supreme Court are further detailed in Articles 86-92 of the Draft Act.
23. Pursuant to Article 25 of the Draft Act, the new Extraordinary Control and Public Affairs Chamber will have jurisdiction to hear “extraordinary complaints”, but also electoral disputes and disputes against the validity of elections and referendums. Its jurisdiction will also cover other matters of public law (including competition protection, energy, telecommunications and rail transport regulation cases) and appeals against decisions by the President of the National Broadcasting Council and against

¹¹ i.e., the Civil Chamber, Criminal Chamber, Labour Law, Social Security and Public Affairs Chamber and Military Chamber (see Article 3 par 1 of the 2002 Supreme Court Act).

¹² i.e., the Civil Chamber, the Criminal Chamber (which will take over matters previously falling within the jurisdiction of the Military Chamber), the Labour Law and Social Security Chamber, the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber (see Article 3 par 1 of the Draft Act).

¹³ See Article 1 of the Draft Act and Article 1 of the 2002 Supreme Court Act.

resolutions of the National Council of the Judiciary, as well as complaints concerning overly lengthy proceedings before common and military courts. This means that the newly established Chamber would take over part of the jurisdiction of the Supreme Court currently falling within the ambit of the work of the Labour Law, Social Security and Public Affairs Chamber, i.e. “public affairs” matters, including adjudication upon the validity of presidential and parliamentary elections, elections to the European Parliament, and national referenda and referenda concerning constitutional amendments (Article 1 par 3).

24. Pursuant to Article 1 par 1 (b) and Article 91 pars 2-3 of the Draft Act, the Extraordinary Control and Public Affairs Chamber will have appellate jurisdiction over final decisions of the other Supreme Court chambers, as a result of the wide scope of “extraordinary appeals” (see Sub-Section 2.1.2 *infra*). This *de facto* confers a higher or special status to this chamber compared to the others.

2.1.1. General Considerations on Extraordinary Appeals

25. The scope of the extraordinary complaints jurisdiction and the mechanism by which it would be exercised raise a number of interrelated questions about the compatibility of the Draft Act with international human rights norms and the requirements of the rule of law, in particular as concerns legal certainty and access to justice,¹⁴ as well as the efficiency of the justice system in general.
26. The new procedure introduces an additional form of appeal against final court decisions, including the Supreme Court’s own decisions (see Article 91 pars 2-3 of the Draft Act), “where this is necessary to ensure the rule of law and social justice” (Article 86 par 1). According to the Explanatory Statement to the Draft Act, this responds to emerging demands to restore a form of extraordinary revision that used to be in place,¹⁵ adapted to today’s context, and also to fill a perceived gap in the current extraordinary appeals mechanism. However, the Explanatory Statement does not specify further why this new procedure would be needed in addition to the usual appeal and cassation process by which lower court decisions may be challenged (see par 38 *infra*).
27. The reopening of final court judgments *prima facie* runs counter to the principle of legal certainty, which requires respect for *res judicata* i.e., the principle of the finality of judgments.¹⁶ Extraordinary complaints mechanisms also compromise “the effective enforcement of a binding judicial decision, [which] is a fundamental element of the rule of law [and] is essential to ensure the trust of the public in the authority of the judiciary”.¹⁷ As expressly stated by the European Court of Human Rights (hereinafter “the ECtHR”) in its case law, “[o]ne of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts

¹⁴ See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, Part II, Sections B, D and E, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)>, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see PACE Resolution 2187(2017) available at <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24213&lang=en>>).

¹⁵ The system of extraordinary revision (*rewizja nadzwyczajna*) was abolished in 1995 and replaced by cassation proceedings. A motion for extraordinary revision could be brought by the Minister of Justice, the Attorney General, the First President of the Supreme Court, the Minister of Social Affairs for social security-related matters (but also by the Commissioner for Human Rights of Poland since 1 January 1988) against any final judgment, including judgments by the Supreme Court.

¹⁶ See *op. cit.* footnote 14, Part II, Section B (8) (2016 Venice Commission’s Rule of Law Checklist). See also Council of Europe, “*The Council of Europe and the Rule of Law - An Overview*”, CM(2008)170, 21 November 2008, par 48, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d22bd>.

¹⁷ CCJE, *Opinion No. 13 (2010) on the Role of Judges in the Enforcement of Judicial Decisions*, 19 November 2010, Conclusion A, <https://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>.

have finally determined an issue, their ruling should not be called into question”.¹⁸ The Court has also held that “[t]he reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law”.¹⁹ This means that final judgments must be respected, unless there are cogent reasons for revising them (see pars 30 and 32 *infra*).²⁰

28. In principle, in an efficient judicial system, errors and shortcomings in court decisions, including those allegedly affecting the rule of law and ‘social justice’, should be addressed through ordinary appeal and/or cassation proceedings before the judgment becomes final, thus avoiding the subsequent risk of frustrating the parties’ right to rely on binding judicial decisions.²¹ As specifically noted in the case law of the ECtHR, “supervisory reviews” (or equivalent procedures) should in principle not be possible if a defect could have been rectified in appeals proceedings²² (see also par 38 and footnote 40 *infra* regarding appeals and cassation in Poland).
29. In principle, the general power of review is exercised by higher courts, following an appeal by one of the parties to the proceedings, based on specific grounds, which needs to be submitted before the judgment becomes final. Otherwise, extraordinary appeals, where they exist, should only be lodged to correct judicial errors and miscarriages of justice, in other words, when made necessary by circumstances of a substantial and compelling character, but not to carry out a fresh examination of a case, or some form of “disguised” appeal.²³ In any case, such reviews must not be achieved at any cost and notably with disregard for the respondents’/defendants’ legitimate reliance on *res judicata*. Rather, the public authorities “must strike a fair balance between the interests of the applicants and the need to ensure the proper administration of justice”.²⁴ A judgment should only be quashed in exceptional circumstances, rather than for the sole purpose of obtaining a different decision in the case (see also par 32 *infra*).²⁵
30. In the context of criminal proceedings, Article 4 par 2 of Protocol No. 7 to the ECHR²⁶ expressly permits a State to reopen a case if there is evidence of new or newly discovered facts, or where a fundamental defect is detected in the previous proceedings, which could affect the outcome of the case. The ECtHR has found that “the mere possibility of reopening a criminal case is *prima facie* compatible with the Convention, including the guarantees of Article 6 [of the ECHR]”.²⁷ However, the Court has also noted that “the power to reopen criminal proceedings must be exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of

¹⁸ European Court of Human Rights (ECtHR), *Brumărescu v. Romania* (Application no. no. 28342/95, judgment of 28 October 1999), par 61, <<http://hudoc.echr.coe.int/fre?i=001-58337>>; and *Ryabikh v. Russia* (Application no. 52854/99, judgment of 24 July 2003), pars 51-52, <<http://hudoc.echr.coe.int/eng?i=001-61261>>.

¹⁹ ECtHR, *Stere and Others v. Romania* (Application no. 25632/02, judgment of 23 February 2006), par 53, <<http://hudoc.echr.coe.int/eng?i=001-72556>>.

²⁰ See *op. cit.* footnote 14, par 63 (2016 Venice Commission’s Rule of Law Checklist).

²¹ See Committee of Ministers of the Council of Europe, *Resolution on the Execution of the Judgments of the European Court of Human Rights in the Ryabikh Group (113 cases) against Russian Federation*, 10 March 2017, Appendix 2, Part III (A) <<https://rm.coe.int/16806f71ef>>.

²² ECtHR, *Nelyubin v. Russia* (Application no. 14502/04, judgment of 2 November 2006), par 28, <<http://hudoc.echr.coe.int/eng?i=001-77827>>.

²³ *Op. cit.* footnote 18, par 52 (ECtHR, *Ryabikh v. Russia*, judgment of 24 July 2003).

²⁴ ECtHR, *Kulkov and others v. Russia* (Applications nos. 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, judgment of 8 January 2009), par 27, <<http://hudoc.echr.coe.int/eng?i=001-90454>>.

²⁵ *Op. cit.* footnote 22, par 28 (ECtHR, *Nelyubin v. Russia*, judgment of, 2 November 2006).

²⁶ *Protocol No. 7 to the ECHR*, ETS No.117, <http://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETS117E_ENG.pdf>, entered into force on 1 November 1988. Poland ratified this Protocol on 4 December 2002.

²⁷ ECtHR, *Nikitin v. Russia* (Application no. 50178/99, judgment of 20 July 2004), par 57, <<http://hudoc.echr.coe.int/eng?i=001-61928>>.

criminal justice”.²⁸ Therefore, the authorities shall, in principle, respect the binding nature of a final judicial decision and “allow the resumption of criminal proceedings only if serious legitimate considerations outweigh the principle of legal certainty”.²⁹

2.1.2. *Material Scope of the Extraordinary Appeals*

31. Article 86 par 1 of the Draft Act specifies that an extraordinary appeal can be brought against a final judgment “where this is necessary to ensure the rule of law and ‘social justice’” and “1) the judgment violates the principles or human and civil freedoms and rights stipulated in the Constitution; 2) the judgment is in flagrant breach of the law through its misinterpretation or misapplication; 3) the material findings of the court clearly contradict the evidence collected in the case – and the judgment cannot be set aside or amended using other extraordinary appeal measures”.
32. When assessing the institution of supervisory review, the ECtHR has considered such procedures to be particularly concerning where the final judgments remained open to review on relatively minor grounds.³⁰ Hence, the material scope of such procedure should be strictly defined and the permissible grounds for reopening cases should be limited only to the most serious violations of the law (see par 29 *supra*). Procedural codes have generally provided that such extraordinary reviews are possible if, e.g., the procedure or the decision originated in the criminal act of one of the participants (party, witness, expert, judge), or in the face of newly/freshly discovered facts or evidence,³¹ or where there were fundamental defects in the proceedings. Additionally, the possibility of reopening proceedings is generally provided in order to give full effect to judgments of the ECtHR (or other international judicial authority) and to achieve *restitutio in integrum*.³² The existing Polish legislation already provides grounds for reopening cases along these lines (see par 38 and footnote 40 *infra*).
33. In terms of material scope, the grounds for lodging the extraordinary appeals stated in Article 86 par 1 are broad and vaguely framed. While the term “rule of law” can be defined both at the national and international levels³³ for the purposes, for example, of assessing the degree of respect for the rule of law in any given country, it remains a multi-faceted and broad concept. As such, it is therefore not appropriate as a ground of appeal, which should be specific and precise. With regard to the concept of “social

²⁸ *Op. cit.* footnote 22, par 26 (ECtHR, *Nelyubin v. Russia*, judgment of, 2 November 2006).

²⁹ ECtHR, *Bratyakin v. Russia* (Application no. 72776/01, judgment of 9 March 2006), <<http://hudoc.echr.coe.int/eng/?i=001-72836>>.

³⁰ *Op. cit.* footnote 28, par 55 (ECtHR, *Nikitin v. Russia*, 20 July 2004).

³¹ UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, par 56,

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en>.

³² i.e., restoring an injured party to the situation he/she would have been in if the violation had not occurred. See the Council of Europe’s Committee of Ministers, *Recommendation No. R (2000) 2 on the Re-examination or Reopening of Certain Cases at Domestic Level following Judgements of the ECtHR*, 19 January 2000, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2ff06>.

³³ See e.g., UN Secretary General, *Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, par 6, <<http://www.un.org/en/documents/view.asp?symbol=S/2004/616>>, in which the rule of law is described as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”. See also *op. cit.* footnote 14, par 18 (2016 Venice Commission’s Rule of Law Checklist), which refers to the following core elements of the rule of law i.e., “(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law”. See also the OSCE Copenhagen Document 1990, which states that “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

justice”, it is neither defined in the Draft Act, nor is it defined by international law. In itself, this term is very broad, and can apply to any variety of situations. Such a broad and vaguely worded condition does not offer clear guidance of a kind that is capable of ensuring that final decisions will only be re-examined when cogent reasons exist for doing so, and therefore does not mitigate the legal uncertainty caused by the Supreme Court’s new jurisdiction to review existing case law. In sum, every judgment carries with it a winning and losing party and coupled with the vague definition of the basis for instigating an extraordinary appeal, any person who feels wronged by a court judgment could potentially invoke some form of social injustice, which could then serve as the basis for relevant officials (see Sub-Section 2.1.4 *infra*) to lodge an extraordinary appeal.

34. Overall, each of the three grounds for bringing an extraordinary complaint mentioned under Article 86 par 1 is extremely broad: inconsistency with constitutional principles (as well as rights); misinterpretation or misapplication of the law – potentially encompassing any point of law that could be raised in an appeal; and findings of the court not being supported by the evidence – which could possibly allow all factual findings to be questioned. In principle, only weighty reasons should justify a departure from the finality of court decisions, a principle that could not be maintained given the broad range of cases covered by Article 86 par 1.
35. Moreover, the field covered by the process of extraordinary appeal is the entire jurisdiction of the Supreme Court, save for judgments concerning the non-existence of a marriage, annulling a marriage or granting a divorce if one of the parties has already entered into another marriage (Article 87 par 3) or where the subject matter of the grievance was already raised in the cassation appeal or was examined by the Court at the level of cassation (Article 87 par 2). The broad scope of application of the process compounds the legal uncertainty caused by the breadth of the grounds for review.
36. An extraordinary complaint shall be lodged within five years after the contested judgment has become final. It is not permissible, however, to lodge an extraordinary complaint more than six months after the judgment becomes final or the cassation has been adjudicated, if this is to the detriment of a defendant in a criminal case (Article 86 par 3). Only one extraordinary complaint may be lodged against a judgment on behalf of any given party (Article 87 par 1). There thus appear to be only few limitations concerning the material scope of the review mechanism and those that exist merely reiterate, to a certain extent, limitations already provided in other pieces of legislation.³⁴
37. Moreover, while Article 86 par 3 appears to protect defendants in criminal proceedings, it does not go far enough to protect individuals who have been acquitted in criminal cases. Indeed, despite the limitations set out therein, this provision would *prima facie* permit the potential reopening of an acquittal during a period of six months – which is a relatively long time. It is worth emphasizing in this context that the ECtHR has considered that, for the purposes of the *non bis in idem* principle,³⁵ supervisory review may be regarded as a special type of reopening of procedures (as opposed to a “second trial”), and thus falls within the scope of Article 4 par 2 of Protocol No. 7 to the ECHR.³⁶ At the same time, the broad material scope of the “extraordinary appeal”

³⁴ e.g., the limitation provided in Article 87 par 3 of the Draft Act is the same as the one stated in Article 400 of the Code of Civil Procedure of Poland, which provides for the restriction of re-opening divorce proceedings where one party has entered into a new marriage.

³⁵ i.e., the prohibition of double jeopardy meaning that one person cannot be subjected to legal action twice for the same act.

³⁶ *Op. cit.* footnote 28, pars 46 and 54 (ECtHR, *Nikitin v. Russia*, 20 July 2004).

provided in the Draft Act, appears to go beyond the mere reopening of cases in exceptional circumstances as contemplated by this provision of the ECHR (see par 30 *supra*). Given that due to the vague wording used in the Draft Act, extraordinary appeals may be possible in a quite wide range of cases, this new procedure may potentially be in breach of the rule against double jeopardy, whereby no one may be held liable or tried or punished again for an offence in respect of which he/she has been finally convicted or acquitted in accordance with the law and penal procedure of a country (Article 14(7) of the ICCPR and Article 4 par 1 of Protocol 7 to the ECHR). Extraordinary appeals should not permit a court to reopen final judgments in criminal cases in breach of the rule against double jeopardy,³⁷ except in the limited cases mentioned in Article 4 par 2 of Protocol No. 7 to the ECHR, which are also reflected in the Criminal Procedure Code of Poland.³⁸

38. Also, and as reiterated on several occasions by the ECtHR, such a procedure should in principle not be initiated if the alleged deficiencies could have been remedied through the ordinary avenues of appeal or cassation, if the relevant substantive law had been correctly applied.³⁹ It is noted that under Polish law, an appeal against a first instance court judgment can generally be based on any allegations, referring both to the facts and the law. Extraordinary means of appeal already exist in the form of cassation complaints, complaints for reopening proceedings and the plea of illegality of a non-appealable ruling, although there are certain limitations to the admissibility of such complaints regarding both the types of cases and the grounds of the complaint.⁴⁰ The human rights and fundamental freedoms stipulated in the Constitution could in principle also be invoked directly before the courts during proceedings, as according to Article 8 par 2 of the Constitution, the provisions of the Constitution are directly applicable. Thus, the existing grounds for appeal based on facts and law would already cover cases of flagrant breaches of the law through misinterpretation or misapplication (Article 86

³⁷ See e.g., Venice Commission, *Opinion on the Draft Law on the Courts of Bosnia and Herzegovina*, CDL-AD(2013)015, 15 June 2013, par 45, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e)>. See also Article 454 of the Code of Criminal Procedure of Poland which specifies that a court of appeal cannot convict an accused who has been acquitted at first instance and cannot exacerbate the penalty by imposing a lifelong deprivation of liberty.

³⁸ See Article 540 of the Code of Criminal Procedure of Poland regarding the reopening of a final decision where an offence has been committed during the course of the proceedings or in cases where new facts or evidence previously unknown to the court come to light (see *op. cit.* footnote 40). See also Article 542 par 5 specifying that “[i]t is not possible to reopen the proceedings ex officio to the detriment of the defendant one year after validation of the judgement”. Article 454 of the Code of Criminal Procedure of Poland also specifies that a court of appeal cannot convict an accused who has been acquitted at first instance, cannot sentence the accused to a more severe penalty of deprivation of liberty (except if the court does not change the determination of facts adopted as the grounds for the appealed judgement) and cannot exacerbate the penalty by imposing a lifelong deprivation of liberty.

³⁹ See e.g., *op. cit.* footnote 22, par 28 (ECtHR, *Nelyubin v. Russia*, 2 November 2006).

⁴⁰ See Article 190 of the Constitution, which provides that “[a] judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings”. See also Article 540 of the Code of Criminal Procedure of Poland, which reads: “Article 540. § 1. Court proceedings concluded by a valid and final decision shall be reopened if: 1) in connection with the proceedings an offence has been committed, and there is good reason to believe that this might have affected the contents of such a decision, and/or 2) after the decision has been issued, new facts or evidence previously unknown to the court come to light, which indicate that:

a) the convicted person has not committed the act, or his act has not constituted an offence or has not carried any penalty,
b) the convicted person has been sentenced for another offence, carrying a more severe penalty than that for the offence committed by him, or material circumstances obligating the extraordinary mitigation of punishment have not been duly considered or material circumstances contributing to the aggravation of the penalty have been incorrectly relied upon.
c) the court has discontinued or conditionally discontinued the proceedings, after relying on incorrect assumption about the accused having committed the alleged offence.

§ 2. The proceedings shall be re-opened for the benefit of the accused in the event that a provision of law which provided the grounds for conviction or conditional discontinuance of the proceedings has been declared no longer binding or has been amended as a result of a judgement of the Constitutional Tribunal.

§ 3. The proceedings shall be re-opened for the benefit of the accused, when such a need results from a decision of an international authority acting under the provisions of an international agreement which has been ratified by the Republic of Poland”. See also Part I, First Book, Title VI, Chapter VI on Resumption of Proceedings of the Civil Procedure Code, available at <<http://prawo.sejm.gov.pl/isap.nsf/download.xsp?id=WDU19640430296&type=U&name=D19640296Lj.pdf>> (in Polish).

par 1 (2) of the Draft Act) or the circumstances envisaged in Article 86 par 1 (3) of the Draft Act, where the court's material findings contradict the evidence collected in the case.

39. More generally, if new grounds for appeal or cassation are considered necessary by the legislator, it is unclear why the legal drafters chose to create this separate procedure (and chamber), instead of supplementing the grounds already provided in the Codes of Criminal Procedure and of Civil Procedure.
40. In light of the foregoing, the wording of Article 86 is not sufficiently clear and precise in terms of the material scope of the "extraordinary complaints" to comply with the principle of legal certainty.⁴¹ Moreover, this material scope is not strictly circumscribed and seems to duplicate the existing ordinary avenues of appeal and cassation.

2.1.3. Temporal Scope of the Extraordinary Appeals

41. In terms of its temporal scope, an extraordinary appeal can be lodged within five years of the contested judgment having become final. However, this time-limit does not apply to extraordinary appeals lodged within three years from the date of entry into force of the Draft Act, which can be brought against judgments that became final after 17 October 1997 (Article 115 par 1). The Explanatory Statement to the Draft Act stipulates that this retroactive effect of the Act is necessary in order to challenge a number of rulings which grossly violate the principles of justice.
42. While the ECtHR has considered that certain transitional provisions may be justifiable in light of a country's specific "historical background", for instance right after the fall of authoritarian regimes,⁴² it also found that deviations from general standards on this basis cannot be upheld in the long run.⁴³ It is thus questionable whether it is justifiable to challenge final court judgments dating back to more than twenty years ago.
43. In this context, it is worth noting that with respect to supervisory reviews specifically, the ECtHR considered that a one-year timeframe for lodging such complaints did not guarantee respect for the requirement of legal certainty.⁴⁴ While final decisions will not remain open to reversal indefinitely, the period of five years set out in the Draft Act, during which they will be vulnerable to extraordinary complaints, likewise seems very long. Moreover, according to Article 115 of the Draft Act, during a three-year transitional period, all final judgments issued since 17 October 1997 may be re-opened through the mechanism of extraordinary appeals. This is even more concerning when looking at the average time for completion of a Supreme Court case, which is seven months.⁴⁵
44. Moreover, as noted by the ECtHR, Article 6 of the ECHR does not exclusively concern access to court and the conduct of proceedings, but also the implementation of judicial decisions.⁴⁶ The proposed new extraordinary appeal could *de facto* lead to a situation

⁴¹ i.e., legal provisions need to be clear and precise so that individuals may ascertain unequivocally which rights and obligations apply to them and regulate their conduct accordingly. See *op. cit.* footnote 14, pages 15-17 (2016 Venice Commission's Rule of Law Checklist).

⁴² See e.g., ECtHR, *Rekvényi v. Hungary* (Application no. 25390/94, judgment of 20 May 1999), par 48, <<http://hudoc.echr.coe.int/eng?i=001-58262>>.

⁴³ See e.g., ECtHR, *Vajnai v. Hungary* (Application no. 33629/06, judgment of 8 July 2008), par 49, <<http://hudoc.echr.coe.int/eng?i=001-87404>>.

⁴⁴ *Op. cit.* footnote 24, par 30 (ECtHR, *Kulkov and others v. Russia*, 8 January 2009), where the Court found that a period of more than 13 months before introducing a supervisory-review complaint was "an exceptionally long period of time".

⁴⁵ Supreme Court of Poland, *Annual Report for the Year 2016*, page 226, available in Polish here: <http://www.sn.pl/osadzienajwyzszym/Dzialalnosc_SN/Dzialalnosc_SN_2016.pdf>.

⁴⁶ *Op. cit.* footnote 18, par 55 (ECtHR, *Ryabikh v. Russia*, judgment of 24 July 2003).

where in many cases, a final, binding judicial decision would potentially remain inoperative for five years to the detriment of one of the parties, depriving them of the benefit of the judgement they have obtained, which is incompatible with Article 6 par 1 of the ECHR.⁴⁷ The destabilizing effect of such a period of uncertainty is self-evident. It not only affects parties to a case, who will then not be able to plan their lives and businesses in full reliance on the expectation that litigation is at an end, but also the wider population, in relation to cases that have laid down a legal principle. For cases concerning the protection of human rights – which could be disputed in an extraordinary complaint – the Venice Commission has specifically recognized that timely remedies are required.⁴⁸

45. Further, such a wide temporal scope means that the Supreme Court would need to deal with a potentially very high number of additional judgments, which would vastly increase its case load, and could very possibly impose a huge burden on the highest instance court in Poland (see Sub-Section 2.1.5 *infra*).
46. Finally, the lower limit of the time-frame provided in the transitional provisions i.e., 17 October 1997, which is also the date when the Constitution of the Republic of Poland entered into force, may be explained when read in conjunction with Article 86 par 1 point 1 of the Draft Act, which specifically refers to the “human and civil freedoms and rights stipulated *in the Constitution*”. At the same time, there is no clear justification as to why there should be specific concerns pertaining to the rule of law or social justice, and potential miscarriages of justice, from that date onwards. The Venice Commission, when reviewing similar provisions, considered that such time limits should be either justified, in order not to appear arbitrary, or reviewed.⁴⁹

2.1.4. Personal Scope of the Extraordinary Appeals

47. The power to submit extraordinary complaints is given to a range of specified public office-holders. The General Public Prosecutor, who is also the Minister of Justice,⁵⁰ a group of 30 deputies or 20 Senators and the Commissioner for Human Rights will be entitled to bring an extraordinary complaint, as will, for cases falling within their jurisdictions, and certain other public-office holders⁵¹ (Article 86 par 2 of the Draft Act). The Explanatory Statement to the Draft Act specifies that the new procedure aims to protect the constitutional rights and freedoms of citizens against possible infringements by court judgments. At the same time, there is no provision that would allow individuals, who would be the ones potentially affected by such judgments, to

⁴⁷ *ibid.* par 55 (ECtHR, *Ryabykh v. Russia*, judgment of 24 July 2003).

⁴⁸ Venice Commission, *Study on Individual Access to Constitutional Justice*, CDL-AD(2010)039rev, pars 109 and 149, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)039rev-e)>, which states that “[t]he introduction of the possibility for lodging individual complaints before a constitutional court and effective constitutional remedies should exist. Moreover, the constitutional or equivalent court should be able to provide a quick remedy and to speed up lengthy procedures, as well as provide compensation in cases where proceedings are of an excessive length” and that “[t]ime limits for the adoption of decisions, if they are established, should not be too short to provide the constitutional court with the opportunity to examine the case fully and should not be so long to prevent the effectiveness of the protection of human rights *via* constitutional justice”.

⁴⁹ Venice Commission and the CoE Directorate for Justice and Human Dignity, *Joint Opinion on the Draft Law on the Temporary State Commission on Miscarriages of Justice of Georgia*, CDL-AD(2013)013, 17 June 2013, par 63, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)013-e)>.

⁵⁰ Since the entry into force of the new Law on the Prosecution Service on 4 March 2016, the functions of the General Public Prosecutor are exercised by the Minister of Justice (see Article 1 par 2 sentence 2 of the new Law available at <<http://www.legislationline.org/topics/country/10/topic/9>>).

⁵¹ i.e., the Ombudsperson for Children, the Patient’s Ombudsperson, the Chair of the Polish Financial Supervision Authority, the Financial Ombudsperson and the President of the Office of the General Counsel to the Republic of Poland. For the purposes of this Opinion, and while acknowledging that the Scandinavian term “Ombudsman” is considered to be gender-neutral in origin, the term “ombudsperson” is generally preferred, in line with increasing international practice, to ensure the use of gender-sensitive language (see e.g., <https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/1400199_0.pdf>).

- lodge extraordinary complaints; this calls into question the justification and very purpose of the new provision.
48. Moreover, it is noted that the ECtHR has expressly recognized that “the right of a litigant to a court would be [...] illusory if a Contracting State’s legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a *State official*” [emphasis added].⁵² This is particularly the case if such an application can be made by a general prosecutor who is not a party to the proceedings.⁵³ Hence, the proposed provision introduces such a possibility of interference by state officials, thus undermining the right of a litigant to a court.
49. Furthermore, the fact that the General Public Prosecutor/Minister of Justice, and also 30 deputies of the Sejm or 20 senators can initiate such proceedings, would allow these public and political figures to have a potential influence on the judiciary – at least from the public viewpoint, even though the final decision will ultimately be taken by judges. Such a scheme may infringe upon judicial independence, as well as the principle of division and balance of powers.
50. The Draft Act would thus create a situation where different branches of government are able to interfere with the decision-making powers of the judges,⁵⁴ particularly the finality of their decisions. The *UN Basic Principles on the Independence of the Judiciary* (1985)⁵⁵ provide that the judiciary shall decide matters before them impartially, and without any inappropriate or unwarranted interference with the judicial process. The Principles likewise state that judicial decisions shall not be subject to revision “without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law”.⁵⁶ Generally, with the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.⁵⁷
51. Moreover, and as also noted by the Consultative Council of European Judges (hereinafter “the CCJE”), “[t]he enforcement of a decision must not be undermined by extraneous intervention whether from the executive or the legislator by imposing retroactive legislation”.⁵⁸ Indeed, “[t]he very notion of an “independent” tribunal set out in Article 6 of the ECHR implies that its power to give a binding decision may not be subject to approval or ratification, or that the decision may not be altered in its content, by a non-judicial authority, including the Head of State”.⁵⁹
52. The Draft Act enables only politicians and institutional actors to submit extraordinary complaints. This means that the judicial determination of the rights and liabilities of individuals or legal entities in concrete cases that have already been litigated can be called into question by the actions of third parties, and not by the parties themselves. It

⁵² *Op. cit.* footnote 18, par 56 (ECtHR, *Ryabykh v. Russia*, judgment of 24 July 2003).

⁵³ *Op. cit.* footnote 18, pars 62-65 (ECtHR, *Brumărescu v. Romania*, 28 October 1999).

⁵⁴ *Op. cit.* footnote 31, par 19 (UN Human Rights Committee’s General Comment No. 32).

⁵⁵ *UN Basic Principles on the Independence of the Judiciary*, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 2, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>.

⁵⁶ *ibid.* Principle 4.

⁵⁷ Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies, par 17, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)>.

⁵⁸ *Op. cit.* footnote 17, pars 11-12 (2010 CCJE Opinion No. 13).

⁵⁹ *ibid.* par 12 (2010 CCJE Opinion No. 13).

is not clear what justification could be offered for such a serious curtailment of the right of access to court, as protected by Article 6 of the ECHR, which also includes the right to the implementation of judicial decisions.⁶⁰ The ability for the the First President of the Supreme Court or a chamber President to appoint a “public interest advocate” to participate in proceedings (Article 90) does not compensate adequately for this restriction of people’s rights.

53. In practice, leaving the lodging of appeals to politicians and institutional actors may lead to a situation where some persons and individuals will have better prospects than others of persuading a sufficient number of politicians to take up their cause. Additionally, powerful lobby and interests groups could use this new procedure to indirectly influence the work of courts.

2.1.5. *Other Concerns*

54. The additional level of appeal introduced by the Draft Act would make the court system more complex, and could thus well lead to the prolongation of proceedings.⁶¹ From a practical point of view, this provision alone could potentially paralyze the work of the Court indefinitely, which would in turn undermine legal certainty. In order to illustrate the magnitude of the task for the Supreme Court proposed by the Draft Act, the number of cases that the Supreme Court dealt with in the year 2016 alone (i.e., 11,275)⁶² serve as ample evidence. While this is not tantamount to the number of final judgments handed down, it suffices to illustrate the annual workload of the Court.
55. Moreover, the introduction of this new appeals procedure, combined with the possibility to reopen numerous final judgments, also has to be considered in the broader context of an already overloaded judicial system, as demonstrated by the abundant recent case-law of the ECtHR concerning Poland on the excessive length of judicial proceedings.⁶³
56. The ECtHR regularly emphasizes, when faced with allegations of proceedings not conducted within a reasonable time, that the Convention obliges the State parties to “organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time”.⁶⁴ In that respect, structural features in a legal system that cause delays in judicial proceedings are not an excuse under Article 6 of the ECHR or Article 14 of the ICCPR.⁶⁵ With the Polish judicial system already overloaded today, the long-term solution to improve this situation can hardly lie in the establishment of an additional appeals level, but rather in streamlining the proceedings and making them more effective.⁶⁶

⁶⁰ *Op. cit.* footnote 18, par 55 (ECtHR, *Ryabykh v. Russia*, judgment of 24 July 2003).

⁶¹ See e.g., the comments made by the Venice Commission and Council of Europe’s DGI regarding the four levels of jurisdiction in the judicial system in Ukraine, in their *Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine*, CDL-AD(2010)003, 16 March 2010, pars 20-23, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)003-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)003-e)>.

⁶² In 2016, the Civil Chamber concluded 5,498 cases, the Social Security and Public Affairs Chamber – 3,225 cases, the Criminal Chamber – 2,489 cases and the Military – 63; see Supreme Court of Poland, *Annual Report for the Year 2016*, available in Polish here: <http://www.sn.pl/osadzienajwyzszym/Dzialalnosc_SN/Dzialalnosc_SN_2016.pdf>.

⁶³ See, in particular, the pilot-judgment, ECtHR, *Rutkowski and Others v. Poland* (Applications nos. 72287/10, 13927/11 and 46187/11 - and 591 other applications, judgment of 7 July 2015), <<http://hudoc.echr.coe.int/eng?i=001-155815>>, which notes in particular “the scale and complexity of the problem of excessive length of proceedings”.

⁶⁴ ECtHR, *Süßmann v. Germany* (Application no. 20024/92, judgment of 16 September 1996), par 55, <<http://hudoc.echr.coe.int/eng?i=001-57999>>.

⁶⁵ *Op. cit.* footnote 61, par 22 (2010 Venice Commission-CoE-DGI Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine).

⁶⁶ *ibid.* par 22.

2.1.6. *Conclusion*

57. In light of the foregoing, the introduction of this extraordinary review of final court decisions raises serious prospects of incompatibility with key rule of law principles, including the principle of *res judicata* and the right to access justice. It also runs the risk of potentially overburdening the Supreme Court, while conferring upon the other branches of government an influence over the judiciary that runs counter to the principles of judicial independence and separation of powers. **It is thus recommended to remove the provision for extraordinary complaints from the Draft Act as being inherently incompatible with international rule of law and human rights standards.** As mentioned above, the same goals of protecting the rule of law and social justice could be achieved through the proper use of already available general or cassation appeals to ensure the rectification of judicial errors or other deficiencies before judgments become final and enforceable.

2.2. *The Adjudication of Election-related Matters by the New Extraordinary Control and Public Affairs Chamber*

58. The jurisdiction of the Supreme Court to review electoral complaints and pass judgment on the validity of elections and referenda remains in place. Given the role of the Supreme Court in such matters, it is worth emphasizing that the administration of democratic elections requires that acts and decisions of independent and impartial election-administration bodies be subject to appeal to an independent and impartial judicial authority.⁶⁷ For all types of election disputes, the decisions of the higher electoral body should be reviewable by the highest body of the judiciary, whose ruling should then be final.⁶⁸ Hence, the comments made in this Opinion concerning aspects pertaining to the independence of the Supreme Court of Poland are of particular relevance given this Court's adjudication of the validity of elections and referenda. Only complete transparency, impartiality and independence from any politically motivated influence will ensure proper review of state actions taken during the entire electoral process.⁶⁹
59. Regarding the Supreme Court's role in election dispute resolutions, it is also worth reiterating the findings and recommendations made in the *2015 OSCE/ODIHR Parliamentary Election Assessment Mission Final Report on Poland*.⁷⁰

⁶⁷ See e.g., UN Human Rights Committee, *General Comment No. 25 on Article 25 of the ICCPR*, 27 August 1996, par 20, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en>, which provides that: "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant". See also OSCE/ODIHR, *Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System* (2000), par A.5, <<http://www.osce.org/odihr/elections/17567>>.

⁶⁸ *ibid.* par B.10 (2000 ODIHR publication on Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System).

⁶⁹ See *OSCE Existing Commitments for Democratic Elections in OSCE participating States* (2003), Section 4, <<http://www.osce.org/odihr/elections/13957>>. See also Venice Commission, *Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report*, 18-19 October 2002, par 68, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)>.

⁷⁰ OSCE/ODIHR, *Poland - Parliamentary Election Assessment Mission Report*, 25 October 2015, pages 3 and 18, <<http://www.osce.org/odihr/elections/poland/217961?download=true>>. The OSCE/ODIHR found that the decisions of the National Election Commission (NEC) could only be appealed to the Supreme Court in very limited cases, and particularly that there was a lack of judicial review of candidate registration refusals, and recommended that the Election Code be amended to provide for judicial review of NEC decisions, in particular in cases related to candidate or candidate list registration. The Election Code envisages that only two categories of NEC decisions can be appealed to the Supreme Court. These are the decisions on the refusal to accept the financial report of an electoral committee (Article 145 of the Election Code) and on the refusal to accept the notice of establishment of an electoral committee (Article 205 of the Election Code).

60. Articles 1 par 3 and Article 25 of the Draft Act on the jurisdiction of the Supreme Court states that Extraordinary Appeals and Public Affairs Chamber will hear disputes concerning parliamentary and presidential elections, as well as elections to the European Parliament, national referenda and referenda concerning constitutional amendments. This part of the jurisdiction of the Supreme Court, currently within the ambit of the Labour Law, Social Security and Public Affairs Chamber, will now be transferred to the new Extraordinary Appeals and Public Affairs Chamber. Provisions further detailing the rules and procedures concerning election dispute resolution are contained in the Election Code, the Civil Procedure Code and the Criminal Code.
61. According to Article 113 of the transitional provisions of the Draft Act, upon the entry into force of the Act, “Supreme Court judges sitting in the Labour Law, Social Security and Public Affairs Chamber shall become judges sitting in the Labour Law and Social Security Chamber”, unless they are terminated as a result of their age (see Sub-Section 4.3 *infra*). This means that the newly established Extraordinary Appeals and Public Affairs Chamber would be composed entirely of judges appointed all at the same time, and following the new procedure set out in Article 30 of the Draft Act. Pursuant to this provision, all applications for such judicial positions need to be submitted to the National Council of the Judiciary (Article 30 par 2), which is the body competent to review and assess candidates for the posts of judges of the Supreme Court (Article 3 par 1 (1) of the 2011 Act on the National Council of the Judiciary).⁷¹
62. In this respect, it must be emphasized that, as also noted in the August 2017 Opinion (see Sub-Section 7 *infra*), the new modalities of having the *Sejm* select the judge members to the National Council of the Judiciary would call into question the Council’s independence, should the reform be pursued (see Sub-Section 7 *infra*). Further, the President of said chamber, which deals with sensitive public issues, will be appointed by the President of the Republic following a process that also raises some concerns (see Sub-Section 4.2 *infra*). Generally, the proposed draft legislation could risk politicizing the appointment of members and President of the Chamber, and of judges in general.
63. Moreover, all public affairs matters will need to be put on hold until the vacant judicial positions in the new Extraordinary Appeals and Public Affairs Chamber are filled, which may take some time. This runs the risk of creating a backlog of public affairs cases that have yet to be heard, while the transfer of cases to the new chamber may also trigger unnecessary delays contrary to the right to a fair and public hearing within a reasonable time protected under Article 14 of the ICCPR and Article 6 of the ECHR.⁷² Further, the transfer of all such cases to a completely new chamber with a special status (see par 24 *supra*) as a result of the adoption of a new legislation could also run contrary to the principle of the “natural judge” whereby one should only be tried by an ordinary, pre-established, competent tribunal or judge “foreseen by the law”, and that also forbids the setting up of *ad hoc*, special or *ex post facto* jurisdiction.⁷³
64. In light of the above, **it is thus recommended to provide for transitional provisions that will ensure that judges already seized of public affairs cases may still render their judgments, while ensuring that other such cases also continue to be heard**

⁷¹ See the English version of the Act on the National Council of the Judiciary (2011, amended 2016), available at http://www.legislationline.org/download/action/download/id/6755/file/Poland_Act_on_National_Council_Judiciary_2016_en.pdf.

⁷² See e.g., ECtHR, *Fisanotti v. Italy* (Application no. 32305/96, judgment of 23 April 1998), par 22, <<http://hudoc.echr.coe.int/eng/?i=001-58159>>, where the Court considered that the introduction of a reform cannot justify delays since States are under a duty to organise the entry into force and implementation of new legislative measures in a way that avoids prolonging the examination of pending cases.

⁷³ See also Venice Commission, *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, 16 March 2010, par 78, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e)>.

pending the re-structuring of the Supreme Court, in order to avoid a backlog. In any case, for the reasons set out above, extraordinary appeals should be removed from the Draft Act and hence from the jurisdiction of the Supreme Court.

2.3. The New Disciplinary Chamber

65. The New Disciplinary Chamber will be in charge of hearing disciplinary cases against Supreme Court judges and other legal professionals where this is provided by separate legislation, as well as complaints concerning overly lengthy proceedings before the Supreme Court (Article 26 of the Draft Act).
66. This new chamber stands out insofar as it is somewhat removed from the authority of the First President of the Supreme Court compared to the other chambers. In a departure from the procedure by which Presidents of other chambers are chosen, the President of the Republic of Poland does not have to consult the First President of the Supreme Court when choosing the President of the Disciplinary Chamber (Article 14 par 3). Moreover, the President of the Disciplinary Chamber has an array of special powers that are not granted to other chamber Presidents. These include budgetary powers of the kind which the First President exercises for the rest of the Supreme Court (Article 7 pars 2-3 and 4), the right to appoint and dismiss chairs of departments within the Disciplinary Chamber, to be consulted when the President of the Republic of Poland determines the number of vacancies in the Chamber and to authorise the additional employment by members of the Chamber (Article 19 par 1), the institution of disciplinary inquiries against Supreme Court judges (Article 75 par 1), and the determination of the Chamber's internal organisation and internal rules of conduct (Article 95).
67. The First President of the Supreme Court is furthermore constrained to act "in consultation with" the President of the Disciplinary Chamber when exercising certain functions, including the appointment and dismissals of chairs of departments in other chambers and the selection of lay justices, as well as when ordering the release of a judge detained *in flagrante delicto* or on the authority of a disciplinary court (Article 19 par 2). Pursuant to Article 97 of the Draft Act, the Disciplinary Chamber will furthermore be supported by its own secretariat following special rules, making it largely autonomous within the Supreme Court, and *de facto*, creating a separate chamber with a special status within the Supreme Court.
68. It is unclear from the Explanatory Statement to the Draft Act why such a special autonomous status for this chamber is needed. While the independence of a body adjudicating on disciplinary cases against judges need to be ensured, the modalities of appointment of the President of the Disciplinary Chamber confer on the President of the Republic a decisive influence, which is even more exacerbated by the fact that the First President of the Supreme Court is not consulted. While Article 144 par 3 (23) of the Constitution of the Republic of Poland specifically provides that the President of the Republic of Poland appoints the Presidents of the Supreme Court, such a prerogative should be of a ceremonial nature (see par 105 *infra*). In any case, the conditions and procedure for appointing the Presidents of the Supreme Court should be open and transparent to ensure that objective criteria of merit and competence prevail and that the best candidate is ultimately appointed (see pars 103-104 *infra*). The fact that the President of the Republic of Poland has the final say in this process means that one cannot exclude that political or other considerations may prevail over criteria for appointment. Moreover, overall, there is a risk of having a future President of the

Disciplinary Chamber, who would be somewhat beholden towards the appointing authority in a manner that may undermine judicial independence (see also Sub-Section 4.2 *infra* regarding the appointment of presidents of the Supreme Court and related recommendation in par 105 *infra*).

69. Moreover, allowing the President of the Disciplinary Chamber a say when appointing/dismissing chairs of department in other chambers and during the selection of lay judges seems to go quite far and also does not appear to be linked in any way to disciplinary matters. In light of the above, these provisions would open the door for indirect influence of the President of the Republic, who is part of the executive branch, in these areas, which should be under the sole responsibility of the First President of the Supreme Court. **The specific status and rules applicable solely to the Disciplinary Chamber and its President, particularly with regard to the President of the Republic’s special role, should be reconsidered.**

2.4. Supreme Court Lay Judges Sitting on the Disciplinary and the Extraordinary Control and Public Affairs Chambers

70. Article 58 par 1 provides that lay members of the Supreme Court, a category introduced by the Draft Act, will participate in the hearing of extraordinary complaints, as well as disciplinary cases against Supreme Court Judges and disciplinary matters set out in Article 26 pars 1 and 2 of the Draft Act.
71. Chapter 6 of the Draft Act further details the conditions for their eligibility, process of appointment and their status. Persons are eligible to serve as Supreme Court lay judges if they meet certain conditions and do not fall under a number of excluded categories (see Articles 58 par 2 and 59). The Board of the Supreme Court⁷⁴ determines the number of Supreme Court lay judges, but the body responsible for their selection is the Senate (upper house of Parliament), which does so by means of a secret ballot (Article 60 pars 1-2). Nominations may be made to the Senate by “associations, other community and professional organisations registered pursuant to separate laws” (except political parties), or by groups of 100 or more citizens with voting rights (Article 61 par 2). The Supreme Court lay judges are appointed to hold office in cycles of four calendar years (Article 60 par 3), with no restriction on re-appointment, provided that they continue to meet the eligibility requirements, including the 60 years’ age limit at the time of selection.
72. In this context, it should be emphasized that Article 182 of the Constitution of the Republic of Poland provides that “[a] statute shall specify the scope of participation by the citizenry in the administration of justice” and that the institution of lay judges already exists in the Polish court system, in the lower courts. The principle of public participation in the administration of justice is overall welcome, as also noted in ODIHR previous opinions.⁷⁵ Specifically, the involvement of civil society representatives in disciplinary proceedings against judges is generally considered to be a positive measure, since this generally helps ensure transparency, as well as greater community involvement in disciplinary proceedings, while also averting the risk of

⁷⁴ Pursuant to Article 20 par 1 of the Draft Act, “[t]he Board of the Supreme Court shall be composed of the First President of the Supreme Court, Supreme Court presidents and judges elected by the assemblies of Supreme Court chambers for a period of three years”.

⁷⁵ See e.g., *op. cit.* footnote 10, pars 51, 55 and 79 (2017 OSCE/ODIHR’s Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland).

judicial corporatism.⁷⁶ At the same time, the participation of citizens in the administration of justice does not necessarily mean that lay judges should be involved at all stages of judicial proceedings, even before the highest jurisdiction of a country. On the contrary, having such judges sitting in the highest courts tends to be at odds with practices in European countries (see par 77 *infra*).

73. It is important to emphasize, however, that all the requirements of independence and impartiality apply to lay judges, as they do to professional judges and juries.⁷⁷ To determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the ECtHR considers various elements, *inter alia*, the manner of appointment of its members and their terms of office, the existence of guarantees against outside pressure (including against the direct or indirect interference from the executive), and whether the body presents an appearance of independence.⁷⁸
74. The introduction of lay judges to the Supreme Court is very concerning when viewed from the perspective of international standards on judicial independence. The appointment mechanism poses particular dangers for judicial independence, both in terms of its lack of objective criteria and a risk of politicization of the process. In principle, a selection mechanism via a fair, professional and transparent competition should always be favoured.⁷⁹
75. The conditions of eligibility for these positions are: Polish citizenship (only) and the enjoyment of full civil and public rights; impeccable integrity; being between 40 and 60 years of age at the time of selection; sufficiently good health to perform the functions of a Supreme Court lay judge; and at least secondary or secondary vocational education (Article 58 par 2). According to recommendations elaborated at the international level, to ensure judicial independence, the selection of judges should be based on objective, pre-established, and clearly defined criteria,⁸⁰ relating particularly to “qualifications, integrity, ability and efficiency”,⁸¹ while ensuring that the composition of the judiciary

⁷⁶ See *op. cit.* footnote 80, par 9 (2010 *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, par 9, <<http://www.osce.org/odihr/kyivrec>>. See also e.g., Venice Commission, *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges* (5 March 2015), Sub-Sections 4.2.2 and 4.2.4, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>>.

⁷⁷ See ECtHR, *Landborger v. Sweden* (Application no. 11179/84, judgment of 22 June 1989), pars 30-36, <<http://hudoc.echr.coe.int/eng?i=001-57515>>; *Holm v. Sweden* (Application no. 14191/88, judgment of 25 November 1993), par 30, <<http://hudoc.echr.coe.int/fre?i=001-57851>>; and *Remli v. France* (Application no. 16839/90, judgment of 23 April 1996), par 46, <<http://hudoc.echr.coe.int/fre?i=001-57983>>. See also OSCE/ODIHR, *Legal Digest of International Fair Trial Rights* (2014), Sub-Section 3.3.3 on pages 66-67, <<http://www.osce.org/odihr/94214>>.

⁷⁸ In the case of lay assessors specifically, see *ibid.* par 32 (ECtHR, *Landborger v. Sweden*, judgment of 22 June 1989). See also ECtHR, *Campbell and Fell v. the United Kingdom* (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78, <<http://hudoc.echr.coe.int/eng?i=001-57456>>. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38, <<http://hudoc.echr.coe.int/eng?i=001-91144>>; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), par 103, <<http://hudoc.echr.coe.int/eng?i=001-115871>>; as well as *op. cit.* footnote 14, pars 74-76 (2016 Venice Commission’s Rule of Law Checklist).

⁷⁹ See OSCE/ODIHR-DHR-Venice Commission, *Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova*, CDL-AD(2014)006, 24 March 2014, pars 48-49, <http://www.legislationline.org/download/action/download/id/5196/file/Joint_VC_Opinion_JUD_MLD_24March2014_en.pdf>.

⁸⁰ See e.g., *op. cit.* footnote 31, par 19 (UN HRC General Comment No. 32 (2007)); and *op. cit.* footnote 57, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities). See also CCJE, *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*, 23 November 2007, pars 5-51, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>; *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23], pars 2.1 and 2.2, <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>>; and *op. cit.* footnote 80, par 21 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

⁸¹ UN Special Rapporteur on the Independence of Judges and Lawyers, *Leandro Despouy, 2009 Report*, UN Doc A/HRC/11/41, 24 March 2009, pars 30 and 72, <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/11/41&Lang=E>>.

reflects the composition of the population as a whole⁸² and is balanced in terms of gender.⁸³ While the conditions of eligibility provided in the Draft Act are fairly numerous, they are quite general, and it is not clear how these criteria would allow a comparative evaluation of candidates. The Draft Act also does not include any instructions on how to undertake comparative evaluations based on these criteria that may be capable of helping the Senate select the best possible candidates. Instead, the mechanism for deciding on lay judges is simply a secret ballot held by the Senate.

76. The fact that Supreme Court lay judges are chosen by the Senate – by simple majority – also suggests that their selection may easily become politicised. Moreover, the contemplated selection process could potentially endanger the impartiality of lay judges, who might later feel obliged to be ‘grateful’ to the political party, which supported their election by the Senate, and act accordingly when adjudicating cases.⁸⁴ To compound this, it is noted that Supreme Court lay judges are renewed every four years, which would enable the government of the day, if it held a Senate majority, to influence Supreme Court decisions via this type of ‘lay cohort’. The *UN Basic Principles on the Independence of the Judiciary* declare that judicial appointments should be protected from improper influence.⁸⁵ Moreover, the UN Special Rapporteur on the Independence of Judges and Lawyers in his 2009 report expressed “general concern that the involvement of the legislature in judicial appointments risks their politicization”.⁸⁶
77. In addition, the Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ) in a survey on European judicial systems suggests that the use of lay judges in the highest court of a country is unprecedented in a Council of Europe member state: ‘[S]ome systems rely completely on professional judges⁸⁷ [...], whereas other systems⁸⁸ [...] give a significant and even pre-eminent role to lay judges/magistrates [...] The role of lay judges could be limited to the first instance (Estonia, Luxembourg, Slovakia), or be extended to the second instance (Austria, Norway, Sweden, Switzerland), *but never to the level of the Supreme Courts*’⁸⁹ [emphasis added]. While the presence of lay judges in lower courts (where questions of fact are mostly discussed) is quite widespread, their absence in the supreme judicial instances can be explained by the fact that those instances are mostly dealing with questions of law, where specialist knowledge is generally required.
78. The lay judges choose from among themselves a Board of Supreme Court lay judges (Article 69 par 1). This Board’s powers are described in very general terms in Article 69 par 2 as organizational and promotional duties, and it is the President of the Republic of Poland who decides, by decree, on the composition, organizational structure and exact

⁸² *Op. cit.* footnote 80, par 24 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

⁸³ See par 190 under Strategic Objective G.1: “Take measures to ensure women’s equal access to and full participation in power structures and decision-making” of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>>; *OSCE Ministerial Council Decision No. 7/09 on Women’s Participation in Political and Public Life*, 2 December 2009, par 1, <<http://www.osce.org/mc/40710?download=true>>; see also *op. cit.* footnote 26, pars 81 and 91 (2011 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice).

⁸⁴ See e.g., Venice Commission, *Opinion on the Draft Law on the Amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine*, CDL-AD(2013)014, 15 June 2013, par 47, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)014-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e)>.

⁸⁵ See also *op. cit.* footnote 55, Principle 2 (1985 UN Basic Principles),

⁸⁶ *Op. cit.* footnote 81, par 25 (2009 Annual Report of the UNSR).

⁸⁷ e.g., Albania, Andorra, Armenia, Azerbaijan, Bulgaria, Cyprus, Croatia, Georgia, Greece, Ireland, Iceland, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Netherlands, Portugal, Romania, Turkey, Ukraine.

⁸⁸ Such as in Norway, Denmark, Sweden, Germany or UK-England and Wales.

⁸⁹ Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ), *Report on “European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice”*, Edition 2014 (2012 data), page 167, <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf>.

competence of said Board, as well as on the relations of the Board with the First President of the Court and the Disciplinary Chamber in particular, among others (Article 69 par 3). Therefore, while the selection of the lay judges is in the hands of the Senate of Poland, the direction and management of the work of Supreme Court lay judges falls within the power of the President of the Republic of Poland. Given the importance of the cases in which Supreme Court lay judges would be involved, the discretion of the President of the Republic of Poland to intervene and guide the work and composition of the Board of lay judges appears to constitute an executive over-reach. It also defeats the purpose of the institution of lay judges by making the organization of their work dependent on the executive. Moreover, it is also not clear why the composition, organizational structure and competences of the Board are not set out in law, or determined by the First President of the Supreme Court, in consultations with the Board of lay judges.

79. In sum, having lay judges elected by the Senate risks the politicization of such appointments, which calls into question the actual and perceived independence of these judges. Moreover, the role played by the President in deciding on the composition, organizational structure and competences of the Board of lay judges raises concerns with respect to his/her potential influence over lay judges. **It is thus recommended to delete from the Draft Act the provision introducing lay judges at the Supreme Court level to hear extraordinary complaints and disciplinary cases set out in Article 26 pars 1 and 2 of the Draft Act.**

2.5. The Advisory Role of the Supreme Court

80. Pursuant to Article 1 par 4 of the Draft Act, the power of the Court to review draft legislation and provide its opinion thereupon has been narrowed down. Whereas currently the Supreme Court delivers opinions “on draft laws and other normative acts of law which form the basis for rendering decisions by the courts and their operations *as well as other laws to the extent that it deems advisable*”,⁹⁰ the provision now reads that it provides opinions “on draft laws and other legal acts on the basis of which courts render their decisions and operate as well as other draft laws *to the extent that they affect cases falling within the subject-matter jurisdiction of the Supreme Court*” (emphasis added).
81. This would potentially affect the Supreme Court’s ability to play a consultative role also in legislative processes that aim to reform the judiciary. As noted in the August 2017 Opinion, the CCJE has recommended that “the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system”.⁹¹
82. The reasons for restricting this part of the Supreme Court’s mandate is not clear, and will likely hamper its ability to impact issues of great significance for preserving judicial independence, where the views of the Supreme Court are highly relevant. For instance, according to the new wording, the Supreme Court would not appear to be competent to comment on issues pertaining to the National Council of the Judiciary or

⁹⁰ See Article 1 par 3 of the 2002 Supreme Court Act.

⁹¹ Consultative Council of European Judges (CCJE), *Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16 October 2015, par 31, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

Constitutional Tribunal, even though the underlying legislation may potentially directly affect the judiciary or impact judicial independence. It would be advisable to **reconsider narrowing the Supreme Court’s jurisdiction to issue opinions on legislation, to ensure that it may exercise its advisory role with regard to all laws potentially affecting the judiciary and judicial independence in general** (see also Sub-Section 8 *infra* concerning the legislative process pertaining to the Draft Act).

3. The Rules of Procedure of the Supreme Court

83. Article 4 of the Draft Act provides that “[t]he President of the Republic of Poland, after consulting the Board of the Supreme Court, shall determine, by way of regulation, the rules of procedure of the Supreme Court”. These rules encompass a number of key aspects of the Supreme Court’s functioning i.e., the determination of the number of positions of Supreme Court judges, including the number of Supreme Court judges’ positions in individual chambers, the internal organisation of the Supreme Court, the rules of internal conduct as well as the detailed scope of duties of judicial assistants and the manner of their performance (Article 4 of the Draft Act).
84. The Draft Act, like the July 2017 Draft Act before it, would represent a significant change from the mechanism by which the Rules of Procedure of the Supreme Court are currently adopted by the General Assembly of the Supreme Court judges, without the intervention of a member of the executive or any other body (Article 3 par 2 of the 2002 Supreme Court Act). Moreover, a transitional provision authorizes the President to adopt an initial set of Rules of Procedure without even consulting the Board of the Supreme Court (Article 110 of the Draft Act). This provision would confer on the executive branch a decisive influence over the organization and functioning of the Supreme Court, and could potentially also impact the security of tenure of Supreme Court judges. In substance, the risks identified with respect to judicial independence and the principle of separation of powers in the analysis of an equivalent provision in the August 2017 Opinion (see Sub-Section 3.1 of Annex 1) remain the same in the Draft Act. The wording of Article 110 threatens the judicial independence in both its individual and its institutional aspects.
85. For the reasons set out in detail in the August 2017 Opinion (see pars 67-69 of Annex 1), it is well recognised that the individual independence of judges is underpinned by security of tenure. The Presidential power to determine the number of judges serving in the Supreme Court puts this at risk, since there is nothing in the Draft Act to preclude the President from using this power to reduce the number of judicial posts and thereby force judges out of office. As pointed out in the August 2017 Opinion, and further developed below, international norms regarding security of tenure imply that they cannot be circumvented by abolishing the judicial office in question.⁹² In common law jurisdictions, this is sometimes made explicit by including a specific provision that precludes the abolition of a judicial office while there is a substantial holder thereof.⁹³

⁹² *Op. cit.* footnote 4 par 39 (August 2017 Opinion).

⁹³ Such provisions are found in the constitutions of 23 Commonwealth member states. See Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles* (British Institute of International and Comparative Law, 2015), pars 2.2.9-2.2.10, <https://www.biicl.org/documents/689_bingham_centre_compendium.pdf?showdocument=1>. These types of provisions may arguably not be necessary since most Commonwealth constitutions formulate the grounds for removing a judge in exhaustive terms. The provisions are presumably included out of caution, and to strengthen the independence of the judiciary.

86. As far as the institutional independence of the judiciary is concerned, the August 2017 Opinion observes that enabling a member of the executive to regulate such a wide range of matters may deprive litigants of their right to “an independent and impartial tribunal established by law” under Article 6 of the ECHR.⁹⁴ Namely, placing excessive regulatory powers in the hands of the executive may enable it to “interfere in matters that are directly and immediately relevant to the adjudicative function”, which the *UNODC Commentary on the Bangalore Principles* describes as breaching a minimum condition for the institutional independence of the judiciary.⁹⁵
87. In this context, it is particularly concerning that under the Draft Act, the first Rules of Procedure are determined by a member of the executive, in this case the President of the Republic of Poland, acting alone and without needing to consult a judicial or other independent body. While the President would be held to consult the Board of the Supreme Court if he or she later wished to revise the Rules of Procedure, deciding on the need for revisions also lies within his/her discretion alone. These extensive powers would mean that the President would be able to exert (real or perceived) political influence on the work of the Supreme Court from the outset, which could potentially damage the independence and impartiality of the highest instance court in Poland.
88. The Rules of Procedure of the Supreme Court should instead be the subject of an internally democratic procedure of the justices of the Supreme Court, as is currently the case in Article 3 pars 2 and 3 of the 2002 Supreme Court Act. According to these provisions, the Rules of Procedure of the Supreme Court are adopted by a resolution of the General Assembly of the Justices of the Supreme Court. The role of the executive or legislature in the administration of the Supreme Court should in principle be limited to assigning appropriate financial resources.
89. **In light of the above, the power given to the President to the Rules of Procedure of the Supreme Court, especially with respect to the first Rules of Procedure, where this is done without requiring the opinion of the Supreme Court Board, is incompatible with the principles of judicial independence and of the separation of powers. It is recommended to retain the power to determine the regulations of the Supreme Court in the General Assembly of the Supreme Court or in some other independent judicial body such as the Board of the Supreme Court.**

4. Eligibility, Appointment, Status and Career of Supreme Court Judges

4.1. New Eligibility Requirements

90. Article 29 of the Draft Act introduces three new eligibility requirements for Supreme Court judges compared to Article 22 of the 2002 Supreme Court Act i.e., to have reached the age of 40 years old, not to have been convicted or conditionally discharged of an intentional crime prosecuted by public indictment or an intentional fiscal crime, and not to have served in, worked for or co-operated with the state security bodies referred to in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance.⁹⁶ The Polish citizenship requirement mentioned in the 2002 Supreme

⁹⁴ *Op. cit.* footnote 4, par 36 (August 2017 Opinion).

⁹⁵ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), par 26, <https://www.unodc.org/unodc/en/corruption/tools_and_publications/commentary-on-the-bangalore-principles.html>.

⁹⁶ Available at <<https://ipn.gov.pl/en/about-the-ipn/documents/327.The-Act-on-the-Institute-of-National-Remembrance.html>>.

Court Act has been narrowed down to require *sole* Polish citizenship, and the dual citizenship of judges has become a ground of termination of their mandates as per Article 35 par 1 (7) of the Draft Act.

4.1.1. Sole Polish Citizenship Requirement

91. The Draft Act introduces *sole* Polish citizenship as a new eligibility requirement for the position of Supreme Court judges (Article 29 par 1 (1)), including for Supreme Court lay judges (Article 58 par 2 (1)), as well as for common court judges (new Article 61 par 1 of the Law on the Organisation of Common Courts), military judges (new Article 22 par 1 (1) of the Law on the Organization of Military Courts) and trainee judges (Article 117 of the Draft Act).
92. In this context, it is noted that Article 32 of the Constitution of Poland stipulates the principles of equality of all persons before the law, including the right to equal treatment and non-discrimination.⁹⁷ This principle of equal treatment is extended to persons with dual citizenship by Article 3 par 1 of the Law on Polish Citizenship of 2 April 2009,⁹⁸ which states that “[a] Polish citizen who simultaneously holds citizenship of another State has the same rights and obligations with respect to the Republic of Poland as a person who holds solely Polish citizenship.”
93. Notwithstanding these principles, the Draft Act precludes Polish citizens who are also citizens of another state, from occupying the above-mentioned judicial positions. It is noted, however, that such requirements are not formulated with regard to other important positions, such as those of the President of the Republic of Poland, members of Cabinet or members of parliament, or any other public office for that matter. While the need for Polish citizenship is set out in law for most of the above positions, such legislation does not require that the office-holders have *only* Polish citizenship, nor does it oblige them to renounce any other citizenship that they may hold when taking office, as Supreme Court judges, other judges and trainee judges are required to do in the Draft Act. The Explanatory Statement to the Draft Act does not provide a clear explanation to justify this change, and it is thus not clear why Supreme Court judges should have much stricter citizenship-related eligibility requirements than political figures leading the country.
94. This requirement of *sole* Polish citizenship would somewhat contradict the judgment of the ECtHR in the case of *Tanase v. Moldova* (2010).⁹⁹ Here, the Court considered that legislative provisions preventing elected deputies with multiple nationalities from taking seats in the Parliament were disproportionate, noting in particular that the public authorities did not provide an explanation about why concerns had emerged regarding the loyalty of dual citizens,¹⁰⁰ while acknowledging that a different approach may be justified where special historical or political considerations render a more restrictive practice necessary.¹⁰¹ A similar reasoning could also apply in the case of other public-office holders. Moreover, such an approach would also not be compatible with Article 14 of the ECHR, which protects against discrimination on the grounds of nationality.

⁹⁷ *Op. cit.* footnote 5 (Constitution of the Republic of Poland).

⁹⁸ Official Journal of the Republic of Poland Dz.U. 2012 poz 161.

⁹⁹ ECtHR, *Tanase v. Moldova* (Application no. 7/08, Grand Chamber judgment of 27 April 2010), par 180, <<http://hudoc.echr.coe.int/eng?i=001-98428>>.

¹⁰⁰ *ibid.* par 174 (ECtHR, *Tanase v. Moldova*, 27 April 2010).

¹⁰¹ *ibid.* pars 172 and 180 (ECtHR, *Tanase v. Moldova*, 27 April 2010).

95. It is also noted that Poland has signed, although not yet ratified, the European Convention on Nationality,¹⁰² which is thus not legally binding on Poland. Article 17 of this Convention explicitly provides that “[n]ationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party”. In principle, pursuant to Article 18 of the Vienna Convention on the Law of Treaties,¹⁰³ “a state is obliged to refrain from acts which would defeat the purpose of a treaty when [...] it has signed the treaty”. The provisions of the Draft Act would be in flagrant contradiction with the above-mentioned provision of the European Convention on Nationality, thus defeating the very purpose of this Convention, in violation of Article 18 of the Vienna Convention on the Law of Treaties.
96. In light of the foregoing, **the legal drafters should remove sole Polish citizenship as a new eligibility requirement for all judicial positions.**

4.1.2. Lustration Requirement

97. Article 29 of the Draft Act specifies that in order to be eligible for the position of Supreme Court judge, a candidate may not have served in, worked for or co-operated with the state security bodies referred to in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance (hereinafter “1998 Act”).¹⁰⁴ Article 7 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Agencies for the period 1944-1990 and the Content of such Documents (hereinafter “2006 Act”)¹⁰⁵ provides an obligation for persons holding public office, including judges and prosecutors, to submit a vetting declaration concerning employment or service in State security organs or collaboration with these organs in the period from 22 July 1944 to 31 July 1990, for persons born before 1 August 1972. Hence, any person wishing to become a judge of any court in Poland must already submit such a vetting declaration, which is then examined by the Office of the Institute of National Remembrance (Article 7 par 5 of the 2006 Act).
98. While an assessment of the legitimacy and compliance with international standards of lustration legislation would go beyond the scope of the Opinion, it is worth referring to relevant lustration Guidelines prepared by the Parliamentary Assembly of the Council of Europe in 1996,¹⁰⁶ which state that “lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries”.¹⁰⁷ In that regard, it is questionable whether lustration should still apply nearly thirty years after the fall of the communist totalitarian regime and twenty years after the adoption of the first lustration law in Poland in 1997.

¹⁰² *European Convention on Nationality*, ETS No.166, which entered into force on 1 March 2000. Poland signed the Convention on 29 April 1999 but has not yet ratified it.

¹⁰³ *Vienna Convention on the Law of Treaties*, signed on 23 May 1969 and entered into force in 1980. Poland acceded to this Convention on 2 July 1990.

¹⁰⁴ Official Journal of Laws of the Republic of Poland, Dz.U. 1998 nr 155 poz. 1016. English version available at <<https://ipn.gov.pl/en/about-the-ipn/documents/327.The-Act-on-the-Institute-of-National-Remembrance.html>>.

¹⁰⁵ Official Journal of Laws of the Republic of Poland, Dz.U. z 2016 r.poz 1721, 1948, 2260, 2261, z 2017 r. poz. 1530, 1600. English version available at <<https://ipn.gov.pl/en/about-the-ipn/documents/327.The-Act-on-the-Institute-of-National-Remembrance.html>>.

¹⁰⁶ Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, included in a report on Measures to dismantle the heritage of former communist totalitarian systems. Available at <<http://assembly.coe.int/nw/xml/xref/x2h-xref-viewhtml.asp?fileid=7506&lang=en>>.

¹⁰⁷ *ibid.* Guideline (g) (1996 PACE Guidelines on Lustration Laws).

99. In addition, the new eligibility requirement should not be interpreted to require candidates to re-submit their vetting declarations. Indeed, Article 7 par 3 of the 2006 Act also specifies that the submission of a vetting declaration implies that there shall be no obligation to submit the declaration again, if at a later date a person runs for or holds a public office requiring fulfilment of an obligation to submit a vetting declaration.
100. Article 35 par 1 (8) of the Draft Act provides that the fact of “having been found” to have served, worked or collaborated with the state security authorities listed in the 1998 Act constitutes a ground of termination of the judge mandate. Further, Article 118 specifies that this provision shall only apply to persons appointed to the position of a Supreme Court judge after the date of entry of the Act into force, and therefore not to existing Supreme Court judges. The wording of Article 35 par 1 (8) appears to be unduly broad, as it does not require that the fact that an untrue lustration declaration was submitted be determined by a final court judgment, which then should also adjudicate on the prohibition of holding public offices for a period of 3 to 10 years (Article 21a par 2b of the 2006 Act). It is only on the basis of such a final judgment that a judge may eventually be prohibited from holding office for a limited period of time. Moreover, Article 35 par 6 provides that in order to determine whether such a termination ground exists, the First President of the Supreme Court can request information to the President of the Institute of National Remembrance. It is not clear under which circumstances and conditions this may be done, which does not exclude potential for discretionary application. **Article 35 par 1 (8), if maintained, should therefore require that the relevant facts be determined by a final court judgment. Article 35 par 6 should also be more clearly circumscribed to prevent situations where the procedure for checking whether a judge has served, worked or collaborated with the state security authorities listed in the 1998 Act is used as a potential form of intimidation and/or harassment over certain judges.**

4.2. Appointment of the First President of the Supreme Court and Presidents of Chambers

101. The Draft Act provides that the President of the Republic of Poland shall appoint both the First President of the Supreme Court (Articles 11-12) and the Presidents of the respective chambers (Article 14). This is in accordance with Article 144 par 3 (23) of the Constitution of the Republic of Poland. In each case, the President is to select candidates from a shortlist. Currently, Article 10 of the 2002 Supreme Court Act states that the President of the Republic of Poland appoints the First President directly from among Supreme Court judges and Article 16 par 1 (3) of the 2002 Supreme Court Act specifies that the General Assembly of Judges of the Supreme Court is responsible for the selection of two candidates for such post. Chamber Presidents are appointed by the President of the Republic of Poland upon a motion lodged by the First President of the Supreme Court (Article 13 par 2 of the 2002 Supreme Court Act).
102. For the position of First President, the General Assembly of Supreme Court judges must now submit a shortlist of five candidates made up of sitting Supreme Court judges (Article 11). It would appear that candidacy is by nomination rather than application, and the General Assembly of Supreme Court judges is required to hold a secret ballot to determine its shortlist (Article 12). For the position of chamber President, the assembly of judges of the respective chamber shall produce a shortlist of three candidates from among its existing members in a similar manner (Article 14 par 4). When selecting a chamber President, the President of the Republic of Poland is required to consult the

First President of the Supreme Court, except when appointing the President of the Disciplinary Chamber (Article 14 par 3). The First President is appointed for a six-year term, and may be re-appointed once (Article 11 par 1). The chamber Presidents are appointed for a three-year term of office and may be re-appointed a maximum of two times (Article 14 par 2), whereas according to Article 13 par 2 of the 2002 Supreme Court Act, the length of appointment for the post of President of a chamber is five years. Both appointments are explicitly contingent on a Supreme Court judge remaining in office i.e., until a First President or chamber President resigns, retires or is removed from office (Articles 11 par 1 and 14 par 2).

103. Generally, the procedures for the appointment of presidents of courts should follow the same process as those for the selection and appointment of judges.¹⁰⁸ Having the judges of a particular court elect the court chairperson is usually considered a good option,¹⁰⁹ in line with the requirements of the principle of internal independence of the judiciary.¹¹⁰ The CCJE recently emphasized that even in such cases, objective criteria of merit and competence should also prevail.¹¹¹ The Draft Act is currently silent in that respect and **it is thus recommended to supplement the Draft Act by specifying such criteria.**
104. Raising the number of potential candidates for the position of First President proposed by the General Assembly of Supreme Court judges to the President of the Republic from two to five *de facto* dilutes the role of the General Assembly and confers on the President of the Republic more influence, especially since he/she is not bound in his or her choice by the number of votes received by each of the candidates. Moreover, the fact that the President of the Republic of Poland has the final say in the appointment and re-appointment decisions cannot exclude that political or other considerations may prevail over the merit. Moreover, this also runs the risk that a future First President of the Supreme Court may be somewhat beholden towards the appointing authority in a manner that may undermine judicial independence, particularly if the First President is eligible for re-appointment. As noted in the August 2017 Opinion with regard to judicial appointments, recommendations elaborated at the regional level emphasize that undue political influence over judicial appointments processes may be avoided if the authorities in charge of the selection and career of judges are independent of the executive and legislative powers. This is for example the case when such decisions are made by independent judicial councils or other independent bodies where at least half of the members are judges appointed by their peers.¹¹²

¹⁰⁸ CCJE, *Opinion No. 19 on the Role of Court Presidents*, 10 November 2016, par 38, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2016\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2016)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

¹⁰⁹ *Op. cit.* footnote 80, par 16 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

¹¹⁰ Venice Commission and DGI, *Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, 14 October 2014, par 84, <[http://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)031-e](http://venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)031-e)>.

¹¹¹ *Op. cit.* footnote 108, par 40 (2016 CCJE Opinion No. 19 on the Role of Court Presidents). See also *op. cit.* footnote 57, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), par 12.3, <http://www.judicialintegritygroup.org/images/resources/documents/BP_Implementation%20Measures_Engl.pdf>; and the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), which are the outcome of an international research project of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law, Principles 10, <<https://www.biicl.org/ingham-centre/projects/capetownprinciples>>;

¹¹² See e.g., *ibid.*, par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers”; *op. cit.* footnote 80, par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that “apart from a substantial number of judicial members”, “[the] composition [of bodies deciding on judicial selection] shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office”; *op. cit.* footnote 80, par 1.3 (1998 European Charter on the Statute of Judges), which states that “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive

105. Accordingly, **the legal drafters should consider entrusting the ultimate power to select the First President and chamber Presidents to a judicial or other independent body where at least half of the members are judges appointed by their peers, while ensuring that the final appointment by the President of Poland remains a ceremonial act. The legal drafters should also reconsider making these posts subject to re-appointment rather than having a single fixed term.**
106. Regarding the appointment of chamber Presidents specifically, Article 14 of the Draft Act removes the powers of motion by the First President of the Supreme Court and states only that the President of the Republic of Poland should ask for the opinion of the First President in relation to the nominations. The President of the Republic of Poland's powers are even broader regarding the appointment of the President of the Disciplinary Chamber, where he/she is not even required to consult the First President of the Supreme Court (Article 14 par 3). What is more, the proposed article reduces the Chamber Presidents' terms of office to a period of three years, which could mean less stability in the operations of each chamber. The reduced term of office coupled with the increased executive discretion for the President of the Republic of Poland in nominations of the chamber Presidents cannot exclude frequent changes in the running of the Chambers where the said President's actions are not in accordance with the expectations of the executive. More generally, the legislation on the Supreme Court should specify the circumstance in which chamber Presidents may be dismissed, as the Draft Act is currently silent in that respect.
107. With respect to the length of judicial tenure, the CCJE has stated: "On the one hand, the term of office should be long enough to gain sufficient experience and to permit the realisation of ideas to offer better services to the court users. On the other hand, the term of office should not be too long, since this can lead to routine and can hinder the development of new ideas".¹¹³ The CCJE recommended that States find an adequate balance between these two perspectives. It also noted that "each election or appointment of a president provides a certain influence of the electing or appointing body on the respective court".¹¹⁴ This suggests that the new modalities contemplated by the Draft Act would confer more influence on the Executive as far as the term of office of chamber Presidents is concerned.
108. **This enhanced control of the President of the Republic of Poland over the work of the Chambers, and thus the Supreme Court as a whole, is unjustified and risks violating the principle of the independence of the judiciary. It is recommended to remove the relevant aspects of Articles 11 and 14 from the Draft Act.**

and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; and op. cit. footnote 80, par 48 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), which stated that "[i]t is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary". See also Venice Commission, Report on Judicial Appointments (2007), CDL-AD(2007)028-e, 22 June 2007, pars 25 and 32, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e)>;

¹¹³ *Op. cit.* footnote 108, par 44 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

¹¹⁴ *ibid.* par 44 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

4.3. New Rules Concerning the Retirement of Supreme Court Judges

4.3.1. The Lowering of the Retirement Age and Optional Early Retirement for Women

109. Supreme Court judges currently have security of tenure until they attain a mandatory retirement age of 70 years (Article 30 of the 2002 Supreme Court Act). The Draft Act establishes a new mandatory retirement age of 65 years, unless the judge requests an extension of his or her appointment and receives the consent of the President of the Republic of Poland, who *may* in that process consult the National Council of the Judiciary, but is not obliged to do so (Article 36 par 1). Pursuant to Article 108 of the Draft Act, the new retirement age would apply immediately upon the Act's entry of the Act into force. Although women judges are subject to the same mandatory retirement age as male judges, the Draft Act grants the right to optional early retirement upon reaching the age of 60 exclusively to women judges (Article 36 par 5).
110. The July 2017 Draft Act proposed very similar provisions for the retirement of Supreme Court judges, although it provided that the extension would be granted by the National Council of the Judiciary after consulting the Minister of Justice (see pars 118-119 of Annex 1) and not by the President of the Republic of Poland. The analysis that OSCE/ODIHR made in the August 2017 Opinion on the July 2017 Draft Act therefore remains highly relevant (see pars 110-122 of Annex 1).
111. According to Article 36 of the Draft Act, the President of the Republic of Poland *may*, but does not have to, ask to the National Council of the Judiciary to provide its opinion on the proposed extension of judges who have reached retirement age. The extension is thus solely in the hands of the executive, in the person of the President of the Republic of Poland.
112. A State is in principle free to determine the mandatory retirement age of its judges, although the level at which the mandatory age is set may be significant in terms of judicial independence (see par 112 of Annex 1), providing that the applicable rules are in accordance with the principles of security of tenure. The fact that the new retirement age is immediately applicable and would result in the *ex lege* retirement of all Supreme Court judges who are more than 65 years old, even though an extension may be granted by the President. This violates the principle of security of tenure, all the more since the Draft Act does not provide transitional measures to protect the legitimate expectations of the existing Supreme Court judges to remain in office until the age of 70 years old (see pars 112-114 of Annex 1). As concluded in the August 2017 Opinion, **any changes to the retirement age of judges shall only apply to judges appointed after the entry into force of the Act and not to those already sitting on the Supreme Court bench, who should be able to remain in office until they are 70 years old,¹¹⁵ under the legislation currently in place¹¹⁶ (see pars 112-114 of Annex 1). Moreover, the legal drafters should also remove the earlier optional retirement age for women Supreme Court judges, as this perpetuates and entrenches inequality and gender stereotypes about women judges compared to their men counterparts, thus**

¹¹⁵ For instance, when the retirement age for High Court and appellate judges in England and Wales was lowered from 75 to 70 years, judges already on the bench were exempted; see Judicial Pensions and Retirement Act 1993, section 26 and Schedule 7.

¹¹⁶ CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012, par 67 <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1233592>>.

constituting discrimination prohibited by international human rights standards (see pars 115-116 of Annex 1).¹¹⁷

4.3.2. Discretionary Extensions of Appointments after Reaching the Retirement Age

113. As a precondition to requesting an extension by the President of the Republic of Poland, the judge is required to obtain a certificate, in accordance with the rules applying to candidates for judicial appointment, which confirms that he or she is medically fit to perform judicial duties (Article 36 par 1). The President's consent does not seem to be automatic and the Draft Act does not specify the criteria that will guide the President's decision, which would thus lie within the sole discretion of the President. If granted by the President of the Republic of Poland, an extension lasts for three years. A judge may voluntarily retire at any time during this period and may apply for a second and final extension under the same conditions (Article 36 par 4).
114. As mentioned in par 110 *supra*, the July 2017 Draft Act provided that the extension would be granted by the National Council of the Judiciary after consulting the Minister of Justice (see pars 118-119 of Annex 1). The new modalities introduced by the Draft Act thus further enhance the influence of the executive over the process. Judges interested in seeking an extension are now exposed to direct rather than indirect political influence (see par 119 of Annex 1). Hence, the comments made in the August 2017 Opinion (pars 120-122 of Annex 1) remain particularly relevant.
115. Noting the related risk of potential direct or indirect influence or interference of the executive over individual judges, the August 2017 Opinion recommended that the relevant **provisions allowing for extensions of service be deleted** due to their potential to undermine judicial independence. **The same recommendation should be made with respect to the Draft Act.** Indeed, excluding the possibility of extension/re-appointment in general remains a strong guarantee against politicization of the judiciary.¹¹⁸

4.4. Rules and Limitations Regarding Other Occupations or Employment of Supreme Court Judges in Office and Retired Judges

116. Article 43 of the Draft Act sets out rules pertaining to other occupations or employment of Supreme Court judges in Office, which are also applicable to retired Supreme Court judges (Article 43 par 6). The First President of the Supreme Court has the power to grant or deny permission to a judge wishing to undertake external work or business activity. Concerning retired Supreme Court judges specifically, the OSCE/ODIHR would like to reiterate its recommendations from the August 2017 Opinion, insisting that **the limitations concerning the occupation or employment of retired judges are vague and restrictive and should be clearly circumscribed** (see par 128 of Annex 1).

¹¹⁷ See e.g., regarding certain benefits only granted to women, ECtHR, *Konstantin Markin v. Russia* (Application no. 30078/06, judgment of 22 March 2012), par 141, <<http://hudoc.echr.coe.int/eng/?i=001-109868>>.

¹¹⁸ See e.g., Venice Commission, *Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia*, CDL-AD(2002)026, pars 30-31, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2002\)121-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2002)121-e)>.

5. Disciplinary Proceedings against Supreme Court Judges and other Legal Professionals

117. The Draft Act confers on the President of the Republic the possibility to appoint an Extraordinary Disciplinary Proceedings Representative from among the judges of the Supreme Court, ordinary courts or military courts, who will have the power to initiate disciplinary proceedings against any Supreme Court judge (Article 75 par 8 of the Draft Act). Article 123 of the Draft Act acknowledges that all proceedings undertaken before the entry into force of the Draft Law in relation to disciplinary proceedings remain valid. However, Article 124 par 1 states that disciplinary proceedings that were concluded with a final ruling before the date of entry into force may be resumed upon the motion of the Minister of Justice if an offence was committed in connection with the proceedings and there are reasonable grounds to believe that this offence could have affected the ruling or if new facts or evidence are revealed after the ruling was issued. It is unclear why the Draft Act includes such a specific transitional provision, whereas these questions could and should be dealt with under normal procedural legislation.¹¹⁹

5.1. The President of the Republic's Involvement in Disciplinary Proceedings against Supreme Court Judges

118. The Draft Act introduces significant changes to the disciplinary proceedings against Supreme Court judges. Article 75 par 8 provides that the President of the Republic of Poland can nominate his or her own Disciplinary Representative from amongst the judges of the Supreme Court, ordinary courts or military courts. The President can make such an appointment at any time, meaning that, such a representative may either join ongoing proceedings or initiate new proceedings. An appointment of the President's Disciplinary Representative automatically excludes the disciplinary representative of the Supreme Court or his or her deputy from undertaking any further steps in the disciplinary proceedings. The OSCE/ODIHR has already raised some concerns concerning similar provisions pertaining to the Minister of Justice's involvement in disciplinary proceedings against Supreme Court judges in its August 2017 Opinion, which remain valid (see Sub-Section 4 of Annex 1).

119. Insofar as the Draft Act provides for the involvement of the executive/the President in the disciplinary proceedings of Supreme Court judges, this seriously undermines judicial independence, as already explained in detail in the August 2017 Opinion (see pars 45-54 of Annex 1). Indeed, the *2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence* specifically state that “[b]odies deciding on cases of judicial discipline must not be controlled by the executive branch *nor shall there be any political influence pertaining to discipline* [and] [a]ny kind of control by the executive branch over judicial councils or bodies entrusted with discipline is to be avoided”.¹²⁰ Contrary to these recommendations, the proposed scheme confers on the President of the Republic of Poland, via his/her Disciplinary Representative, a decisive influence over measures pertaining to the discipline of Supreme Court judges, as he or she may trigger disciplinary investigations or join disciplinary proceedings, in which case this

¹¹⁹ See e.g., Article 540 of the Code of Criminal Procedure of Poland regarding the reopening of a final decision where an offence has been committed during the course of the proceedings or in cases where new facts or evidence previously unknown to the court come to light (see *op. cit.* footnote 40).

¹²⁰ *Op. cit.* footnote 80, par 9 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

excludes other disciplinary representatives from the procedure. It is generally considered as a good option to establish an independent body to initiate disciplinary proceedings, which is separate from the independent body or court taking the decision relating to the disciplinary liability of a judge.¹²¹ **The President of the Republic should not play any role in such disciplinary processes.**

120. As in the July 2017 Draft Act, disciplinary proceedings against a Supreme Court judge can be initiated by the Disciplinary Proceedings Representative of the Supreme Court either on his or her own initiative, or at the request of certain authorities including the First President of the Supreme Court, the President of the Supreme Court who directs the work of the Disciplinary Chamber, the Supreme Court Board, the General Public Prosecutor, or the National Public Prosecutor (Article 75 par 1). As noted in the August 2017 Opinion (see par 53 of Annex 1), providing the Chamber President with such powers is not appropriate in view of the fairness of such proceedings. Indeed, the *2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence* state that “bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them”.¹²² In any case, if the Chamber President initiates such proceedings, then he or she should not sit on the bench.¹²³
121. **In light of the new rules on disciplinary proceedings, and their adverse effects on judicial independence, it is recommended to remove all provisions pertaining to the Disciplinary Proceedings Representatives of the President of the Republic and their special role in disciplinary proceedings against Supreme Court judges. Also, the President of the Supreme Court who directs the Disciplinary Chamber should be removed from the list of persons who may initiate disciplinary proceedings against Supreme Court judges in Article 75 par 1 (see pars 52-53 of Annex 1).**

5.2. The Minister of Justice’s Involvement in Disciplinary Proceedings against Other Legal Professionals

122. The Draft Act grants the Minister of Justice/General Public Prosecutor powers similar to the ones given to the President of the Republic of Poland in disciplinary proceedings against military court judges (new Article 40b of the 1997 Act on the Organisation of Military Courts, proposed by Article 103 par 10 of the Draft Act), judges of the common courts (new Article 112c of the 2001 Act on the Organisation of Common Courts, proposed by Article 105 par 19 of the Draft Act), prosecutors of the Institute of National Remembrance (new Article 51 par 6 of the 1998 Act on the Institute of National Remembrance, proposed by Article 104 of the Draft Act) and other prosecutors (new Article 153a of the 2016 Law on Public Prosecution, proposed by Article 107 par 11 of the Draft Act).
123. Generally, and as noted in the August 2017 Opinion, the fact that the Minister of Justice can influence disciplinary proceedings against judges, and can initiate such proceedings,

¹²¹ See *op. cit.* footnote 57, par 69 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *ibid.* par 9 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence); and CCJE, *Opinion No. 3 (2002) on the Principles and Rules Governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002, pars 68, 69 and 77, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorIntranet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true)>.

¹²² *ibid.* par 26 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

¹²³ OSCE/ODIHR-Venice Commission-DGI, *Joint Opinion on the Draft Law on the Prosecution Service of the Republic of Moldova*, CDL-AD(2015)005-e, 23 March 2015, par 122, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)005-e)>.

raises some concerns with regard to the independence of the judiciary and the principle of the separation of powers (see Sub-Section 4.1 of Annex 1).¹²⁴

124. With regard to military judges and common court judges, the concerns identified in the August 2017 Opinion in relation to equivalent provisions regarding the Minister of Justice/General Public Prosecutor's involvement in disciplinary proceedings against Supreme Court judges apply in a similar manner (see Sub-Section 4.1 of Annex 1). In that respect, the greatest concern relates to the unfettered power and discretion of the Minister of Justice/General Public Prosecutor to appoint his or her Disciplinary Representative, to the exclusion of any other representative undertaking action in a case and who may either commence proceedings on his or her own motion or join ongoing proceedings and having the ability to re-open cases in the same matter even following their closure (see proposed amendments to Article 112c of the 2001 Law on the Organisation of the Common Courts, under Article 105 par 19 of the Draft Act). Therefore, and as recommended in the August 2017 Opinion, **it is recommended to reconsider all provisions pertaining to the Disciplinary Representatives of the Minister of Justice/General Public Prosecutor and their special role in disciplinary proceedings against military and common court judges, in light of their negative effects on judicial independence.**
125. The Minister of Justice's role in disciplinary proceedings against prosecutors of the Institute of National Remembrance, which is supposed to be independent from the organs of state authority (Article 9 of the 1998 Act), and other prosecutors, is also problematic (see new Article 51 of the 1998 Act on the Institute of Remembrance and new Article 153a of the Law on the Prosecution Service). Prosecutors are required to perform their functions impartially and independently from external influence, be it from the executive, the media or other interest groups.¹²⁵ Moreover, prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability.¹²⁶ Indeed, the independence and autonomy of prosecution services is considered to be an indispensable corollary to the independence of the judiciary.¹²⁷
126. According to recommendations made at the international and regional levels, disciplinary proceedings against prosecutors shall be impartial and transparent, and guarantee an objective evaluation and decision.¹²⁸ The right to a fair hearing and to access to an independent judge also applies to disciplinary proceedings against

¹²⁴ See also Venice Commission, *Opinion on the Draft Laws on Courts and on Rights and Duties of Judges and on the Judicial Council of Montenegro*, CDL-AD(2014)038, 15 December 2014, par 68, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)038-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)038-e)>.

¹²⁵ See *UN Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), par 4, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>>; and Venice Commission, *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service* (2010), CDL-AD(2010)040, par 73, <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)040.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)040.aspx)>. See also International Association of Prosecutors (IAP), *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999), Section 6, <http://www.iap-association.org/getattachment/16dc04cc-6751-4fde-9312-27a12ee884d9/IAP_Standards.aspx>; and OSCE/ODIHR, *HDIM Annotated Agenda*, 15 September 2015, pages 14-15, <<http://www.osce.org/odihr/179066?download=true>>.

¹²⁶ CoE Consultative Council of European Prosecutors (CCPE), *Opinion No.9 on European Norms and Principles concerning Prosecutors* (2014), Principle V, <<https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>>.

¹²⁷ *ibid.* Principle IV (2014 CCPE's Opinion No.9 on European Norms and Principles concerning Prosecutors).

¹²⁸ *Op. cit.* footnote 125, par 22 (1990 UN Guidelines on the Role of Prosecutors); and *ibid.* Principle XII (2014 CCPE's Opinion No.9 on European Norms and Principles concerning Prosecutors). See also *op. cit.* footnote 125, Section 6 (g) (1999 IAP's Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors).

prosecutors.¹²⁹ Furthermore, the OSCE/ODIHR and Venice Commission have generally questioned the involvement of the Minister of Justice in aspects pertaining to the operation of the prosecution system, in order not to undermine the Prosecution Service's institutional autonomy.¹³⁰

127. In light of the foregoing, **the strong involvement of the Minister of Justice in disciplinary proceedings against prosecutors should also be reconsidered, in order to enhance the autonomy of the prosecution service.**
128. In accordance with Article 103 par 15 of the Draft Act on amendments to the Military Courts Organisation Act of 21 August 1997, the new Article 41d of that Act states that “[t]he Minister of Justice shall have access to information about the actions taken by the disciplinary court of the first instance”. A new Article 51 par 11 of the Act of 18 December 1998 on the Institute of National Remembrance also allows the Minister for Justice to “have access to information about the actions taken by the disciplinary court, point to any irregularities found, demand clarification and demand that effects of irregularities be removed”, except in areas where disciplinary court members are independent. The proposed new Article 169 of the Law on the Prosecution Service of 28 January 2016, contains similar powers of direct oversight over the respective disciplinary courts by the General Public Prosecutor, who is also the Minister of Justice, which calls into question the prosecutors' right to a fair hearing and access to an independent judge in disciplinary proceedings mentioned in par 126 *supra*. The same applies with respect to military judges' right to a fair and public hearing in disciplinary proceedings¹³¹ (see pars 56-58 of Annex 1). **Such provisions should be removed from the Draft Act.**

6. The Compulsory Retirement of All Judges of the Military Chamber and the Application of New Retirement Provisions to Existing Supreme Court Judges

6.1. The Compulsory Retirement of All Judges of the Military Court

129. The transitional provisions of the Draft Act provide that Supreme Court judges of the Military Chamber, regardless of age, shall be retired on the date when the Act enters into force (Article 108 par 3). There is no possibility for these judges to seek continuation in office or reinstatement.
130. The August 2017 Opinion dealt extensively with the compulsory retirement of Supreme Court judges prior to attaining the current mandatory retirement age of 70 years (see Sub-Section 5.1.1 of Annex 1). Most of the discussions focused on the mass retirement of all judges regardless of age, subject to a discretionary mechanism under which they could petition for their retention.¹³² The Opinion concluded that the provisions were inherently incompatible with the principles of security of judicial tenure and of

¹²⁹ *ibid.* par 21 (1990 UN Guidelines on the Role of Prosecutors). See also e.g., Venice Commission, *Opinion on the Draft Organic Law of the Public Prosecutor's Office of Bolivia*, CDL-AD(2011)007, 30 March 2011, par 53, <[http://www.venice.coe.int/webforms/documents/?pdf=cdl-ad\(2011\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2011)007-e)>.

¹³⁰ See e.g., OSCE/ODIHR-Venice Commission-CoE's Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, *Joint Opinion on the Prosecution Service of the Republic of Moldova*, CDL-AD(2015)007, 23 March 2015, par 131, <http://www.legislationline.org/download/action/download/id/5956/file/266_MOL_CRIM_22_March_2015_en.pdf>.

¹³¹ See also *op. cit.* footnote 78, pars 87-95 (ECtHR, *Oleksandr Volkov v. Ukraine*, 9 January 2013); and par 43 (ECtHR, *Ohujic v. Croatia*, 5 May 2009); and, where the ECtHR expressly stated that Article 6 par 1 of the ECHR applies to disciplinary proceedings initiated against a judge under its civil head, for the entire procedure including appeal.

¹³² *Op. cit.* footnote 4, pars 63-87 (August 2017 Opinion).

separation of powers protected by international standards (pars 67-77 of Annex 1). Indeed, and as also noted in the August 2017 Opinion, it is questionable whether the contemplated institutional re-organization of the Supreme Court would justify the early retirement of all judges of the Military Chamber, as the material scope of the work of the Supreme Court will largely remain the same, and the jurisdiction of this chamber will now fall to the Criminal Chamber (Article 112 par 3 of the Draft Act).

131. **It is thus recommended to remove from the Draft Act the provision on the automatic retirement of all judges of the Military Chamber and instead to ensure that, upon their consent, the judges currently sitting on the Military Chamber are re-assigned to the Criminal Chamber.** This would also be in line with the wording of Article 180 par 5 of the Constitution of the Republic of Poland, which states that “[w]here there has been a re-organization of the court system or changes to the boundaries of court districts, a judge may be transferred to another court or retired with maintenance of full remuneration”.

6.2. The Compulsory Retirement of Existing Supreme Court Judges Having Reached the Retirement Age and the Procedure for their Extension

132. The transitional provisions to the Draft Act provide that Supreme Court judges who have reached 65 years of age or who will reach this age within three months of the entry into force of the Draft Act shall retire three months after its entry into force, unless, upon their request, they are granted an extension by the President of the Republic (Article 108 par 1). Requests for extension may be submitted within one month of the Draft Act’s entry into force; the procedure for extensions set out in Sub-Section 4.3.2 applies *mutatis mutandis* (see Article 108 par 1). Hence, the Draft Act does not exempt judges currently sitting on the Supreme Court from the new retirement provisions, and thus applies retroactively contrary to the recommendations made in par 112 *supra*.
133. Article 108 par 4 takes into consideration that the lowering of the retirement age could result in the retirement of the First President of the Supreme Court, who under the Article 183 par 3 of the Constitution of the Republic of Poland and Article 10 of the 2002 Act is entitled to a term of six years. The Draft Act provides that if the First President of the Supreme Court is retired as a result of the above provision, the President of the Republic of Poland is to designate a Supreme Court judge to direct the work of the Supreme Court until a new First President can be appointed (Article 108 par 4). A new First President shall be appointed once two thirds of the number of judicial seats in each chamber have been filled pursuant to the Rules of Procedure of the Supreme Court. Similarly, in the event that the President of a Chamber is retired under the transitional provisions, the President of the Republic of Poland may designate a Supreme Court judge to direct the work of that chamber until two thirds of the judicial seats in the chamber have been filled (Article 108 par 4).
134. The August 2017 Opinion noted that the effect of lowering the retirement age from 70 to 65 without a transitional provision, which exempted judges already in office, was a *prima facie* infringement of judicial security of tenure (pars 113-114 of Annex 1). It is worth reiterating that the Universal Charter of the Judge explicitly provides that “[a]ny change to the judicial obligatory retirement age must not have retroactive effect”,¹³³ and

¹³³ See International Association of Judges, *International Charter of the Judge* (1999), Article 8, <<http://www.iaj-uim.org/universal-charter-of-the-judges/>>; and *op. cit.* footnote 57, par 49 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

referring to the decision of the Court of Justice of the European Union in *European Commission v. Hungary*,¹³⁴ which found the retrospective lowering of the retirement age from 70 to 62 for all judges, prosecutors and notaries to constitute age discrimination.

135. The need to protect current judges from a sudden reduction in the retirement age in the interests of judicial independence can be further supported with reference to state practice. When the retirement age for High Court and appellate judges in England and Wales was lowered from 75 to 70 years, judges already on the bench were exempted.¹³⁵ Most Commonwealth states with written constitutions specify a mandatory judicial retirement age, but some acknowledge that the retirement age may be varied, while at the same time guaranteeing that such variation shall not apply to existing judges without their consent.¹³⁶
136. The Draft Act will lead to the early retirement of the First President of the Supreme Court and of two Presidents of chamber.¹³⁷ Such termination of office *ex lege* amounts to a violation of the principles of irremovability of judges and security of tenure, which is specifically protected by Article 180 par 1 of the Constitution of the Republic of Poland, and aim to ensure the independence of the judiciary. This is even more concerning in the current situation, where the possibility of extension lies within the sole discretion of the President of the Republic, and the Draft Act contains little to no additional safeguards, such as the involvement of an independent judicial body.
137. Article 108 par 4 of the Draft Act provides for the temporary nomination by the President of the Republic of Poland of a First President of the Supreme Court and of chamber Presidents in cases of their early retirement for having reached, or nearly reached, the new age of retirement. The President has full discretion to designate any Supreme Court judge for that purpose, who will occupy such functions until new judges have been appointed for these positions.
138. Regarding the early retirement of the First President of the Supreme Court, the OSCE/ODIHR has previously noted in the August 2017 Opinion that such *ex lege* early retirement of a judge who holds the function of president of a court is incompatible with international standards (see Sub-Section 5.3 of Annex 1). Similar concerns apply regarding the chamber Presidents, who are members of the Board of the Supreme Court for a duration of three years (Article 19 par 1 of the 2002 Supreme Court Act). The First President of the Supreme Court and the Board members should be able to serve their full terms of office, except if a breach of disciplinary rules or criminal law is clearly established, following proper disciplinary or judicial procedures (par 108 of Annex 1).
139. While it is acceptable in some cases to temporarily appoint judges, any temporary element of a judicial appointment is always accompanied by a threat to judicial independence as a result of the potential deciding authority's discretion involved therein, and the temporary nature of the post, which may pressure judges to decide cases in a way that enhances their chances for a renewed term. Essentially, any temporary appointment should follow clear and pre-determined criteria, and be conducted by an

¹³⁴ *Op. cit.* footnote 116, pars 65-81 (CJEU, *European Commission v. Hungary*, 6 November 2012).

¹³⁵ See Judicial Pensions and Retirement Act 1993, section 26 and Schedule 7.

¹³⁶ See *op. cit.* footnote 93, par 2.2.26 (Van Zyl Smit). For instance, the Commonwealth of Australia Constitution Act 1900, section 72, allows the judicial retirement age to be lowered but provides that such changes cannot affect existing judges retrospectively.

¹³⁷ See the biographies of the First President of the Supreme Court and of the chamber Presidents on the website of the Supreme Court of Poland, <<http://www.sn.pl/en/about/SitePages/Organization.aspx>>.

independent body to avoid any potential external interference in the process (see par 75 *supra*).¹³⁸

140. **In light of the above, it is thus recommended to remove Article 108 from the Draft Act and ensure that all sitting Supreme Court judges are able to remain in office until they have reached 70 years of age.**

7. New Draft Amendments to the 2011 Act on the National Council of the Judiciary

141. Following the decision on 24 July 2017 of the President of the Republic of Poland to veto the Draft Act amending the 2011 Act on the National Council of the Judiciary,¹³⁹ the President submitted a new draft Act to the Sejm on 26 September 2017.¹⁴⁰ The OSCE/ODIHR thereby takes this opportunity to refer to the findings and recommendations contained in its *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland* published on 5 May 2017.¹⁴¹
142. According to the proposed new Article 9a of the Act on the National Council of the Judiciary that would be introduced by the draft Act, the judge members of the National Council of the Judiciary would be elected by the Sejm by a vote of a 3/5th majority in the presence of at least half of the statutory number of Deputies. Pursuant to a new Article 11a par 2, the entities authorized to nominate candidates for membership in the National Council of the Judiciary shall be either a group of at least 2,000 nationals of the Republic of Poland who are over 18 years of age, have full legal capacity and enjoy full public rights, or a group of at least 25 judges, excluding retired judges.
143. The amendments made to the proposed modalities for the election of judge members to the Council by the Sejm do not affect the recommendations made in the 2017 *OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*. Indeed, it is the very fact that the vast majority of members of the National Council of the Judiciary (21 out of 25 members) are selected by the Parliament, that raises concerns with respect to the real and perceived independence of the Council and is not compatible with the requirement of impartiality.¹⁴² In such cases, political considerations may prevail when selecting judge members (in addition to these possibly politically motivated appointments, members of parliament and of the executive also sit on the Council, which was also call

¹³⁸ See also *op. cit.* footnote 73 (2010 Venice Commission's Report on the Independence of the Judicial System – Part I (judges)).

¹³⁹ See <<http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1423>>.

¹⁴⁰ See <<http://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=PROJNOWEUST&NrKadencji=8&Kol=D&Typ=UST>>.

¹⁴¹ *Op. cit.* footnote 10, pars 12-15 (2017 OSCE/ODIHR, Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland).

¹⁴² The ECtHR has expressly held that where bodies appointing the vast majority of council members were from the executive and legislative branches, this constituted a structural deficiency that was not compatible with the principle of independence (see *op. cit.* footnote 78, pars 112 and 117, particularly par 112 (ECtHR, *Oleksandr Volkov v. Ukraine*, 9 January 2013)). See also 2015 GRECO's Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Serbia, par 99, where a majority of members of the Council for the Judiciary is elected by the Parliament, and where GRECO specifically recommended to change the composition of the High Judicial Council, in particular by excluding the National Assembly from the election of its members, provided that at least half of its members are judges elected by their peers and abolishing the *ex officio* membership of representatives of the executive and legislative powers. See also Venice Commission, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), par 70, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e)>; and Venice Commission, pars 36-37, *Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine*, CDL-PI(2015)016-e, 24 July 2015, pars 36-37, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e)>.

into question in the OSCE/ODIHR Final Opinion).¹⁴³ The OSCE/ODIHR thereby reiterates its recommendation to reconsider the principle of election of judge members to the Council by the *Sejm*, and ensure instead that they continue to be selected by the judiciary.

144. Additional recommendations on proposals for amendments to the 2011 Act on the National Council of the Judiciary that aim to enhance the representation of judges from all court levels, increase the openness and transparency of the nomination and selection process, and avoid corporatism are also available in Sub-Sections 3.1.2 and 3.1.3 of the 2017 OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland.

8. Additional Concerns Related to the Legislative Process

145. OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability” (1990 Copenhagen Document, par 5.8).¹⁴⁴ Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).¹⁴⁵ The August 2017 Opinion provides additional guidance to ensure the effectiveness of public consultation mechanisms (see par 134 of Annex 1). In particular, when a reform of the judiciary is envisaged, the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system¹⁴⁶ (see par 135 of Annex 1).
146. The reorganisation of courts, including changes to jurisdiction and internal reconfigurations, is something which countries may need to enter into from time to time and is a legitimate subject for legislation. However, in view of the fundamental importance of courts to the rule of law, great care must be taken to ensure that any such reorganisation is compatible with well-established international standards. The Venice Commission has recommended that legislative proposals to reconfigure a court should preferably be at the initiative of a judicial council or similar independent body with responsibility for the judicial system.¹⁴⁷ In any case, such bodies do not appear to have been involved in deciding on the fundamental reorganisation and reconfiguration of the Supreme Court set out in the Draft Act. It is also key that, when initiating fundamental reforms of the judiciary, which may affect everyone as a potential user of the justice system, civil society organizations and the public at large are consulted and play an active part in the process.

¹⁴³ *Op. cit.* footnote 80, pars 23 and 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 60, par 93 (2014 Report of the UNSR on Judicial Accountability); and *op. cit.* footnote 112, par 32 (2007 Venice Commission’s Report on Judicial Appointments). See also UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on Judicial Accountability*, A/HRC/26/32, 28 April 2014, par 93, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_32_ENG.DOC>.

¹⁴⁴ Available at <<http://www.osce.org/fr/odihr/elections/14304>>.

¹⁴⁵ Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

¹⁴⁶ *Op. cit.* footnote 91, par 31 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

¹⁴⁷ Venice Commission, *Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine*, CDL-AD(2013)034, 10 December 2013, pars 13-14, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)034-e)>.

147. Moreover, contrary to the above-mentioned principle on effective public consultations, the Draft Act was submitted by the President of the Republic of Poland to the Sejm on 26 September 2017¹⁴⁸ and, despite its aim of reforming the highest court in the country, has not been subjected so far to legitimate consultations, either with the bodies of the judiciary and judges, or with the public or civil society organizations. Also, contrary to the requirement set out in Article 34 par 3 of the Rules of the *Sejm*,¹⁴⁹ the Explanatory Statement to the Draft Act does not mention the results of prior consultations nor specify the various proposals and opinions received.
148. The President of the Republic has prepared an Explanatory Statement to the Draft Act, which lists a number of reasons justifying the contemplated reform,¹⁵⁰ but does not mention the research and impact assessment on which these findings are based. In particular, little evidence is presented to demonstrate that the existing problems within the Polish judiciary, and particularly the Supreme Court, require a legislative reform of this scale and could not be addressed through better implementation of the existing laws, for example. The Explanatory Statement also does not outline whether and to what extent the benefits of the measures chosen by the authors of the Draft Act outweigh their costs, including their negative impact on judicial independence. It also does not demonstrate how the Supreme Court, under that new scheme, will be more efficient, so that justice will be better rendered. Given the potential impact of the Draft Act on the independence of the judiciary and the rule of law, it is essential that such legislation be preceded by an in-depth regulatory impact assessment, complete with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option (including the “no regulation” option),¹⁵¹ also in line with the requirements concerning explanatory statements to all bills listed in Article 34 par 2 of the Rules of the *Sejm*.¹⁵²
149. Moreover, the Draft Act seeks to amend numerous provisions of other pieces of legislation, which were only recently adopted or amended. This raises doubts as to whether these continuous legal changes are part of any coherent policy involving a thorough problem analysis and outline of the comparative costs and benefits of all available policy solutions. The volume of legislation amended in the field of the judiciary, its piecemeal structure, level of detail and frequent amendments, could lead to confusion, backlog in courts and to a situation where individuals, including even legal professionals, may have difficulties understanding and implementing the relevant legislation. Additionally, the manner in which these laws were amended may have negative repercussions, not only with respect to the democratic legitimacy of the legislation, but also with respect to public confidence in public institutions in general. A comprehensive approach, involving a proper policy discussion with all relevant stakeholders and impact assessment at the outset, should underlie the reform process.
150. In light of the above, so far the process by which the Draft Act was developed does not conform to the aforesaid principles of democratic law-making. Any legitimate reform process of such calibre **should be transparent, inclusive, extensive and should**

¹⁴⁸ See <<http://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=PROJNOWEUST&Nrkadencji=8&Kol=D&Typ=UST>>.

¹⁴⁹ See Article 34 par 3 of the *Standing Orders of the Sejm of 30 July 1992*, as last amended in 2017 (hereinafter “Rules of the *Sejm*”), available at: <<http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>> (in Polish) and at : <http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14798:the-standing-orders-of-the-sejm-of-the-republic-of-poland&catid=7&Itemid=361> (in English).

¹⁵⁰ See <http://www.prezydent.pl/download/gfx/prezydent/pl/defaultaktualnosci/5425/17/1/uzasadnienie_sn.pdf>.

¹⁵¹ See e.g., OSCE/ODIHR, *Report on the Assessment of the Legislative Process in the Republic of Armenia* (October 2014), pars 47-48, <<http://www.legislationline.org/documents/id/19365>>.

¹⁵² *Op. cit.* footnote 149, Article 34 par 2 (1992 Rules of the *Sejm*, as last amended in 2017).

involve effective consultations, including with representatives of the Supreme Court, associations of judges and other representatives of the judiciary, relevant authorities, such as the Office of the Commissioner for Human Rights, and civil society organisations. Such reform should also involve a full impact assessment, and a review of the respective amendments' compatibility with relevant international human rights standards. The Polish legislator is therefore encouraged to ensure that the Draft Act is subjected to such consultations, according to the principles stated above, at all stages of the law making process, particularly before the Parliament. Adequate time should also be allowed for this purpose.

[END OF TEXT]

ANNEX 1 - OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (30 August 2017) - Opinion-Nr.: JUD-POL/313/2017 [AIC]

OPINION

ON CERTAIN PROVISIONS OF THE

DRAFT ACT ON THE SUPREME COURT

OF POLAND

**based on an unofficial English translation of certain provisions of the Draft Act
commissioned by the OSCE Office for Democratic Institutions and Human Rights**

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Annex: Extracts of the Draft Act on the Supreme Court of Poland

I. INTRODUCTION

1. *On 17 July 2017, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the First President of the Supreme Court of Poland to review certain provisions of the Draft Act on the Supreme Court (hereinafter “Draft Act”), which had been submitted to the Sejm (lower house of the Parliament) on 12 July 2017.*
2. *On 19 July 2017, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of said provisions with international human rights and rule of law standards and OSCE human dimension commitments.*
3. *The first reading by the Sejm in plenary occurred on 18 July 2017, and the second reading the day after. On 20 July 2017, during the third reading, the Sejm adopted the Draft Act with a series of amendments, which have been taken into account in the legal analysis contained in this legal review. The Opinion therefore reviews Articles 3 par 3, 31 and 37, 41 par 7, 54 and 56-57, 60, 62, 87-91 and 95-96 (new numbering) of the Draft Act, as requested by the First President of the Supreme Court.*
4. *On 22 July 2017, hence ten days following its submission to the Sejm, the Senate approved the Law on the Supreme Court without amendments*
5. *On 24 July 2017, the President of the Republic decided to refer the Act back to the Sejm pursuant to Article 122 par 5 of the Constitution of the Republic of Poland¹⁵³ based on concerns as to its legality and in particular the potential role of the General Public Prosecutor, who also holds the office of the Minister of Justice, in the oversight and control of the Supreme Court, as proposed by the Draft Act.¹⁵⁴*
6. *This Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

7. The scope of this Opinion covers only the Articles of the Draft Act submitted for review, except for cases where the OSCE/ODIHR deemed it necessary to refer and analyse other provisions in the interests of comprehensiveness, including key provisions of the Constitution of the Republic of Poland¹⁵⁵ (hereinafter “the Constitution”). Thus limited, the Opinion does not constitute a full and comprehensive review of the Draft Act or of the entire legal and institutional framework regulating the judiciary in Poland.
8. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international standards, norms and practices as well as

¹⁵³ Article 122 par 5 of the Constitution states: “If the President of the Republic has not referred the bill to the Constitutional Tribunal in accordance with para. 3, he may refer the bill, with a justification, to the Sejm for its reconsideration. If the said bill is passed again by the Sejm by a three-fifths majority vote in the presence of at least half of the statutory number of Deputies, then, the President of the Republic shall sign it within 7 days and shall order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*). If the said bill has been passed by the Sejm, the President of the Republic shall have no right to refer it to the Constitutional Tribunal in accordance with the procedure prescribed in para. 3”.

¹⁵⁴ See the Statement by the President of the Republic of Poland Andrzej Duda of 24 July 2017 <<http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art.256.oswiadczenie-prezydenta-rp-ws-ustaw-dot-wymiaru-sprawiedliwosci.html>>.

¹⁵⁵ *Constitution of the Republic of Poland of 2 April 1997, as last amended in 2009,* <<http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>> (in Polish) and <<http://legislationline.org/documents/action/popup/id/16683/preview>> (in English).

- relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
9. The Opinion also makes reference to the findings and recommendations contained in the *OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland* published on 5 May 2017 (hereinafter “2017 OSCE/ODIHR Final Opinion”),¹⁵⁶ particularly where the provisions of the Draft Act make reference to the National Council of the Judiciary. The Draft Act in question was adopted by the Sejm on 12 July 2017 and by the Senate on 15 July 2017.¹⁵⁷ On 24 July 2017, the President of the Republic also decided to refer this Draft Act back to the Sejm pursuant to Article 122 par 5 of the Constitution of the Republic of Poland.
 10. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women¹⁵⁸ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality¹⁵⁹ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion’s analysis seeks to take into account the potentially different impact of the Draft Act on women and men, as judges or as lay persons.
 11. This Opinion is based on an unofficial English translation of certain provisions of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.
 12. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary in Poland in the future.

III. EXECUTIVE SUMMARY

13. The Draft Act under review makes some changes to the structure of the Supreme Court of Poland and introduces new provisions regarding the status, retirement and discipline of Supreme Court judges, among others. Upon entry into force, the Draft Act will lead to the compulsory retirement of all existing Supreme Court judges, thus amounting to a *de facto* dismissal of the entire Supreme Court bench, except those judges designated by the Minister of Justice (who is also the General Public Prosecutor of Poland), and approved by the President for retention. The Draft Act also regulates the recruitment of new replacement judges to the Supreme Court through a process controlled by the executive, that is, the Minister of Justice/General Public Prosecutor and the President of the Republic. The Draft Law further introduces provisions, which secure the control of the Minister of Justice/General Public Prosecutor over disciplinary proceedings initiated against judges of the Supreme Court.
14. Every State is entitled to reform its judicial system and the legal framework in which its courts and judges operate providing that it respects longstanding international human

¹⁵⁶ OSCE/ODIHR, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, <<http://www.legislationline.org/search/runSearch/1/type/2/country/10/topic/9>>.

¹⁵⁷ See <<http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1423>>.

¹⁵⁸ UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Poland ratified this Convention on 30 July 1980.

¹⁵⁹ See par 32 of the *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

rights standards and OSCE commitments. In this regard, the proposed provisions raise serious concerns with respect to key democratic principles, in particular the separation of powers and the independence of the judiciary, which are entrenched in international treaties ratified by Poland and the Constitution of Poland.

15. The provisions reviewed are inherently incompatible with international standards and OSCE commitments on the independence and impartiality of the judiciary and should not be adopted. This applies in particular to those provisions concerning the statutory retirement of existing Supreme Court judges, the appointment of replacement judges, and the enhanced involvement of the Minister of Justice/General Public Prosecutor in disciplinary proceedings brought against Supreme Court judges. Other provisions that provide the executive branch with a stronger role in judicial administration (see Sub-Section 3.1 *infra*) or perpetuating and entrenching inequality between women and men should also be re-considered (see Sub-Section 6.1 *infra*).
16. Since the Draft Act does not appear to have been consulted widely with key stakeholders, especially those who will be affected by it, such as members of the Supreme Court and of the judiciary, the OSCE/ODIHR would also like to reiterate that when initiating fundamental reforms of the judicial system, the judiciary and civil society should be consulted and should ideally play an active part in the process, as specified in key OSCE commitments (1990 Copenhagen Document, par 5.8 and 1991 Moscow Document, par 18.1). Any legislative proposals on judicial reform should be subject to inclusive, extensive and effective consultations at all stages of the law-making process, from the early stages of policy-making through the parliamentary stage of the discussions, up until the law is adopted.
17. In light of international human rights and rule of law standards and good practices, the OSCE/ODIHR advises that the Draft Act be rejected in its entirety and, in particular, in light of the following key recommendations:
 - A. to remove Articles 87-91, 95 and 96 regarding the compulsory retirement of existing Supreme Court judges, the procedure for their retention and the process for the appointment of replacement judges from the Transitional Provisions of the Draft Act; [par 109]
 - B. to delete all provisions conferring on the Minister of Justice a role in disciplinary proceedings against Supreme Court judges, in particular Articles 54 and 57 as well as pars 4 and 5 of Article 56 of the Draft Act, while also removing the President of the Supreme Court who directs the Disciplinary Chamber and the General Public Prosecutor from the list of persons who may request the institution of a disciplinary inquiry under Article 56 par 1 of the Draft Act; [par 55]
 - C. to remove Article 41 par 7, which foresees an additional allowance for judges sitting in the Disciplinary Chamber; [par 62]
 - D. to reconsider the extensive involvement of the President of the Republic and of the Minister of Justice in the adoption of the Rules of Procedure of the Supreme Court (Article 3 par 2), and instead retain the current system; [pars 37 and 41]
 - E. to retain the present mandatory retirement age of 70 years for both men and women judges, while removing provisions concerning possible extensions of service and those pertaining to an earlier optional retirement age for women Supreme Court judges, especially as the latter risk perpetuating and entrenching inequality; [pars 117 and 122] and

- F. to entrust the First President of the Supreme Court or some other office or institution independent of the executive with the power to approve external work or business activities of judges and clearly circumscribe the limitations imposed on retired judges. [pars 127-128]

Given the many references in the Draft Act to the National Council of the Judiciary, the OSCE/ODIHR also takes this opportunity to reiterate the findings and recommendations of its 2017 Final Opinion, as relevant, in particular its key recommendation to refrain from adopting the Draft Amendments to the 2011 Act on the National Council of the Judiciary, as of 17 July 2017 (see Sub-Section 7 *infra*).

Additional Recommendations, highlighted in bold, are included in the text of the Opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. The Role and Status of the Supreme Court of Poland

18. Article 10 of the Constitution of the Republic of Poland provides that “[t]he system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers”. Regarding the judiciary specifically, Article 175 of the Constitution provides that “the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts”. The Constitution further states that the Supreme Court is mandated to adjudicate upon the validity of elections to the Sejm and the Senate (Article 101 par 1) and of the President of the Republic (Article 129 par 1), to determine the validity of referenda (Article 125 par 4), and to exercise supervision over common and military courts regarding judgments and other activities specified by the Constitution and statutes (Article 183).
19. Article 176 par 2 of the Constitution specifies that the organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute. The rules concerning the organizational structure, the status, rights and duties of Supreme Court judges as well as their disciplinary responsibility, and the proceedings before the Supreme Court, are currently laid out in the 2002 Act on the Supreme Court (hereinafter “the 2002 Act”), which was last amended in 2016.¹⁶⁰ Any matter not regulated by the 2002 Act shall be governed by the Act on the Organisation of Common Courts¹⁶¹ (Article 8 of the 2002 Act).
20. The changes introduced by the Draft Act in comparison to the 2002 Act relate primarily to re-organizing the four existing Chambers of the Supreme Court¹⁶² into two Chambers dealing with public and private law respectively, as well as the establishment of a new

¹⁶⁰ For the Polish version of the 2002 Act on the Supreme Court as of 22 July 2016, see <<http://www.legislationline.org/documents/id/21175>>. For an English version of the same Act as of 8 February 2013, see <<http://www.legislationline.org/documents/id/21174>>.

¹⁶¹ For the Polish version of the 2001 Act on the Organisation of Common Courts, as well as latest amendments to the Act adopted on 12 July 2017, see <<http://dziennikustaw.gov.pl/Wyszukiwanie/tabid/114/Default.aspx?Title=Prawo%20ustroju%20s%C4%85d%C3%B3w%20powszechnych%20oraz%20niel%C3%B3rych%20innych%20ustaw>>. For an English version of the same Act as of 1 January 2016, see <http://www.legislationline.org/download/action/download/id/6754/file/Poland_Law_Common_Court_Organisation_2016_en.pdf>.

¹⁶² i.e., the Civil Chamber, Criminal Chamber, Labour Law, Social Security and Public Affairs Chamber and Military Chamber (see Article 3 par 1 of the 2002 Act).

special Disciplinary Chamber (Article 2 of the Draft Act). The latter shall be in charge of disciplinary proceedings for all legal professions including lawyers, legal counsellors, notaries, judges of military courts, judges of common courts, prosecutors and prosecutors of the Institute of National Remembrance (see Article 5 of the Draft Act) (see also par 74 *infra* regarding the existing system).

21. The Draft Act also confers on the Minister of Justice the possibility to appoint a representative who will have the power to initiate disciplinary proceedings against any Supreme Court judge (Article 54 of the Draft Act). It is worth emphasizing here that, since the entry into force of the new Law on the Prosecution Service on 4 March 2016, the functions of the General Public Prosecutor are exercised by the Minister of Justice (see Article 1 par 2 sentence 2 of the new Law).
22. Under the Draft Act, the executive branch will also have enhanced prerogatives; in particular, the executive will be able to determine the rules of procedure of the Supreme Court, including the total number of Supreme Court judges, the Chambers in which they serve and the division of cases between Chambers (Article 3 of the Draft Act). A number of new provisions further concern the conditions and procedure for becoming a Supreme Court judge, as well as the status, retirement and discipline of such judges. In particular, the Draft Act thus provides the Minister of Justice, who also holds the office of the General Public Prosecutor, with near-complete control over the Supreme Court.
23. The transitional provisions of the Draft Act introduce the compulsory retirement of all current judges of the Supreme Court. Exceptionally, judges proposed by the Minister of Justice/General Public Prosecutor and approved by the President of the Republic may remain in office, following a non-binding opinion provided by the National Council of the Judiciary. If former Supreme Court judges request to serve in other courts, such request would need to be approved by the Minister of Justice/General Public Prosecutor. The Draft Act also provides the procedures and modalities for recruiting new judges to the Supreme Court.
24. As a consequence of these modifications, the Draft Act introduces amendments to other acts, namely the Codes of Civil and of Criminal Procedure, the 1997 Act on the Organisation of Military Courts, the 1998 Act on the Institute of National Remembrance, the 2001 Act on the Organisation of Common Courts, the 2001 Code of Proceedings in Misdemeanour Cases, the 2011 Act on the National Council of the Judiciary, and the 2016 Law on Public Prosecution. It is worth noting that Article 10 par 1 of the Draft Act provides that “any matter not regulated by the Act shall be governed by the Act on the Organisation of Common Courts”.

2. International Standards and OSCE Commitments on the Independence of the Judiciary

25. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.¹⁶³ As stated in the OSCE Copenhagen

¹⁶³ See UN Human Rights Council, *Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers*, A/HRC/29/L.11, 30 June 2015, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11>, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards”.

Document 1990, “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

26. The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.¹⁶⁴ More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every person’s right to a fair trial i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary. This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources.
27. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. While every State is entitled to reform its judicial system and the legal framework in which its courts and judges operate, reform of the judiciary must respect longstanding international standards on the independence of the judiciary, the separation of powers and the rule of law, as well as the principle of equality between women and men.
28. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an “independent and impartial tribunal”, articulated in Article 10 of the Universal Declaration of Human Rights, which reflects customary international law, and subsequently incorporated into Article 14 of the *International Covenant on Civil and Political Rights*¹⁶⁵ (hereinafter “the ICCPR”). The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the *UN Basic Principles on the Independence of the Judiciary* (1985),¹⁶⁶ and have been further elaborated in the *Bangalore Principles of Judicial Conduct* (2002).¹⁶⁷ International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers. In its *General Comment No. 32 on Article 14 of the ICCPR*, the UN Human Rights Committee specifically provided that States should ensure “the actual independence of the judiciary from political interference by the executive branch and legislature” and “take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws, and establishing clear procedures and objective criteria for the appointment,

¹⁶⁴ See e.g., *OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems*, 6 December 2005, <<http://www.osce.org/mc/17347?download=true>>.

¹⁶⁵ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

¹⁶⁶ *UN Basic Principles on the Independence of the Judiciary*, endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>>.

¹⁶⁷ *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>. See also *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), prepared by the Judicial Group on Strengthening Judicial Integrity, <http://www.judicialintegritygroup.org/images/resources/documents/BP_Implementation%20Measures_Engl.pdf>.

remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.¹⁶⁸

29. As a member of the Council of Europe, Poland is also bound by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁶⁹ (hereinafter “the ECHR”), particularly its Article 6, which provides that everyone is entitled to a fair and public hearing “by an independent and impartial tribunal established by law”. To determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the European Court of Human Rights (hereinafter “ECtHR”) considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.¹⁷⁰
30. The Council of Europe’s Committee of Ministers also formulated important and fundamental judicial independence principles in its *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*,¹⁷¹ which among others expressly states that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers” (par 46) and that “[s]ecurity of tenure and irremovability are key elements of the independence of judges” (par 49). The Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),¹⁷² an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, and to the opinions and reports of the European Commission for Democracy through Law (hereinafter “Venice Commission”).¹⁷³
31. As a Member State of the European Union (EU), Poland is also bound by EU treaties and is obliged to respect the main values upon which the EU is based, including the rule

¹⁶⁸ UN Human Rights Committee, *General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, par 19,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en.

¹⁶⁹ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Poland ratified the ECHR on 19 January 1993.

¹⁷⁰ See European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom* (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78, <http://hudoc.echr.coe.int/eng?i=001-57456>. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38, <http://hudoc.echr.coe.int/eng?i=001-91144>; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), par 103, <http://hudoc.echr.coe.int/eng?i=001-115871>.

¹⁷¹ Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies,

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true).

¹⁷² Available at http://www.coe.int/t/dghl/cooperation/ccje/textes/avis_en.asp, particularly CCJE, *Opinion No. 3 (2002) on the Principles and Rules Governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002,

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true). See also CCJE, *Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 23 November 2001,

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3&direct=true); *Magna Carta of Judges*, 17 November 2010, par 13,

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true); and *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*, 16 October 2015,

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true).

¹⁷³ In particular European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments (2007)*, CDL-AD(2007)028-e, 22 June 2007, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e); *Report on the Independence of the Judicial System – Part I: The Independence of Judges (2010)*, CDL-AD(2010)004, 16 March 2010,

[http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)004.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx); and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

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of law, as stated in Article 2 of the Treaty on European Union.¹⁷⁴ Article 47 of the *EU Charter of Fundamental Rights*, which is binding on Poland, reflects the ECHR’s fair trial requirements pertaining to “an independent and impartial tribunal previously established by law”.

32. OSCE participating States have also committed to ensure “the independence of judges and the impartial operation of the public judicial service” as one of the elements of justice “which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings” (1990 Copenhagen Document).¹⁷⁵ In the 1991 Moscow Document,¹⁷⁶ participating States further committed to “respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service” (par 19.1) and to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice” (par 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the Ministerial Council also called upon OSCE participating States “to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary”, as a key element of strengthening the rule of law in the OSCE area.¹⁷⁷ Further and more detailed guidance is also provided by the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) (hereinafter “2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence”).¹⁷⁸
33. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, including, among others:
- the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;¹⁷⁹
 - the reports and other documents of the European Network of Councils for the Judiciary (ENCJ);¹⁸⁰
 - the *European Charter on the Statute for Judges* (1998);¹⁸¹ and
 - the opinions of the OSCE/ODIHR dealing with issues pertaining to judicial councils and the independence of the judiciary.¹⁸²

¹⁷⁴ See the consolidated versions of the Treaty on European Union, OJ C 326, 26 October 2012, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>>. Article 2 of the Treaty on European Union states: “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.”

¹⁷⁵ OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June-29 July 1990), pars 5 and 5.12, <<http://www.osce.org/fr/odihr/elections/14304>>.

¹⁷⁶ OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991), <<http://www.osce.org/fr/odihr/elections/14310>>.

¹⁷⁷ OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area*, Helsinki, 4-5 December 2008, <<http://www.osce.org/mc/35494>>.

¹⁷⁸ The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence, <<http://www.osce.org/odihr/kyivrec>>.

¹⁷⁹ Available at <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>.

¹⁸⁰ Available at <<https://www.encj.eu/>>.

¹⁸¹ *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAI/DOC (98)23], <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1766485&direct=true>>.

¹⁸² Available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>>.

34. Finally, given the role of the Supreme Court in electoral matters, it is worth emphasizing that the administration of democratic elections requires that election-administration bodies perform their duties in a professional and impartial manner, independent from any political interests, and that their acts and decisions be subject to judicial review.¹⁸³ As stated in the OSCE/ODIHR publication on *Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System* (2000),¹⁸⁴ decisions made by independent and impartial authorities, which are responsible for supervising the conduct of elections, shall be subject to appeal with an independent and impartial judicial authority (par A.5). For all types of election disputes, the decisions of the higher electoral body should be reviewable by the highest body of the judiciary whose ruling should then be final (par B.10). Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the entire electoral process.¹⁸⁵

3. The Internal Organization and Functioning of the Supreme Court of Poland

3.1. The Rules of Procedure of the Supreme Court

35. Article 3 par 2 of the Draft Act provides that “[t]he President of the Republic of Poland, upon the request of the Ministry of Justice and after consulting the National Council of the Judiciary, shall determine, by way of regulation, the rules of procedure of the Supreme Court”. By contrast, according to Article 3 par 2 the 2002 Act, the rules of procedure are currently adopted by the General Assembly of Justices of the Supreme Court. These rules encompass a number of key aspects of the Supreme Court’s functioning, including the total number of positions of Supreme Court judges and respective allocations per Chamber, the detailed division of cases between chambers and the rules of internal conduct, among others (Article 3 par 2 of the Draft Act).
36. Under Article 6 of the ECHR, everyone is entitled to a fair and public hearing “by an independent and impartial tribunal established by law”. According to the ECtHR’s case-law, the purpose of the term “established by law” in Article 6 is to ensure “that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament [...]. Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation”.¹⁸⁶ Moreover, in principle, the judiciary should be involved in all decisions which affect the practice of judicial functions (e.g., the organisation of courts, procedures, other legislation).¹⁸⁷ As stated by the Venice Commission, “[i]t would be desirable to avoid extensive involvement of the executive (Ministry of Justice) in adopting court rules for internal

¹⁸³ See e.g., UN Human Rights Committee, *General Comment No. 25 on Article 25 of the ICCPR*, 27 August 1996, par 20, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en>, which provides that: “An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant”.

¹⁸⁴ Available at <<http://www.osce.org/odihr/elections/17567>>.

¹⁸⁵ See *OSCE Existing Commitments for Democratic Elections in OSCE participating States* (2003), Section 4, <<http://www.osce.org/odihr/elections/13957>>. See also Venice Commission, *Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report*, 18-19 October 2002, par 68, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)>.

¹⁸⁶ ECtHR, *Frani v. Slovakia* (Application no. 8014/07, judgment of 21 June 2011), par 134, <<http://hudoc.echr.coe.int/eng?i=001-105236>>.

¹⁸⁷ *Op. cit.* footnote 20, par 9 (2010 CCJE Magna Carta of Judges).

operation and procedure and delegate the adoption of the internal regulation and rules of procedure to the courts, within the limits set by the laws”.¹⁸⁸ According to the *Commentary on the Bangalore Principles*, one of the minimum conditions for judicial independence, alongside security of tenure and financial security, is institutional independence, that is, independence with respect to matters of administration that relate directly to the exercise of the judicial function.¹⁸⁹

37. Consequently, the internal organization of the Supreme Court and all related administrative tasks should not be subject to external interference, nor should it be under the direction of the Minister of Justice/General Public Prosecutor or the President of the Republic. Indeed, the Supreme Court would appear to be better suited to lay down its own rules of internal conduct and the division of cases between chambers, if the aim is to guarantee the court’s efficient functioning (as stated in Article 3 par 2 of the Draft Act). **The legal drafters should therefore remove any provisions which mandate the involvement of the President of the Republic and of the Minister of Justice/General Public Prosecutor in the adoption of the Rules of Procedure of the Supreme Court.**
38. Regarding the determination of the total number of judicial positions in a court, the Venice Commission has considered that “the appropriate body to make the ultimate assessment on the number of Supreme Court judges and of the need for more judges is usually the legislator or the High Council of Justice, given that the choice depends, *inter alia*, on the available budgetary means, which cannot be determined by the Supreme Court judges. It is nevertheless highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...]”¹⁹⁰ As further elaborated in Sub-Section 8 *infra*, the proposed reforms were not subject to an open and meaningful process of consultation or debate, also with the members of the Supreme Court itself and the judiciary in general. While the Supreme Court has issued its own opinion on the Draft Act,¹⁹¹ based on its obligation to provide its opinion on draft laws concerning the judiciary found in Article 1 (3) of the 2002 Act, it is understood that the proposed Draft Act no longer includes such role for the Supreme Court (see par 136 *infra*).
39. The powers granted to the Minister of Justice/General Public Prosecutor and the President of the Republic in Article 3 par 2 of the Draft Act are extremely wide, and include the determination of the number of judges’ positions and thus potentially the power to reduce the number of judicial posts, which could force Supreme Court judges to vacate their offices. The executive should not have the possibility of single-handedly reducing the number of judges (see also comments on court re-organization and re-appointment/transfer of judges in pars 70-74 *infra*). In any case, security of tenure

¹⁸⁸ Venice Commission, *Opinion on the Draft Law on the Courts of Bosnia and Herzegovina*, CDL-AD(2013)015, 15 June 2013, par 70, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e)>.

¹⁸⁹ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), par 26, <https://www.unodc.org/unodc/en/corruption/tools_and_publications/commentary-on-the-bangalore-principles.html>, which states: “An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary’s liberty in adjudicating individual disputes and in upholding the law and values of the constitution.”

¹⁹⁰ Venice Commission, *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, 14 October 2014, par 19, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)031-e)>.

¹⁹¹ Available at <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2017.07.18_Opinia.o.projekcie.ustawy.o.Sadzie.Najwy%C5%BCszym_druk.1727.pdf>.

should be guaranteed and legislation should protect judges from any kind of potentially forced resignations. The Draft Act should reflect these principles, to ensure that it is not in conflict with international standards set out above, as well as with the provisions of the Constitution of Poland, particularly its Article 180 par 1 on the irremovability of judges and Article 183 par 3 on the appointment of the First President of the Supreme Court of Poland.

40. As to the determination of ‘rules of internal conduct’, it is not clear what such rules will cover. Hence, this power may be used to determine matters that are “immediately relevant to the adjudicative function” (e.g., the assignment of judges or sittings of the court), which means that the executive would be in a position to interfere in matters of judicial administration, thus potentially undermining judicial independence.¹⁹² Also, in principle, such rules of internal conduct should be drawn up by the judges themselves and should be self-regulatory instruments generated by the judiciary itself.¹⁹³ Having the executive determine such rules, as provided in the Draft Act, would appear to be an unnecessary step that affects the independence and the ability of the Supreme Court to govern itself.
41. In light of the foregoing, **it is recommended that the powers of the executive to determine the rules of procedure of the Supreme Court, including the number of Supreme Court judges and the rules of internal conduct, be removed from Article 3 of the Draft Act and to instead retain the current system.**

3.2. Case Allocation

42. The Supreme Court is headed by a First President and presidents of the Supreme Court shall direct the work of the respective chambers (Articles 13 and 14 of the Draft Act). Article 62 par 1 provides that cases shall be allocated and court formations decided by the President of the Supreme Court, who directs the work of the chamber in question. This provision should be read in conjunction with Articles 95 and 96, whereby the new presidents of each of the (new) chambers will effectively be proposed by the Minister of Justice/General Public Prosecutor and approved by the President following a non-binding recommendation by the National Council of the Judiciary (see Sub-Section 5 *infra* and Article 96 par 2 of the Draft Act). The Draft Act does not set out objective criteria for case allocation, apart from the rule that “cases shall be heard in the order of their receipt unless a special provision provides otherwise” (Article 62 par 2). This provision further states that “[i]n particular justified cases, the President of the Supreme Court may order a case to be heard out of order”. Such rules on case allocation are vague, and open to (potentially different) interpretation.
43. While the rule regarding the chronological order in which cases are heard may be justified to ensure a fair hearing within a reasonable time, this has to be balanced with other considerations such as the possibly urgent nature of a case, or its importance in political and social terms, as well as the more general principle of the good administration of justice.¹⁹⁴ In principle, the allocation of cases to individual judges

¹⁹² *Op. cit.* footnote 37, pars 26 (c) (2007 UNODC’s Commentary on the Bangalore Principles of Judicial Conduct).

¹⁹³ *Op. cit.* footnote 20, pars 48 (ii) and 49 (iii) (2002 CCJE Opinion No. 3 on the Principles and Rules Governing Judges’ Professional Conduct).

¹⁹⁴ See e.g., although in cases of constitutional justice, ECtHR, *Stjßmann v. Germany* (Application no. 20024/92, judgment of 16 September 1996), par 56, <<http://hudoc.echr.coe.int/eng?i=001-57999>>; and Venice Commission, *Opinion on the Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland*, CDL-AD(2016)001, 11 March 2016, pars 54-66, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e)>.

should be based on objective and transparent criteria that are established in advance to enhance transparency and avoid the unequal distribution of cases.¹⁹⁵ General rules of case allocation (including exceptions) should be formulated by law or by special regulations prepared on the basis of the law, e.g. court regulations laid down by the presidium or president of a court in consultation with the assembly of judges of that court.¹⁹⁶ Although it may not always be possible to establish a fully comprehensive abstract system that applies in all cases, exceptions should be justified and the criteria for decisions on case allocation taken by the court president or presidium shall be defined in advance on the basis of objective criteria.¹⁹⁷

4. Disciplinary Proceedings against Supreme Court Judges and other Legal Professionals

44. The Explanatory Statement to the Draft Act emphasizes that one of the most important elements of the Supreme Court reform is the creation of a new and autonomous Disciplinary Chamber within the Supreme Court to deal with disciplinary cases against Supreme Court judges and other legal professionals (see par 20 *infra*). It further states that such changes are necessary to enhance impartiality and effectiveness in disciplinary matters and avoid the risk of professional corporatism. In that respect, it is worth referring to the latest findings from the Council of Europe's Group of States against Corruption (GRECO) regarding corruption prevention in respect of judges in Poland from March 2017,¹⁹⁸ including aspects relating to discipline. In its report, GRECO noted that all recommendations concerning corruption prevention within the judiciary have been implemented satisfactorily, except for recommendation ix which it considered as only partly implemented given the need to improve scrutiny of asset declarations submitted by judges.

4.1. The Minister of Justice/General Public Prosecutor's Involvement in Disciplinary Proceedings against Supreme Court Judges

45. According to the current system, a Disciplinary Proceedings Representative of the Supreme Court (hereinafter "Supreme Court Disciplinary Representative") is elected by the Board of the Supreme Court for a term of four years. After a preliminary examination of the circumstances upon the request of the First President, of the Board or on his/her own initiative, the Supreme Court Disciplinary Representative may, if there are sufficient grounds to justify this step, decide to institute disciplinary proceedings (Article 54 and 56 of the 2002 Act). The disciplinary case is then heard by the disciplinary court of first instance (Supreme Court bench of three Supreme Court judges). In case of a refusal to institute disciplinary proceedings, this decision may be challenged by the requesting body before the disciplinary court of first instance and the

¹⁹⁵ *Op. cit.* footnote 21, pars 80-81 (2010 Venice Commission's Report on the Independence of the Judicial System).

¹⁹⁶ *ibid.*

¹⁹⁷ Venice Commission, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, 19 March 2012, par 91, <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)001-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx)>.

¹⁹⁸ Council of Europe's Group of States against Corruption (GRECO), *Second Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Poland*, 28 March 2017, <<http://www.coe.int/en/web/greco/evaluations/round-4>>.

- Disciplinary Representative is then bound by the court's instructions regarding further procedure (Article 56 pars 4-5 of the 2002 Act).
46. The Draft Act establishes a new standard disciplinary procedure for Supreme Court judges and makes express provision for the Minister of Justice/General Public Prosecutor to be directly involved in the process in three ways.
 47. First, disciplinary proceedings against a Supreme Court judge may now be initiated by the Supreme Court Disciplinary Representative¹⁹⁹ not only on his or her own initiative or at the request of the First President of the Supreme Court or of the Board, but also upon the request of other authorities including the President of the Supreme Court who directs the work of the Disciplinary Chamber, the General Public Prosecutor or the National Public Prosecutor (Article 56 par 1). As mentioned in par 21 *supra*, the functions of the General Public Prosecutor are exercised by the Minister of Justice, which in the case of this Draft Act not only creates severe issues of conflict of interest, but also undermines the principle of separation of powers (see par 51 *infra*).
 48. Second, the Draft Act provides for near-complete control of the Minister of Justice/General Public Prosecutor over disciplinary proceedings of Supreme Court judges by empowering the Minister to appoint a Disciplinary Proceedings Representative of the Minister of Justice (hereinafter "Ministerial Representative") to conduct a specific case concerning a Supreme Court judge (Article 54 par 1). The appointment of the Ministerial Representative is tantamount to demanding an inquiry into whether a disciplinary offence has been committed by a particular judge (Article 54 par 4) and excludes the participation of any other disciplinary proceedings representative in the case in question (Article 54 par 1). The Ministerial Representative may institute disciplinary proceedings against a Supreme Court judge at the request of the Minister of Justice/General Public Prosecutor or may accede to disciplinary proceedings that are already pending (Article 54 par 3), and would then take over the case previously handled by another disciplinary representative (Article 54 par 1). The appointment of the Ministerial Representative expires with the decision to refuse to institute, or to discontinue, disciplinary proceedings, but this does not prevent the Minister from re-appointing a Ministerial Representative in the same matter (Article 54 par 5).
 49. Third, where the Supreme Court Disciplinary Representative (or the Ministerial Representative) refuses to institute disciplinary proceedings because he or she believes that there are no sufficient grounds to do so, a copy of the decision refusing to institute proceedings must be delivered to the Minister of Justice/General Public Prosecutor, who is entitled to raise an objection (Articles 56 par 4 and 57 par 2). The Draft Act states that if such an objection is raised, then this shall mean that the Disciplinary Representative is obliged to institute disciplinary proceedings after all; the Minister's instructions concerning the further course of proceedings shall be binding on the respective Disciplinary Representative (Articles 56 par 4 and 57 par 2). The Draft Act also makes similar provision for ministerial involvement at a later stage in disciplinary proceedings: if the Supreme Court Disciplinary Representative (or the Ministerial Representative) does not find sufficient grounds for requesting that the disciplinary case be heard, he or she shall issue a decision to discontinue disciplinary proceedings, which must be delivered to the defendant and the Minister. In cases involving the Supreme Court

¹⁹⁹ The Supreme Court Disciplinary Representative is elected by the Board of the Supreme Court, as also done under the 2002 Act (see Article 53 of the Draft Act).

Disciplinary Representative, the Minister is entitled to raise an objection which is then tantamount to an obligation to continue disciplinary proceedings (Articles 56 par 5). In cases where the Ministerial Representative is in charge, the Minister of Justice/General Public Prosecutor (and the defendant) may appeal to the disciplinary court (Article 57 par 6).

50. These articles of the Draft Act providing for direct ministerial involvement in the disciplinary proceedings of Supreme Court judges seriously undermine judicial independence. International standards and OSCE commitments require that judges shall not be subjected to undue interference by the executive branch and that they shall be protected against improper pressure, which is capable of influencing them in the exercise of their independent judgment in their respective cases.²⁰⁰ Disciplinary proceedings or the threat of such proceedings may be misused by placing improper pressure on the judges concerned.²⁰¹ The *2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence* state that “[b]odies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline. Any kind of control by the executive branch over judicial councils or bodies entrusted with discipline is to be avoided”.²⁰² Further, international recommendations suggest the establishment of an independent body to initiate disciplinary proceedings, which should be separate from the independent body or court that will decide on the disciplinary liability of a judge.²⁰³ In its opinions, the Venice Commission has also stated that provisions granting a minister of justice the right to initiate disciplinary proceedings against judges are not in line with principles of the independence of the judiciary and the separation of powers.²⁰⁴ Moreover, as further noted by the Venice Commission, it is essential that “dismissal due to offences committed by the post holder be investigated by an independent body and not by a political organ as the Parliament or the President”.²⁰⁵ This statement applies *mutatis mutandis* to the Minister of Justice/General Public Prosecutor.
51. In light of the above, allowing the Minister of Justice to initiate disciplinary proceedings against Supreme Court judges is inherently incompatible with the requirements of judicial independence. This is even further exacerbated by the fact that the Minister of Justice is also the General Public Prosecutor and may in fact be party to the proceedings before the Supreme Court, which in addition to undermining the principle of separation of powers would also amount to a conflict of interest. In illustrative terms, this would create a situation where the Government, a potential party to proceedings before the Supreme Court, could initiate a procedure against judges of this very same court. Moreover, enabling the Minister of Justice/General Public Prosecutor to object to decisions not to institute disciplinary proceedings, or to discontinue them where they

²⁰⁰ See e.g., Court of Justice of the European Union, *TDC A/S v. Erhvervsstyrelsen*, Case C-222/13, 9 October 2014, pars 29-32, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=eli:ECLI:EU:C:2014:2265>>, where the Court held that for a court to be independent, it should be protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. See also e.g., *op. cit.* footnote 26, par 1 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

²⁰¹ See e.g., European Association of Judges, *Resolution of 4 September 2011*, par 8, <http://zdruzenie.sk/wp-content/uploads/2016/10/resolution_slovakia_from_istanbul_-_4th_september_2011.pdf>.

²⁰² *Op. cit.* footnote 26, par 9 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

²⁰³ See *op. cit.* footnote 19, par 69 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities). See also *op. cit.* footnote 20, pars 68, 69 and 77 (2002 CCJE Opinion No. 3 on the Principles and Rules Governing Judges’ Professional Conduct); and *ibid.* par 5 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

²⁰⁴ Venice Commission, *Opinion on the Draft Laws on Courts and on Rights and Duties of Judges and on the Judicial Council of Montenegro*, CDL-AD(2014)038, 15 December 2014, par 68, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)038-e)>.

²⁰⁵ *Op. cit.* footnote 38, par 72 (2014 Venice Commission-DHR-DGI Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia).

have started, and allowing him/her to effectively reverse those decisions and take over the disciplinary proceedings, could potentially put pressure on individual judges, who may then feel obliged to follow the position of the executive power when adjudicating cases. As the European Commission has observed, “[t]he mere threat of disciplinary proceedings being initiated pursuant to the instructions of the Minister of Justice would directly affect the independence of judges of the Supreme Court”.²⁰⁶

52. This undermining of judicial independence is compounded by the fact that the Minister can re-appoint a ministerial Disciplinary Proceedings Representative even after the previous Representative has taken the decision not to institute, or to discontinue proceedings, which means that the Minister may potentially subject an individual judge to constant investigations in respect of the same matter. The *UN Basic Principles on the Independence of the Judiciary* state that matters of discipline, suspension or removal “shall be processed expeditiously and fairly under an appropriate procedure” (Principle 17). The Minister’s power to order repeated (and endless) investigation of the same judge in respect of the same matter is incompatible with this principle. Additionally, the fact that the discretion granted to the Minister is expressed in unfettered terms is also contrary to the rule of law.²⁰⁷ Legislation should always indicate with sufficient clarity the scope and manner of the exercise of competent authorities’ discretion to give individuals adequate protection against arbitrary interference,²⁰⁸ which does not seem to be the case here as there is no limit to the Minister’s above-mentioned power.
53. While of much less significance than the foregoing issues, there appears to be a further inconsistency with OSCE commitments, namely the ability of the President of the Supreme Court who directs the Disciplinary Chamber to request the Supreme Court Disciplinary Representative to institute an inquiry into whether disciplinary proceedings should be initiated (Article 56 par 1). Providing the Chamber President with such powers is not appropriate in view of the *2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence*, which state that “bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them”.²⁰⁹
54. **In light of the new rules on disciplinary proceedings, and their adverse effects on judicial independence, it is recommended to remove all references providing the Minister of Justice, who is at the same time the General Public Prosecutor, with a special role in disciplinary proceedings against Supreme Court judges, particularly Articles 54 and 57 as well as pars 4 and 5 of Article 56 of the Draft Act. Instead, it would be advisable to retain the current wording of Article 56 of the 2002 Act. The President of the Supreme Court who directs the Disciplinary Chamber and the General Public Prosecutor (who is also the Minister of Justice) should further be removed from the list of persons who may initiate disciplinary proceedings against Supreme Court judges in Article 56 par 1.**

²⁰⁶ European Commission, *Commission Recommendation regarding the Rule of Law in Poland*, C(2017) 5320 final, 26 July 2017, par 42, <http://ec.europa.eu/newsroom/document.cfm?doc_id=46116>.

²⁰⁷ See e.g., ECtHR, *Segerstedt-Wiberg and Others v. Sweden* (Application no. 62332/00, judgment of 6 June 2006), par 76, <<http://hudoc.echr.coe.int/eng?i=001-75591>>.

²⁰⁸ *ibid.*

²⁰⁹ *Op. cit.* footnote 26, par 26 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

4.2. The Adjudication of a Disciplinary Case against a Supreme Court Judge

55. Article 52 of the Draft Act provides that disciplinary cases against Supreme Court Judges shall be heard at first instance before one judge of the Disciplinary Chamber, with the exception of wilful offenses prosecuted by the public prosecution, which shall be heard by three judges of the Disciplinary Chamber. In the second instance, all cases will be heard by three judges of the Disciplinary Chamber. It is worth noting that pending the date on which the last vacant Supreme Court judge position is filled, the tasks and competences of the President of the Disciplinary Chamber will be exercised by a Supreme Court judge proposed by the Minister of Justice (see Sub-Section 5 *infra*) and designated by the President of the Republic of Poland (Article 96 par 3). Moreover, pursuant to Article 41 par 7 of the Draft Act, judges of the Disciplinary Chamber are entitled to an additional allowance amounting to 40% of their basic salaries and their functional allowances combined.
56. Contrary to the allegation made in the Explanatory Statement that the right to a fair and public hearing is not applicable to disciplinary proceedings, disciplinary proceedings against judges that may lead to their dismissal do fall within the ambit of Article 14 par 1 of the ICCPR and Article 6 par 1 of the ECHR (civil limb).²¹⁰ Indeed, in the case of *Olujić v. Croatia* (2009), the ECtHR has expressly held that Article 6 par 1 of the ECHR applies to disciplinary proceedings initiated against a judge under its civil head, for the entire procedure including appeal.²¹¹ It thereby adopted a broader approach than in the *Pellegrin v. France* (1999) case cited in the Explanatory Statement. The UN Special Rapporteur on the Independence of Judges and Lawyers has also expressly stated that the question of whether a particular behaviour or conduct constitutes a cause for sanction must be determined by an independent and impartial body pursuant to fair proceedings, in accordance with Article 14 of the ICCPR.²¹²
57. Fair trial guarantees are thus applicable to disciplinary proceedings against judges, including the right to a fair and public hearing before an independent and impartial tribunal established by law. This also means, in particular, that the judge subjected to the disciplinary proceedings shall be present or represented at the disciplinary hearing²¹³ and assisted by a lawyer of his or her choice.²¹⁴ Moreover, the decision of the disciplinary court should be motivated and state the essential findings, evidence and legal reasoning.²¹⁵
58. The involvement of executive organs in disciplinary proceedings against judges, possibly leading to their early dismissal, severely politicizes this process, and greatly

²¹⁰ See e.g. UN Human Rights Committee, *Casanovas v France*, Communication 441/1990, UN Doc CCPR/C/51/D/441/1990 (1994), par 5.2; and *Perterer v Austria*, Communication 1015/2001, UN Doc CCPR/C/81/D/1015/2001 (2004), par 9.2. See also *op. cit.* footnote 14, Principle 17 (1985 UN Basic Principles), which states that “[t]he judge shall have the right to a fair hearing”; and *op. cit.* footnote 18, pars 91 and 95 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

²¹¹ *Op. cit.* footnote 18, par 43 (*Olujić v. Croatia*, ECtHR judgment of 5 May 2009); and *ibid.* pars 87-95 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013).

²¹² UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on Judicial Accountability*, A/HRC/26/32, 28 April 2014, par 79, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A_HRC_26_32_ENG.DOC>. See also International Commission of Jurists, *Practitioners Guide No. 13 on Judicial Accountability* (2016), <<https://www.icj.org/icj-launches-new-practitioners-guide-on-judicial-accountability/>>.

²¹³ See *op. cit.* footnote 29, par 5.1 (1998 European Charter on the Statute for Judges), which states that “the judge proceeded against must be entitled to representation”. See also UN Human Rights Committee, *Aarela and Nakkalajarvi v. Finland*, Communication 779/1997, UN Doc CCPR/C/73/D/779/1997 (2001), par 7.4.

²¹⁴ See e.g., UN Human Rights Committee, *Kulov v. Kyrgyzstan*, Communication 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), par 8.7.

²¹⁵ See *op. cit.* footnote 26, par 26 (2010 OSCE/ODIHR Kyiv Recommendations), which states that “[t]he decisions regarding judicial discipline shall provide reasons”. See also e.g. in the case of a decision on disciplinary responsibility taken by a Bar Council, ECtHR, *H. v. Belgium* (Application no. 8950/80, judgment of 30 November 1987), par 53, <<http://hudoc.echr.coe.int/eng/?i=001-57501>>.

jeopardizes the judges' independence. Also, the modalities of appointing replacement Supreme Court judges set out in Articles 95 and 96 confer a decisive role on the executive, and place into question the independence of all Supreme Court judges (for a more extensive discussion on this point, see Sub-Section 5.2 *infra*). Hence, the new Chambers, whatever their composition in a given case, including disciplinary cases, cannot be considered to be an 'independent and impartial tribunal' under Article 14 par 1 of the ICCPR and Article 6 par 1 of the ECHR. This deficiency cannot be corrected on appeal since appeals are heard on second instance by three Supreme Court judges of the same Chamber. The Draft Act also does not specify that the judges sitting on the appeal shall be different from the judge(s) who heard the case in first instance, which would undermine their impartiality.²¹⁶

59. In addition, the principle of equality of arms, which applies in principle to civil as well as to criminal cases,²¹⁷ calls for a "fair balance" between the parties, requiring that each party should be afforded a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent.²¹⁸ The fact that the body in charge of the preliminary examination of the case is subject to binding instructions by the Minister of Justice (Articles 56 and 57) from the very outset jeopardizes the legitimacy of the proceedings, and the actual equality of the parties at the time of adjudication.
60. **Given the modalities for appointing judges to the Disciplinary Chamber, the status of these judges and the great influence of the Minister of Justice on disciplinary proceedings during the preliminary phase, the adjudication of disciplinary cases against Supreme Court judges is not compliant with relevant fair trial requirements set out in Article 6 par 1 of the ECHR and Article 14 par 1 of the ICCPR. This deficiency cannot be cured on appeal in light of the composition of the competent courts of second instance.**

4.3. The Additional Allowance for Judges of the Disciplinary Chamber

61. Article 41 of the Draft Act provides that a judge who sits on the Disciplinary Chamber will be entitled to an additional allowance amounting to 40% of his or her basic salary and his or her functional allowance combined. The Explanatory Statement to the Draft Act specifies that the higher remuneration for judges of the Disciplinary Chamber is justified due to the scope and magnitude of the tasks that they perform, as well as specific limitations that prevent them from engaging in any other occupation or income-earning activity while sitting on the Disciplinary Chamber, unless the Minister of Justice consents to this (Article 37 par 11). In this context, it is unclear why stricter limitations should apply to the judges of the Disciplinary Chamber as opposed to other judges of the Supreme Court.
62. The level of remuneration of judges should be guaranteed by law and be commensurate with their responsibilities and scope of duties, and not subject to any discretionary

²¹⁶ See e.g., ECtHR, *Driza v. Albania* (Application no. 33771/02, judgment of 13 November 2007), pars 78-83, <<http://hudoc.echr.coe.int/eng?i=001-83245>>; and *Peruš v. Slovenia* (Application no. 35016/05, judgment of 27 September 2012), pars 38-39, <<http://hudoc.echr.coe.int/eng?i=001-113520>>, where the same judges participated in different stages of a civil case.

²¹⁷ See e.g., ECtHR, *Feldbrugge v. the Netherlands* (Application no. 8562/79, judgment of 29 May 1986), par 44, <<http://hudoc.echr.coe.int/eng?i=001-57486>>.

²¹⁸ See, for reference, ECtHR, *Werner v. Austria* (Application no. 21835/93, judgment of 24 November 1997), par 63, <<http://hudoc.echr.coe.int/eng?i=001-58114>>.

application.²¹⁹ In the view of the CCJE, all judges of the same seniority should receive the same remuneration, with the exception of any specific additional remuneration for special duties or additional burdens (e.g., night duty).²²⁰ Therefore, any additional salary granted solely by virtue of a judge's sitting in the Disciplinary Chamber is not justified, because the specifics of the profession and the burden of responsibilities appears to be of equal weight for all Supreme Court judges.²²¹ Moreover, the fact that the Minister of Justice enjoys full discretion to nominate judges sitting on the Disciplinary Chamber (who are then approved by the President), who are then entitled to a higher salary, is problematic, as noted in Sub-Sections 5.1 and 5.2 *infra*. Also, this new remuneration system could potentially create some tensions, thus running the risk that certain Supreme Court (and other) judges may make every effort to be appointed or transferred as judges of the Disciplinary Chamber to get a higher level of remuneration, thus potentially compromising their judicial independence.²²² If appointment to the Disciplinary Chamber was to be considered as some form of promotion, then it should be subject to the same strict requirements as for appointments, i.e., be based on objective, pre-established, and clearly defined criteria and following the selection by an independent authority (see par 79 *infra*). **Based on the foregoing, the legal drafters should remove Article 41 par 7 from the Draft Act.**

5. The Compulsory Retirement of All Existing Supreme Court Judges, Procedure for Retention and the Appointment of New Judges of the Supreme Court

63. Article 87 of the Draft Act provides that on the day of its entry into force, Supreme Court judges appointed pursuant to previous regulations shall be retired. This shall not apply for judges who have been approved for retention by the President of Poland upon the proposal of the Minister of Justice/General Public Prosecutor and following a non-binding opinion of the National Council of the Judiciary (Article 88). The criteria that shall guide the Minister in this process are stated in Article 88 par 1 of the Draft Act i.e., the need to implement the organisational changes to the Supreme Court provided by the Draft Act and to preserve the continuity of its work. The Minister of Justice/General Public Prosecutor shall also designate the Supreme Court Chamber where the respective judge will perform his or her duties, having regard to the position previously held by that judge and the needs of the Supreme Court in relation to cases heard (Article 88 par 1).
64. A Supreme Court judge who has been compulsorily retired is entitled to his or her Supreme Court judge's salary until the age of 65 (Article 89 par 1). He or she can also request that the Minister of Justice/General Public Prosecutor transfer him or her to a position at a common, military or administrative court (Article 89 par 2), where he or she may use the title "former judge of the Supreme Court" and is entitled to a Supreme

²¹⁹ *Op. cit.* footnote 19, par 54 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); and *op. cit.* footnote 21, par 51 (2010 Venice Commission's Report on the Independence of the Judicial System).

²²⁰ CCJE, *Opinion No. 15 on the Specialisation of Judges*, 13 November 2012, pars 56-57, <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2004049&Site=COE&direct=true>>.

²²¹ *ibid.* par 57, regarding different levels of remuneration for judges solely by virtue of a judge's specialization.

²²² See, for instance, as a comparison (although concerning different retirement ages applicable to the Supreme Court judges and the high specialized courts), Venice Commission, *Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine*, CDL-AD(2013)034, 10 December 2013, par 30, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)034-e)>.

Court judge's salary. The Minister shall have full discretion as to whether or not to grant this request, bearing in mind the rational use of judiciary personnel and the needs related to the workload of individual courts (Article 89 par 2).

65. Article 95 of the Draft Act sets out a special process to fill vacancies in the Supreme Court after the compulsory retirement of judges not designated for retention by the Minister of Justice/General Public Prosecutor and approved by the President (see Sub-Section 5.2 *infra*).

5.1. The Compulsory Retirement of All Existing Supreme Court Judges and the Procedure for their Exceptional Retention

5.1.1. Ex Lege Compulsory Retirement

66. The overall effect of the above-mentioned provisions is that all Supreme Court judges are automatically retired by law on the day when the Act enters into force, except those designated by the Minister of Justice/General Public Prosecutor and approved by the President for retention. The National Council of the Judiciary shall provide its opinion on the proposed retention of certain judges, but its views are of an advisory nature, and not determinative.
67. In this context, it should be noted that security of tenure and irremovability of judges are integral parts of the guarantee of judicial independence.²²³ Judges must have guaranteed tenure until they reach the retirement age or the expiry of their term of office, where this exists.²²⁴ Exceptions to this rule need to be limited to specific cases that are clearly set out in law. In particular, decisions to remove judges should not be taken lightly, or in a summary manner. Rather, judges may only be removed in exceptional cases involving, e.g., incapacity,²²⁵ misbehavior that renders them unfit to discharge their duties,²²⁶ serious grounds of misconduct or incompetence,²²⁷ or serious breaches of disciplinary or criminal provisions established by law.²²⁸ To ensure the independence of the judiciary, any decisions on removal must be adopted by an independent authority or a court through procedures containing all the guarantees of a fair trial and providing the judge with the right to challenge the decision and ensuing sanction (see also Sub-Section 4 on Disciplinary Proceedings *supra*).²²⁹ Cases of early retirement should be possible only at the request of the judge concerned or on medical grounds²³⁰ and the body taking decisions on retirement should not be able to exert any discretion in this regard.²³¹

²²³ *Op. cit.* footnote 19, par 49 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

²²⁴ *ibid.* See also *op. cit.* footnote 14, Principle 12 (1985 UN Basic Principles on the Independence of the Judiciary). See also *op. cit.* footnote 20, pars 57 and 60 (2001 CCJE Opinion No. 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges). The 1998 European Charter on the Statute for Judges affirms that this principle extends to the appointment or assignment to a different office or location without consent (other than in cases of court re-organisation or where such actions are only temporary). See also *op. cit.* footnote 24, par 19.2 (v) (OSCE 1991 Moscow Document), which includes a specific commitment to guarantee the tenure of judges.

²²⁵ *ibid.* Principle 18 (UN Basic Principles on the Independence of the Judiciary).

²²⁶ *ibid.*

²²⁷ *Op. cit.* footnote 16, par 20 (UNHRC General Comment No. 32).

²²⁸ *Op. cit.* footnote 14, par 50 (CoE Recommendation CM/Rec(2010)12).

²²⁹ *Op. cit.* footnote 14, Principles 17-20 (1985 UN Basic Principles on the Independence of the Judiciary); *op. cit.* footnote 20, pars 59-60 (2001 CCJE Opinion No. 1 on Standards concerning the Independence of the Judiciary and the Irremovability of Judges); and *op. cit.* footnote 16, par 20 (UNHRC General Comment No. 32).

²³⁰ *Op. cit.* footnote 19, par 50 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

²³¹ See e.g., *op. cit.* footnote 70, par 52 (2013 Venice Commission's Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine).

68. The principle of security of tenure also applies where society demands the replacement of large numbers of judges, to improve the integrity and efficiency of the court system.²³² However, according to the *UN Basic Principles on the Independence of the Judiciary*, also in these cases, the removal of judges may only occur based on grounds of incapacity or serious misconduct established through fair procedures.²³³ As acknowledged by the OSCE/ODIHR and the Venice Commission in relevant opinions, extraordinary measures may be necessary and justified on an exceptional basis to remedy corruption and incompetence among judges, for instance where there had been considerable political influence on judges' appointments in previous periods.²³⁴ However, such cases should be regarded as wholly exceptional and should be made subject to extremely stringent safeguards to protect judges fit to occupy their positions.²³⁵
69. Also, when using its legislative power to design the future organisation and functioning of the judiciary, the Parliament should refrain from adopting measures which would jeopardise the security of tenure and irremovability of judges, and thus the independence of the judiciary.²³⁶ A new parliamentary majority and government should not question the appointment or tenure of judges who were previously appointed in a proper manner, in conformity with the applicable norms related to the independence of judiciary as previously defined.²³⁷
70. In light of the above, mass dismissals or early retirement of all judges of a certain court are inherently incompatible with the principle of security of judicial tenure and irremovability of judges. Only extraordinary circumstances of reform of a court, for instance where a court is closed or its competence or territorial jurisdiction is considerably reduced – which would be extremely rare in the case of the supreme court of a country – may render some judicial positions obsolete; however, this does not appear to be the case in this Draft Act (see par 74 *infra*). Even in these extraordinary cases where a court is abolished or substantially restructured, all existing members of that court should in principle be re-appointed to the replacement court (if applicable), or appointed to another judicial office of equivalent status and tenure; where this does not exist, the judge concerned should be provided with full compensation for the loss of

²³² See UN Special Rapporteur on the Independence of Judges and Lawyers, *Leandro Despouy, 2009 Report*, UN Doc A/HRC/11/41, 24 March 2009, par 64, <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/11/41&Lang=E>>, emphasizing that this type of removal of judges may only occur in accordance with the UN Basic Principles on the Independence of the Judiciary, that is to say based on grounds of incapacity or serious misconduct established through fair procedures. See also UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, *Report on Guarantees of Non-Recurrence*, UN Doc A/HRC/30/42, 7 September 2015, pars 55 and 107, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/42>.

²³³ *Op. cit.* footnote 14, Principles 17-20 (1985 UN Basic Principles).

²³⁴ OSCE/ODIHR, *Opinion on the Law of Ukraine on the Judiciary and Status of Judges*, 30 June 2017, par 50, <http://legislationline.org/download/action/download/id/7363/file/298_JUD_UKR_30June2017_en.pdf>. See also Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law, *Joint Opinion on the Law on the Judiciary and the Status of Judges and Amendments to the Law on the High Council of Justice of Ukraine*, adopted by the Venice Commission at its 102nd Plenary Session (Venice, 20-21 March 2015), CDL-AD(2015)007, pars 72-73, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)007-e)>.

²³⁵ *ibid.*, par 74.

²³⁶ *Op. cit.* footnote 20, par 43 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy). See also Venice Commission, *Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia*, CDL-AD(2013)007, 11 March 2013, par 71, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)007-e)>.

²³⁷ *ibid.* par 44 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

office.²³⁸ Also in such cases, an appointment to another post shall be subject to appeal before an independent authority, which will investigate the legitimacy of the transfer.²³⁹

71. Contrary to the above-mentioned standards and good practices, the Draft Act treats the early retirement of Supreme Court judges as the rule, and the retention or re-appointment to the “re-structured” Supreme Court as the exception. This approach would not appear to be justified by the international law principles set out above. Rather, an individual approach should be followed whereby, if the number of judicial positions at the Supreme Court is indeed considerably reduced due to court re-structuring initiated by decision or recommendation of an independent judicial body, a transfer to judicial posts at the highest possible level should be offered to the judges concerned. In any case, the procedure for re-appointment or transfer should be transparent and based on clear and objective criteria (see Sub-Section 5.2 *infra*).
72. The Explanatory Statement to the Draft Act justifies the mass dismissals by referring to Article 180 par 5 of the Constitution of the Republic of Poland which states that “[w]here there has been a re-organization of the court system or changes to the boundaries of court districts, a judge may be transferred to another court or retired with maintenance of full remuneration”. As set out in the Explanatory Statement, the re-organization of the Supreme Court constitutes one of the cases mentioned in the Constitution that will justify the early retirement of Supreme Court judges under Article 87 of the Draft Act.
73. However, while a transfer of judges or other equivalent measures may in principle be justified in exceptional cases of *legitimate* institutional re-organization,²⁴⁰ this usually amounts to the closure of a court or its reduction in competence or territorial jurisdiction to such an extent that the employment of a judge is no longer possible or justifiable.²⁴¹ This is the same *rationale* that should underpin the cited Article 180 par 5 of the Constitution and it is difficult to accept any interpretation which would suggest that the Constitution itself warrants mass early retirements or dismissals of judges of the Supreme Court, especially since paragraph 1 of the very same Article 180 of the Constitution lays down the principle of irremovability of judges.
74. The current situation does not, however, amount to a closure of the court or its complete re-structuring, as the Supreme Court will continue to operate and its competence and overall composition is not being reduced. Although the Draft Act does re-organize the Supreme Court Chambers, the Explanatory Statement specifically mentions that matters falling within the jurisdiction of the Labour Law, Social Security and Public Affairs Chamber could easily be split between the Public Law and Private Law Chambers introduced by the Draft Act. The Supreme Court already hears disciplinary cases against Supreme Court judges in first and second instances (Article 53 of the 2002 Act), second instance disciplinary cases against judges of common courts and of military courts,²⁴² and cassation hearings in disciplinary cases against lawyers, legal counsellors, notaries

²³⁸ See e.g., *op. cit.* footnote 15, par 16.3 (2010 Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct).

²³⁹ *Op. cit.* footnote 19, par 50 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities) and *op. cit.* footnote 29, par 3.4 (1998 European Charter of the Statute for Judges).

²⁴⁰ See *op. cit.* footnote 21, par 80 (2016 Venice Commission’s Rule of Law Checklist).

²⁴¹ See e.g., *op. cit.* footnote 45, par 77 (2012 Venice Commission’s Opinion on Two Acts on the Legal Status and Remuneration of Judges and Organisation and Administration of Courts of Hungary).

²⁴² See Article 110 par 1 point 2 of the Act on the Organisation of Common Courts and Article 39a par 1 point 2 of the Act on Military Courts.

and prosecutors.²⁴³ This shows that, in essence, the material scope of the work of the Supreme Court will largely remain the same, so that the early retirement of the majority or all of its judges would not appear to be necessary or justified. Moreover, the vast majority of the provisions of the 2002 Act are retained in the Draft Act as they are, or only in a slightly amended fashion.²⁴⁴

75. Furthermore, where draft amendments affect rights ensured or legitimate expectations based on legislation that existed before the amendments took effect, as is the case here, only compelling reasons shall justify such amendments, all the more if they directly interfere with the administration of justice and the independence of the judiciary.²⁴⁵ The Explanatory Statement does not reveal a situation that would be so dire or so urgent as to justify the need for early retirement of all or the majority of the Supreme Court judges. Such a mass replacement of judges sitting on the highest court of Poland is a radical step, with serious consequences not only for the individual judges, but for the continuity of the work of the Supreme Court and the credibility of the justice system as a whole. Moreover, implementing such extreme measures in the absence of compelling reasons to do so would raise serious concerns in relation to the executive's and legislative's respect for the existing composition and work of the Supreme Court. If the two other powers are seen as instituting a 'take-over' of the highest court in Poland, then this would have grave repercussions for the objective independence of this court, and could ultimately undermine public trust in the judiciary.²⁴⁶
76. Finally, removing all members of the Supreme Court prematurely could set a precedent whereby any incoming government or new Parliament, which does not approve of the existing composition of the Supreme Court, could terminate the mandate of the respective judges and replace them with a new composition of judges.²⁴⁷ Aside from not being compatible with the principles of separation of powers and independence of the judiciary, this risks creating enormous tensions within the judiciary itself. Such a step could also destabilise the Supreme Court, thereby diverting the judges' attention from their normal tasks. Also, as every extraordinary measure, it risks having the judiciary captured by political forces controlling the process.²⁴⁸
77. **In light of the foregoing, Articles 87-91 of the Draft Act are inherently incompatible with the principle of security of judicial tenure protected by international standards and Article 180 of the Constitution of Poland, and thus**

²⁴³ See Article 9 of the Law on Lawyers; Article 62² of the Law on Legal Counsellors; Article 63a of the Law on Notary; and Article 163 par 1 of the Law on the Prosecution Service.

²⁴⁴ Particularly the following provisions of the 2002 Act: Articles 2, 4 (6 of the Draft Act), 5 (7 par 1 of the Draft Act), 6 (8 par 1 and 3 of the Draft Act), 7 (9 of the Draft Act), 8 (10 of the Draft Act), 9 (11 of the Draft Act), 10 (12 par 1 of the Draft Act), 11 (13 par 1 of the Draft Act), 14-15 (16-17 of the Draft Act), 16 (18 of the Draft Act, amended), 17 (19 of the Draft Act), 18 (20 of the Draft Act, amended), 19 (21 of the Draft Act), 20 (22 of the Draft Act, amended), 21 (23 of the Draft Act), 22 (24 of the Draft Act, amended), 26 (27 of the Draft Act), 27 (28 of the Draft Act amended), 33 (33 of the Draft Act, amended), 34-36 (34-36 of the Draft Act), 40 par 1-2 (39 par 1-2 of the Draft Act), 42 (41 of the Draft Act, amended), 43-44 (42-43 of the Draft Act), 45 par 1-3 (44 par 1-3 of the Draft Act), 46 (45 of the Draft Act), 48 (47 of the Draft Act), 49 par 1 and 3 (48 par 1 and 4 of the Draft Act), 50 (49 of the Draft Act), 55 par 4-5 (55 par 4-5 of the Draft Act), 57 (58 par 1 of the Draft Act), 61-63 (66-69 of the Draft Act, amended), 67-68 (73 and 75 of the Draft Act), and 69 (76 par 1 of the Draft Act).

²⁴⁵ See e.g., Venice Commission, *Opinion on the Draft Law on Introducing Amendments and Addenda to the Judicial Code of Armenia*, CDL-AD(2014)021-e, 16 June 2014, par 46-54, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)021-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)021-e)>.

²⁴⁶ See e.g., *op. cit.* footnote 38, par 95-99 (2014 Venice Commission-DHR-DGI Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia).

²⁴⁷ See e.g., regarding the complete renewal of the composition of the Judicial Council, *op. cit.* footnote 84, par 72 (2013 Venice Commission's Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia).

²⁴⁸ See e.g., Venice Commission, *Interim Opinion on the Draft Constitutional Amendments on the Judiciary of Albania*, 21 December 2015, par 98, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)045-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)045-e)>.

should be removed and not included in any current or future reform of the Supreme Court.

5.1.2. Conditions and Procedure for Retention

78. The system of compulsory retirement contemplated by the Draft Act and the decision on who may be retained are wholly dependent on the will of the Minister of Justice/General Public Prosecutor and the President of the Republic. It is the Minister who proposes that certain judges shall be retained, and the President who then approves this retention (or not).
79. Even in the exceptional situation where a court would be *legitimately* re-organized and this justifies certain judicial transfers or re-appointments (see pars 70-73 *supra*), the standards applicable to the appointment and selection of judges should apply *mutatis mutandis* to such decisions. According to recommendations elaborated at the international level, the selection of judges should be based on objective, pre-established, and clearly defined criteria,²⁴⁹ while ensuring that the composition of the judiciary reflects the composition of the population as a whole²⁵⁰ and is balanced in terms of gender.²⁵¹ Also, the selection process should be transparent, and any refusal to appoint a judge should be reasoned. Unsuccessful candidates should have the possibility to challenge the respective decision,²⁵² which should be subject to a full judicial review, on procedure and on substance.²⁵³ Moreover, the authority taking such decisions should in principle be independent of the executive and legislative powers; where the executive or legislature takes selection decisions, an independent authority should be authorized to make recommendations *that the relevant appointing authority follows in practice*.²⁵⁴ Similarly, the body taking decisions on retirement should also not be able to exert discretion but should rather be guided by pre-determined, clear and objective criteria.²⁵⁵
80. The criteria guiding the Minister of Justice's choice for retaining judges are vaguely framed (i.e., the need to implement the organisational changes provided by the Draft Act and to preserve the continuity of the Supreme Court's work), and offer no guidance as to the considerations that the selection of judges for retention would be based on. They thus provide the Minister of Justice with wide discretionary powers, which may lead to potentially arbitrary or politically motivated application (possibly perpetuated by the President's final decision). Also, there do not seem to be any procedures in place

²⁴⁹ See e.g., *op. cit.* footnote 16, par 19 (UN HRC General Comment No. 32 (2007)); *op. cit.* footnote 19, par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 26, par 21 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 29, pars 2.1 and 2.2 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 20, pars 5-51 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society).

²⁵⁰ *ibid.* par 24 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

²⁵¹ See par 190 under Strategic Objective G.1: "Take measures to ensure women's equal access to and full participation in power structures and decision-making" of the Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>>; *OSCE Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life*, 2 December 2009, par 1, <<http://www.osce.org/mc/40710?download=true>>; see also *op. cit.* footnote 27, pars 81 and 91 (2011 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice).

²⁵² See *op. cit.* footnote 19, par 48 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 26, par 23 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 20, pars 50-51 and 91-93 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), and pars 17-31 (2001 CCJE Opinion No. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges).

²⁵³ See e.g., Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020, 15 October 2012, par 56, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)>.

²⁵⁴ *Op. cit.* footnote 19, pars 46-47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

²⁵⁵ See e.g., *op. cit.* footnote 70, par 52 (2013 Venice Commission's Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine).

- whereby the early retirement which occurs by operation of law (see also Sub-Sections 5.1.3 and 5.3 *infra*) and/or the Minister's decision not to retain certain judges could be challenged.
81. Based on the considerations set out above, **such a wide prerogative of the executive that is not tempered by procedural safeguards is inherently incompatible with judicial independence and the requirement that the judiciary should be free from any interference by the executive, and should be removed from the Draft Act.**
82. The fact that the National Council for the Judiciary also has a role to play in relation to retention cannot remedy this dependence on executive discretion at the outset of the process. First, there are no clear criteria according to which the National Council for the Judiciary should decide whether a particular judge should be retained or not. Second, even assuming that this body could be independent from the legislative and executive branches, its views are not determinative in these proceedings and only the President has a final say in that respect. Third, and although the President has referred back to the Sejm the proposed amendments to the Act on the National Council of the Judiciary,²⁵⁶ as noted in the *2017 OSCE/ODIHR Final Opinion*, according to the contemplated scheme, the legislative and executive powers would exercise decisive influence over the composition and decision-making of the Council, which would call into question its independence, should the reform be pursued.²⁵⁷
83. Finally, while noting that Supreme Court judges who are transferred upon their requests retain their actual salaries and may use the title of “former Supreme Court judge”,²⁵⁸ the possibility of a transfer to another court is not an entitlement for them. Instead, their transfer remains at the full discretion of the Minister of Justice, based on criteria which are vague (Article 89 par 2, which states that the Minister shall have regard to the “rational use of judiciary personnel, and the needs related to the workload of the individual courts”). This is contrary to the above-mentioned principle that judges should be re-appointed to a replacement court, if any, or appointed to another judicial office of equivalent status and tenure, based on the decision of an independent judicial body (pars 70-71 *supra*). The Draft Act also does not mention the possibility to appeal the Minister's decision to refuse a transfer. In principle, a full judicial review of the procedure and substance of decisions on transfer should be available.²⁵⁹
84. Based on the above, and in accordance with the principles of international law, any substantive and *legitimate* re-organization of a court system that requires a justified abolition of certain positions of judges, should be conducted by offering the respective judges whose positions may be abolished opportunities for transfer based on clear criteria and to courts of approximately the same type and instance (see Sub-Section 5.1.1 *supra*).²⁶⁰ In the current reform where the Supreme Court has not been closed or had its competences reduced, the existing Supreme Court judges should in principle be

²⁵⁶ Available at <[http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1423_u/\\$file/1423_u.pdf](http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1423_u/$file/1423_u.pdf)>.

²⁵⁷ *Op. cit.* footnote 4, pars 12-15 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

²⁵⁸ See e.g., *op. cit.* footnote 45, pars 77-78 (2012 Venice Commission's Opinion on Two Acts on the Legal Status and Remuneration of Judges and Organisation and Administration of Courts of Hungary).

²⁵⁹ See e.g., *op. cit.* footnote 101, par 56 (2012 Venice Commission's Opinion on the Cardinal Acts on the Judiciary of Hungary as amended).

²⁶⁰ See par 20 of the *International Bar Association's Minimum Standards of Judicial Independence* (1982), <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, which specifically provides that “[i]n case of legislation reorganising courts, judges serving in these courts shall not be affected except for their transfer to another court of the same status”. See also Venice Commission, *Opinion on the Draft Laws on Judges and the Organisation of Courts of the Republic of Serbia*, CDL-AD(2008)007, 19 March 2008, par 23, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2008\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)007-e)>; and *op. cit.* footnote 52, par 58 (2014 Venice Commission's Opinion on the Draft Laws on Courts and on Rights and Duties of Judges and on the Judicial Council of Montenegro).

re-appointed to the newly reorganized Supreme Court, at a minimum to another position, based on the decision or recommendation of an independent body (see pars 70-71 *supra*).

5.1.3. The Lack of Possibility to Challenge the Early Retirement and Related Decisions

85. Article 71 par 3 of the Act on the Organisation of Common Courts provides that a judge may be retired at the request of the Minister of Justice in case of courts' re-organization, if the judge is not transferred to another court. However, it is the National Council of the Judiciary which should adopt a decision in that case (Article 73 par 1); this decision may be appealed to the Supreme Court (Article 73 par 2). The Transitional Provisions of the Draft Act introduce a completely separate procedure, without the decisive intervention of an independent body or the possibility to appeal the decision concerning early retirement.
86. Generally, and while noting that the Supreme Court judges will not lose their status of judges, their early retirement or transfer to other courts should be guided by safeguards and principles similar to those applicable in cases of removal.²⁶¹ These principles require clearly established and transparent procedures and safeguards, based on clear and objective criteria,²⁶² in order to exclude any risk of political influence and ensure that such a measure is really necessary and justified. This means that the decision concerning early retirement of certain judges should be taken by an independent body and subject to a full judicial review on procedure and on substance.²⁶³ The Draft Act does not appear to foresee any such safeguards.
87. For the above reasons, **the provisions concerning the immediate early retirement of Supreme Court judges and the procedure for their retention or transfer (Articles 87 and 88) should be removed altogether, as being inherently incompatible with international standards on the independence of the judiciary.**

5.2. The Appointment of Replacement Supreme Court Judges following Compulsory Retirements

88. With respect to the appointment of new Supreme Court judges, the Draft Act states that the Minister of Justice shall announce in the *Monitor Polski* (official gazette) the number of vacant judicial positions to be filled in individual Supreme Court chambers (Article 95 par 1). For each Supreme Court post that is vacant, the Minister of Justice may put forward a single nominee within 14 days (Article 95 par 2). Such nominees have to meet the general eligibility requirements for Supreme Court judges set forth in Article 24 of the Draft Act,²⁶⁴ but not those of Article 25 pars 2 and 3 generally applicable for all appointments of Supreme Court judges. The latter provision provides

²⁶¹ See e.g., CCJE, *Opinion No. 19 on the Role of Court Presidents*, 10 November 2016, pars 44-48, <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2016\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2016)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)>.

²⁶² *ibid.*

²⁶³ See e.g., *op. cit.* footnote 101, par 56 (2012 Venice Commission's Opinion on the Cardinal Acts on the Judiciary of Hungary as amended).

²⁶⁴ i.e., the respective nominees need to have the Polish citizenship (only) and enjoy full civil and public rights; be persons of immaculate character; have completed a law degree in Poland and obtained a master's degree or a degree recognized in Poland; be distinguished by a high level of juridical knowledge; be fit, as regards their health condition, to perform a Justice's duties; have at least 10 years of experience as a judge or other legal profession or other equivalent experience detailed in Article 24 par 1 (6); must not have performed professional service, work or be a co-worker of the state security organs listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance. Article 24 par 4 also provides that a person who has attained the age of 65 may apply for the post of a Supreme Court judge after having obtained the consent of the Minister of Justice.

that *anyone* satisfying those eligibility requirements may submit a candidature following the announcement in the *Monitor Polski*, along with the candidate's National Criminal Record and health certificate confirming the candidate's ability to perform his/her judicial functions. Ministerial nominees must be assessed by the National Council of the Judiciary and are appointed by the President of the Republic upon the request of the Council (Article 95 par 3). The Minister's nominees are to be considered by the National Council of the Judiciary within 14 days, but if the Council fails to submit a request to the President for candidates to be appointed within that timeline, the approval of either the First or the Second Assembly of the Council²⁶⁵ shall be sufficient (Article 95 par 4). If the vacancies are not filled by ministerial nominees, any person who meets the requirements for the position of a Supreme Court judge is then entitled to apply (Article 95 par 6).

89. In order to establish whether a tribunal, here the Supreme Court, may be considered "independent" (notably of the executive and of the parties to a case), various elements need to be considered. These include the manner in which the respective judges are appointed and their terms of office, the existence of guarantees against outside pressure and the question of whether the body in question appears to be independent.²⁶⁶
90. There are a variety of mechanisms for judicial appointments across the OSCE region. Generally, judicial appointments by the executive are not objectionable *per se*, provided that they are based on objective criteria and that there are sufficient guarantees and safeguards in place to ensure that such decisions are not based on other grounds as the established criteria.
91. With regard to judicial appointments, recommendations elaborated at the regional level emphasize that undue political influence over the appointment process may be avoided if the authorities in charge of the selection and career of judges are independent of the executive and legislative powers, e.g., if such decisions are made by independent judicial councils or other bodies where at least half of the members are judges appointed by their peers.²⁶⁷ The aim of such arrangements is to ensure that judges are selected based on candidates' merits rather than on political considerations.²⁶⁸ Moreover, where legislation provides that the government and/or the legislative power shall take decisions concerning the selection and career of judges, CoE Recommendation

²⁶⁵ Pursuant to the pending draft amendments to the 2011 Act on the National Council of the Judiciary, the First Assembly would be composed of the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, four members of the Sejm and two members of the Senate, in other words mainly representatives of the executive and the legislative branches (eight out of ten) while the Second Assembly is composed of 15 judges (who would be elected by the Sejm following the procedure set out in the draft amendments).

²⁶⁶ See *op. cit.* footnote 60, par 93 (2014 Report of the UNSR on Judicial Accountability); and e.g., ECtHR, *Findlay v. the United Kingdom* (Application no. 22107/93, judgment of 25 February 1997), par 73, <<http://hudoc.echr.coe.int/eng?i=001-58016>>; and *Brudnicka and Others v. Poland* (Application no. 54723/00, judgment of 3 March 2005), par 38, <<http://hudoc.echr.coe.int/eng?i=001-78989>>.

²⁶⁷ See e.g., *op. cit.* footnote 19, par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities), which states that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers"; *op. cit.* footnote 26, par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that "apart from a substantial number of judicial members", "[t]he composition [of bodies deciding on judicial selection] shall ensure that political considerations do not prevail over the qualifications of a candidate for judicial office"; *op. cit.* footnote 29, par 1.3 (1998 European Charter on the Statute for Judges), which states that "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; and *op. cit.* footnote 20, par 48 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society), which stated that "[i]t is essential for the maintenance of the independence of the judiciary that the appointment and promotion of judges are independent and are not made by the legislature or the executive but are preferably made by the Council for the Judiciary". See also *op. cit.* footnote 21, pars 25 and 32 (2007 Venice Commission's Report on Judicial Appointments).

²⁶⁸ See *ibid.* par 51 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); and par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

CM/Rec(2010)12 states that “an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions *which the relevant appointing authority follows in practice*” [emphasis added].²⁶⁹ This demonstrates that the judiciary should in principle have a decisive role in judicial appointment procedures. Further, the criteria based on which decisions concerning the career of judges are made should be objective and at the same time pre-established by law, with a view to ensuring that the respective decisions are based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases.²⁷⁰

92. Overall, Article 95 of the Draft Act does not require the Minister of Justice/General Public Prosecutor to follow the recruitment process and assessment of fitness for office normally applicable to Supreme Court judges (Article 179 of the Constitution²⁷¹ and Articles 21 to 24 of the 2002 Act). Instead, the Minister has full discretion to determine the initial nominees provided that they meet a number of specific requirements stipulated in Article 24 of the Draft Act, and may propose only one candidate for each position to the National Council of the Judiciary. The National Council of the Judiciary’s role is quite marginal since it may only assess the limited proposals put forward by the Minister of Justice and may not choose from a larger pool of candidates fulfilling the conditions for becoming a Supreme Court judge.
93. The wide discretion exercised by the Minister of Justice/General Public Prosecutor in such matters is additionally exacerbated by Article 95 of the Draft Act, which exempts the Minister’s nominees from needing to comply with the Article 25 pars 2-3, meaning that they do not need to submit their National Criminal Records and health certificates confirming their fitness for office.
94. In addition to this, the judicial appointment process based on ministerial nominations does not satisfy international recommendations suggesting that judicial vacancies should be open to application by *all eligible individuals*.²⁷²
95. Moreover, the Minister’s and President’s far-reaching involvement in the appointment procedure, with a decisive influence on the final composition of the Supreme Court, amounts to an undue influence of the executive in this process and could undermine the independence and impartiality of the Supreme Court (and its appointed judges).²⁷³ The damage to public confidence may be all the greater because the Draft Act creates a special process for judicial appointments following the early retirement of the existing judges, which bypasses the usual appointment process for Supreme Court judges. This gives the executive the opportunity to have an immediate influence on the composition of the Supreme Court following the compulsory retirements (the usual appointment process is otherwise retained, in modified form, for future appointments).

²⁶⁹ *ibid.* par 47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

²⁷⁰ *ibid.* par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

²⁷¹ Article 179 of the Constitution reads: “Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary”.

²⁷² See e.g., *op. cit.* footnote 15, par 12.3 (2010 Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct). See also the *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), which are the outcome of an international research project led by Professor Hugh Corder of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law, Principles 10, <<https://www.biicl.org/ingham-centre/projects/capetownprinciples>>.

²⁷³ See e.g., Venice Commission, *Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein*, CDL-AD(2002)032, 16 December 2002, pars 29-30, <[http://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)032-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)032-e.aspx)>.

96. The intervention of the National Council of the Judiciary, whose independence may likewise be questioned as stated in par 82 *supra*, is in any case not decisive in this process. Indeed, the new modalities set out in Article 95 par 4 state that in case of a delayed decision, only one of the two Assemblies of the Council needs to adopt a favourable resolution on the nominee proposed by the Minister of Justice, meaning that the decision could potentially be adopted by the First Assembly alone, i.e., a body mainly composed of representatives of the executive and the legislative branches (eight out of ten).²⁷⁴
97. Even if the Council's independence were ensured, Article 95 of the Draft Act does not specify whether the President of the Republic of Poland would be bound by the outcome of the National Council of the Judiciary's assessment. The 2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence specify that where the final appointment of a judge lies with the State President, his/her discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council or other independent body) and a refusal to appoint such a candidate must be reasoned, and based on procedural grounds only.²⁷⁵ As noted by the Venice Commission, "[a]s long as the President is bound by a proposal made by an independent judicial council [...] the appointment by the President does not appear to be problematic".²⁷⁶ The wording of the Draft Act as it is cannot exclude that the President of the Republic of Poland may also decide to not follow the Council's decision.
98. Hence, the above appointment process gives the executive, via the Minister of Justice/General Public Prosecutor and potentially the President of the Republic, as well as the Legislature, via the First Assembly of the National Council for the Judiciary, a decisive say in the appointment of judges to replace those who were compulsorily retired. In contrast, Article 24 of the 2002 Act provides the General Assembly of the Supreme Court with an important role in the judicial selection process, which includes assessing applicants and forwarding a shortlist of two recommended candidates per vacancy to the National Council of the Judiciary.
99. In addition, in both the ministerial nomination process and the selection process following applications for the remaining positions, time-lines are very short. This is contrary to recommendations elaborated at the regional and international levels, which recommend that adequate time be provided for the assessment of candidates.²⁷⁷ Instead, the National Council of the Judiciary is required to assess applicants within 14 days of the Ministerial nomination. Such short time periods for what may potentially be a large number of candidate evaluations are not conducive to an objective assessment of the judicial qualities of candidates. Moreover, there is no inherent urgency in the procedure that would justify such an expedited process, apart from the urgency created by the compulsory retirement of Supreme Court judges that is to take place following the entry into force of the Act, which the OSCE/ODIHR recommends to reconsider altogether (see par 87 *supra*).
100. In light of the above, **by conferring full discretion on the Minister of Justice, who is also the General Public Prosecutor, to nominate new candidates for the Supreme**

²⁷⁴ *Op. cit.* footnote 4, pars 60 and 70 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

²⁷⁵ *Op. cit.* footnote 26, par 23 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

²⁷⁶ Venice Commission, *Compilation of Venice Commission Opinions and Reports concerning Courts and Judges* (5 March 2015), page 13, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29001-e>>.

²⁷⁷ *Op. cit.* footnote 120, Principles 9-11 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

Court, without the involvement of an independent body whose decisions would be decisive in the appointment process, Article 95 is at odds with the above-mentioned international principles on judicial appointments. This places into question the independence of the Supreme Court altogether and may also damage public trust and confidence in this court and its judges, as well as the judiciary in general.

5.3. The Compulsory Retirement of the First President of the Supreme Court and the Appointment of his or her Replacement

101. As regards the First President of the Supreme Court, Article 10 of the 2002 Act provides that “[t]he First President of the Supreme Court shall be appointed by the President of the Republic of Poland from among active Supreme Court judges for a six-year term of office”. This same provision is found in Article 183 par 3 of the Constitution of the Republic of Poland. Article 19 par 1 of the 2002 Act further provides that the Board of the Supreme Court shall be composed of the First President of the Supreme Court, Presidents of the Supreme Court and Supreme Court Judges selected by the assemblies of the Justices of the Supreme Court Chamber for a term of three years. Article 88 of the Draft Act also raises some specific concerns regarding the early retirement of the First President of the Supreme Court as well as members of the Board of the Supreme Court.
102. The CCJE specifies that when court presidents are appointed for a particular term, they should serve that term in full.²⁷⁸ Early removal can only occur pursuant to established and transparent procedures and safeguards regarding removal, based on clear and objective criteria,²⁷⁹ in order to exclude any risk of undue political influence. Moreover, the Venice Commission, when assessing provisions providing for the automatic termination of the mandates of court chairperson following the enactment of a law, has considered such provisions to be problematic and recommended their removal.²⁸⁰
103. As noted by the Court of Justice of the European Union, if it were permissible for a state to compel an “independent” body to vacate office before serving its full term, in contravention of the rules and safeguards established in applicable legislation, “the threat of such premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence [...] even where the premature termination of the term served comes about as a result of the restructuring or changing of the institutional model”.²⁸¹ This means that even if the adoption of new legislation or amendments to an existing institutional model is legitimate, the independence of said body should not be compromised, which entails the obligation to allow the respective body to serve its full term of office.²⁸²
104. The ECtHR has also expressly considered that office-holders/court executives, hence positions similar to those of a Supreme Court Chairperson, have the right within the meaning of Article 6 par 1 of the ECHR to serve their terms of office until their mandates expire or come to an end.²⁸³ In cases where these office-holders/court

²⁷⁸ *Op. cit.* footnote 109, par 46 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

²⁷⁹ *ibid.* par 46 (CCJE Opinion No. 19 on the Role of Court Presidents).

²⁸⁰ *Op. cit.* footnote 38, par 101 (2014 Venice Commission-DHR-DGI Joint Opinion on the draft Amendments to the Organic Law on General Courts of Georgia).

²⁸¹ Court of Justice of the European Union, *European Commission v. Hungary*, Case C-288/12, 8 April 2014, par 54, <<http://curia.europa.eu/juris/documents.jsf?num=C-288/12>>.

²⁸² *ibid.* par 60.

²⁸³ ECtHR, *Baka v. Hungary* (Application no. 20261/12, judgment of 23 June 2016), pars 107-111, <<http://hudoc.echr.coe.int/eng/?i=001-163113>>.

executives' tenures were prematurely terminated due to the adoption of new legislation, the Court found this to be in violation of Article 6 of the ECHR, because the respective decision to terminate was not open to review by an ordinary national tribunal or other domestic body exercising judicial powers.²⁸⁴ The First President of the Supreme Court and the court's Board members do not seem to have the means to individually challenge this termination before any national body exercising judicial powers, given that their individual complaints would not concern a final decision issued by a court or a public administration authority, as required by Article 79 of the Constitution of Poland. It is also understood that they would not have the possibility to seek remedies before ordinary courts. Article 88 of the Draft Act would accordingly be in violation of Article 6 par 1 of the ECHR regarding the specific situation of the First President of the Supreme Court and members of the Board of the Supreme Court.

105. Moreover, subjecting the First President of the Supreme Court to early retirement at all in these circumstances is questionable; given that this position will apparently remain in the new re-organized set-up of the Supreme Court (see Sub-Section 5.1.1 *supra*), early retirement would, especially in this case, not appear to be necessary or proportionate.
106. Article 91 of the Draft Act provides that if the First President of the Supreme Court has been retired, the related tasks and powers shall be exercised by a Supreme Court judge designated by the President of the Republic of Poland. The selection of the new First President will be carried out within 14 days of filling the last vacant Supreme Court judge position.
107. Generally, the manner in which presidents of courts are selected, appointed or elected should follow the same procedure as that for the selection and appointment of other judges. Especially in the cases of Presidents of Supreme Courts, the relevant processes should formally rule out any possibility of political influence.²⁸⁵ To avoid such risks, the CCJE recommends adopting a model whereby the election/selection of the Presidents of Supreme Courts is done by the judges of the Supreme Court concerned.²⁸⁶ Executive authorities like the Minister of Justice or the President of the Republic, as provided by the Draft Act, should be excluded from this process.²⁸⁷
108. In light of the above, the First President of the Supreme Court and the Board members should be able to serve their full terms of office, except if some breach of disciplinary rules or the criminal law is clearly established, following proper disciplinary or judicial procedures.
109. **Overall, the degree of executive interference in appointments to the Supreme Court, including to its highest positions of First President and Presidents of Chambers, presents a threat to the independence of the judiciary in Poland, thereby undermining public confidence in the judiciary. Hence, Articles 87-91, 95 and 96 should be removed from the Draft Act altogether.**

²⁸⁴ *ibid.* pars 120-122.

²⁸⁵ *Op. cit.* footnote 109, pars 37-40 and 53 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

²⁸⁶ *ibid.* par 53 (CCJE Opinion No. 19 on the Role of Court Presidents).

²⁸⁷ *ibid.* par 47 (CCJE Opinion No. 19 on the Role of Court Presidents).

6. New Rules on the Status and Working Conditions of Supreme Court Judges in Office and Retired Judges

6.1. The New Retirement Age of Supreme Court Judges

110. Article 31 par 1 of the Draft Act lowers Supreme Court judges' mandatory retirement age from 70 years (Article 30 of the 2002 Act) to 65 years of age, and provides women judges with the option of retiring once they have attained 60 years of age. This seems to reflect the recently adopted Act on Re-establishing the Retirement Age at 65 and 60, which will enter into force on 1 October 2017 and which reverses the increase of the general retirement age to 67 years of age for both men and women, as decided in 2012.
111. As a precondition to requesting an extension, the respective judge needs to obtain a certificate, which confirms that he or she is medically fit to perform judicial duties (Article 31 pars 1-2). The application for an extension and the certificate of health is reviewed by the First President of the Supreme Court, who forwards it, along with his/her opinion on the matter, to the Minister of Justice, who also issues an opinion on the application. In the end, all documents are forwarded to the National Council of the Judiciary for a decision (Article 31 par 3). If granted by the Council, an extension lasts for five years, though a judge may voluntarily retire at any time during this period (Article 31 par 4). A judge who attains the age of 70 may apply for a renewal of the extension following the same procedure; no more than two renewals are permitted in this case (Article 31 par 5).
112. In principle, a mandatory retirement age for judges whose tenure is otherwise secure is consistent with judicial independence. The UN Human Rights Committee has observed that the right to a fair trial before an independent tribunal entails that the age of retirement should be "adequately secured by law".²⁸⁸ However, the level at which the mandatory age is set is significant and a comparative overview of applicable legislation across the OSCE region seems to suggest that relatively high retirement ages at around 70 years of age apply to Supreme Court judges or other highest judicial positions.²⁸⁹ On the other hand, problems for judicial independence are likely to arise in situations where the retirement age is low and where judges may be eligible for lucrative or prestigious post-retirement positions over which the government has a significant influence. These include, for instance, appointments to chair public inquiries or, in some jurisdictions, to remain on the bench, either through an extension of tenure or as an acting judge.²⁹⁰
113. Since the age of 65 as established by the Draft Act is a reduction from the existing mandatory retirement age of 70 years old, this would amount *prima facie* to an interference with judicial security of tenure, and thus a violation of judicial independence. The Draft Act does not provide for any transitional measures concerning the entry into force of this new retirement age, which would thereby appear to take effect immediately.
114. In that respect, the Universal Charter of the Judge, which was approved by the International Association of Judges in 1999, specifically provides that "[a]ny change to

²⁸⁸ *Op. cit.* footnote 16, par 19 (UN HRC General Comment No. 32 (2007)).

²⁸⁹ See e.g., CESifo Group, *Research on Judge Selection and Terms of Office in the World* (2013-2014), <<https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Governance-and-Law/Judiciary-System/Judge-selection-in-highest-courts.html>>. See also Venice Commission, *Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice*, CDL-PI(2015)002, 1 July 2015, pages 9-10, <<http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e>>.

²⁹⁰ Geoffrey Robertson QC, *Judicial Independence: Some Recent Problems* (International Bar Association 2014), <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=15ACEA39-AEEE-46EF-AB76-1CD18D7571CC>>.

the judicial obligatory retirement age must not have retroactive effect”.²⁹¹ Moreover, a recent case of the *European Commission v. Hungary* before the Court of Justice of the European Union concerned a general lowering of the retirement age from 70 to 62 years for all judges, prosecutors and notaries.²⁹² The Court noted that the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement for these professions, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned.²⁹³ It concluded that the said measure gave rise to a difference in treatment on grounds of age which was not proportionate as regards the objectives pursued.²⁹⁴

115. In addition to this, the possibility for women judges to retire at the age of 60 years old (Article 31 par 1 of the Draft Act) introduces a differential treatment between women and men judges, which amounts to a discrimination. In its Grand Chamber judgment in the case of *Konstantin Markin v. Russia*²⁹⁵ concerning the availability of three years’ parental leave for servicewomen of the armed forces, the ECtHR considered such an approach to be misconceived and noted that such difference in treatment was “clearly not intended to correct the disadvantaged position of women in society or ‘factual inequalities’ between men and women”.²⁹⁶ Quoting the Court, the ruling also states that these types of measures “had the effect of perpetuating gender stereotypes and [were] disadvantageous both to women’s careers and to men’s family life” (par 141); it found that the differential treatment “cannot be said to be reasonably or objectively justified”, and that it thus “amounted to discrimination on grounds of sex” (par 151).²⁹⁷
116. Article 31 par 1 is also contrary to Article 3 of the International Covenant on Economic, Social and Cultural Rights²⁹⁸ and Article 11 of the CEDAW, which provides that States should eliminate discrimination against women in the field of employment in order to ensure equality of men and women, including the same rights in the field of social security and retirement. Moreover, the Committee on the Elimination of Discrimination against Women has on several occasions expressed its concern when different mandatory retirement ages were provided for men and women, noting the impact of such provisions on reinforcing stereotypes.²⁹⁹
117. In light of the above, **any change to the retirement age of judges shall only apply to judges appointed after the entry into force of the Act and not to those already sitting on the Supreme Court bench. Moreover, the legal drafters should also re-**

²⁹¹ See International Association of Judges, *International Charter of the Judge* (1999), Article 8, <<http://www.iaj-uim.org/universal-charter-of-the-judges/>>.

²⁹² CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012, <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1233592>>.

²⁹³ *ibid.* par 68 (CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012).

²⁹⁴ *ibid.* pars 65-81 (CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012).

²⁹⁵ ECtHR, *Konstantin Markin v. Russia* (Application no. 30078/06, judgment of 22 March 2012), <<http://hudoc.echr.coe.int/eng/?i=001-109868>>.

²⁹⁶ *ibid.* par 141.

²⁹⁷ *ibid.* par 139-151.

²⁹⁸ *UN International Covenant on Economic, Social and Cultural Rights* (hereinafter “ICESCR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICESCR on 18 March 1977. Article 3 of the ICESCR states that “[t]he state parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant” and its Article 6 reads: “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”.

²⁹⁹ See e.g., Committee on the Elimination of Discrimination against Women, *Concluding Observations on the 4th and 5th Periodic Reports of Moldova*, 29 October 2013, pars 27 and 28 (d), <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MDA/CO/4-5&Lang=En>. See also e.g., UN Women, *Do Our Laws Promote Gender Equality? A Handbook for CEDAW-Based Legal Reviews*, pages 9 and 64, <<http://cedaw-in-action.org/en/2013/04/22/do-our-laws-promote-gender-equality-a-handbook-for-cedaw-based-legal-reviews-2013/>>.

consider the earlier optional retirement age for women Supreme Court judges, as this risks perpetuating and entrenching inequality and gender stereotypes about women judges compared to their men counterparts.

6.2. Extension of Appointments after Reaching the Retirement Age

118. The new retirement ages are mandatory, unless the respective judge requests an extension of his or her appointment and such an extension is granted by the National Council of the Judiciary, after consulting with the Minister of Justice (Article 31 par 3 of the Draft Act). The Council's consent does not seem to be automatic and the Draft Act does not specify the criteria that will guide the Council's decision.
119. As mentioned in par 82 *supra*, the independence of the National Council of the Judiciary is questionable according to the scheme contemplated in the draft amendments to the Act on the National Council of the Judiciary, although not adopted (see par 9 *supra*). Hence, the possibility and hope to be extended might influence the attitude of a judge towards the representatives of the executive and legislative branches within the Council in such a way that his/her independence and even his/her integrity could be jeopardized.³⁰⁰
120. Additionally, discretionary extensions of service for judges at the retiring age are generally viewed as undesirable and excluding the possibility of extension/re-appointment has been considered a guarantee against politicization of the judiciary.³⁰¹ For instance, in international courts, there is a growing tendency to disallow the extension of judges' mandates, so as not to jeopardize judicial independence.³⁰² According to par 3.3. of the *European Charter on the Statute for Judges*, judicial appointments for a fixed period are acceptable under the proviso that the decision on whether to renew their mandates is made by "an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary"; the decision may also be taken upon the proposal or recommendation of such a body. However, according to the scheme contemplated by the proposed amendments to the Act on the National Council of the Judiciary (although not adopted), the judiciary would no longer have a decisive role in the decision-making of the Council.³⁰³ Hence, the procedure for the extension of the term of Supreme Court judges who have reached the retirement age does not sufficiently guarantee their independence.

³⁰⁰ *Op. cit.* footnote 93, pars 30-31 (2014 Venice Commission's Opinion - Judicial Code of Armenia). See also Venice Commission, *Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia*, CDL-AD(2002)026, par 57, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2002\)121-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2002)121-e)>.

³⁰¹ *ibid.* pars 30-31 (2014 Venice Commission's Opinion - Judicial Code of Armenia).

³⁰² Theodor Meron (former president of the International Criminal Tribunal for the former Yugoslavia), in the article *Judicial Independence and Impartiality in International Criminal Tribunals*, published in the American Journal of International Law in April 2005, pointed out the dangers inherent in appointments for definite terms where prospects of re-nomination and re-election may induce judges to consider extra-judicial, irrelevant factors, and thus concluded that "non-renewable long terms offer the best protection of independence." In the Statute of the permanent International Criminal Court (ICC), the judges hold office for a term of nine years and are not eligible for re-election except if they were elected at the first election for a term of three years (Article 36 of the ICC Statute). Since the entry into force of Protocol 14 to the ECHR, ECtHR judges are elected for one single term of nine years and their mandate may not be renewed, with a view to reinforcing their independence and impartiality (see the Explanatory Report to Protocol No. 14 to the ECHR, amending the control system of the Convention Strasbourg, 13 May 2004, <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194>>, par 50, which states that "the judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004)".

³⁰³ *Op. cit.* footnote 4, Sub-Section 4 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

121. Finally, this new extension mechanism may subject individual judges to improper influence, pressure, threat or fear of interference, direct or indirect, from authorities intervening in the extension process, such as the First President of the Supreme Court, the Minister of Justice or members of the National Council of the Judiciary, which may undermine the judge's individual independence.³⁰⁴ It may also potentially create an actual or perceived conflict of interest for a judge in any litigation involving the bodies with a role in extension decisions, especially in consideration of the fact that the Minister of Justice is also the General Public Prosecutor in Poland.
122. **Accordingly, the present mandatory retirement age of 70 years for both men and women judges should be retained. Provisions allowing for extensions of service should be deleted due to the potential direct or indirect influence or interference that authorities intervening in the extension process may have on individual judges, thus undermining judicial independence.**

6.3. Limitations Regarding Other Occupations or Employment of Supreme Court Judges in Office and Retired Judges

123. The Draft Act transfers to the Minister of Justice functions formerly falling within the competence of the First President of the Supreme Court, including the power to grant or deny permission to a judge wishing to undertake external work or business activity (Article 37 of the Draft Act). This power also extends to retired judges (Article 37 par 10 of the Draft Act).
124. It is common in countries across the OSCE region for members of the judiciary to be prohibited from carrying out any professional or paid activity while in office, although there may be some exceptions concerning teaching and research activities.
125. The *European Charter on the Statute for Judges* states that judges should “freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens” (par 4.2). The Charter further provides that this freedom may only be limited in so far as such outside activities are incompatible with confidence in, impartiality or the independence of a judge, or his/her ability to deal with his/her cases in a timely manner (par 4.2).³⁰⁵ According to the Charter, remunerated activities should also require prior authorization.³⁰⁶ The *Commentary on the Bangalore Principles of Judicial Conduct* specifies that a judge may accept remuneration if reasonable and commensurate with the task performed, and provided that the arrangement does not lead to conflicts, and the respective activities do not require the judge to spend significant time away from court duties.; in addition, “the source of the payment must not raise any question of undue influence or the judge’s ability or willingness to be impartial in matters coming before him or her as a judge”.³⁰⁷
126. Article 37 par 9 specifies that judges may undertake any type of income-earning activity outside employment and service relationship, provided that this is approved by the Minister of Justice. Further, the Minister may allow the number of teaching hours to be higher than what is specified in the Draft Act. The judge’s immediate “superiors” (the First President of the Supreme Court and in the case of judges sitting on the Disciplinary Chamber, the President of that Chamber) are merely notified of this (even

³⁰⁴ *Op. cit.* footnote 19, par 22 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

³⁰⁵ *Op. cit.* footnote 29, par 4.2 (1998 European Charter on the Statute for Judges).

³⁰⁶ *ibid.*

³⁰⁷ *Op. cit.* footnote 37, pars 182 (2007 UNODC’s Commentary on the Bangalore Principles of Judicial Conduct).

though arguably, they would be in a much better position to assess whether the court's case load permits additional absence of the judge).

127. As regards procedural aspects, vesting the executive with such powers, rather than the First President of the Supreme Court, will lead to actual or perceived influence of the executive over the judiciary, and thereby undermine judicial independence. Insofar as it relates to lectures and other public speaking engagements, the Draft Act contains no safeguards that would prevent the abuse of such power, e.g. not allowing judges to speak out in defence of judicial independence. In that respect, the ECtHR has considered that, having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny.³⁰⁸ It is therefore the **President of the Supreme Court or some independent office or institution that should have a say in the possibility of a judge undertaking external work.**
128. Moreover, the above provisions permanently limit retired judges in their possibility to engage in a number of activities. Such limitations may be excessive and could be considered to be in breach of the retired judge's right to private life under Article 8 of the ECHR. In the case of *Niemitz v. Germany*, the ECtHR made it clear that the notion of "private life" should include activities of a professional or business nature.³⁰⁹ Regarding specifically limitations on practicing law, the Venice Commission has found a blanket prohibition to be an unnecessary and excessive limitation; any restrictions, such as temporarily limiting the possibility of a former judge to act as a lawyer before the court of which that judge was a member, should be narrowly targeted and proportional.³¹⁰ Based on the above, it is noted that **the limitations concerning the occupation or employment of retired judges are vague and restrictive and should be clearly circumscribed.**

7. Draft Amendments to the 2011 Act on the National Council of the Judiciary (Article 85 of the Draft Act)

129. The new Article 85 of the Draft Act, which was introduced following parliamentary discussions before the Sejm, provides further amendments to the 2011 Act on the National Council of the Judiciary (as would have been amended, should the recently initiated reform had been successful, see par 9 *supra*). This provision provides that the Sejm requires a vote of a 3/5th majority in the presence of at least half of the statutory number of Deputies when voting to elect judge members to the National Council of the Judiciary.
130. The change of the voting threshold for such cases does not impact the main findings and recommendations from the 2017 *OSCE/ODIHR Final Opinion*. Indeed, it is the very fact that the vast majority of members of the National Council of the Judiciary (21 out of 25 members), are selected by the Parliament, that raises concerns with respect to the

³⁰⁸ ECtHR, *Harabin v. Slovakia* (Application no. 62584/00, judgment of 29 June 2004), <<http://hudoc.echr.coe.int/eng?i=001-24031>>. See also Venice Commission, *Report on the Freedom of Expression of Judges*, CDL-AD(2015)018, 23 June 2015, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e)>.

³⁰⁹ ECtHR, *Niemitz v. Germany* (Application no. 13710/88, judgment of 16 December 1992), par 29, <<http://hudoc.echr.coe.int/eng?i=001-57887>>.

³¹⁰ Venice Commission, *Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan*, CDL-AD(2013)035, 10 December 2013, par 67, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)035-e#](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)035-e#)>.

real and perceived independence of this council,³¹¹ as this means that political considerations may prevail when selecting such members (not to mention the fact of having members of parliament and of the executive sit on the council).³¹² This is irrespective of the fact that judges or prosecutors associations, 25 judges or prosecutors, the Polish Bar Council, the National Council of Legal Counsels or the National Council of Notaries can now propose judge candidates to the Speaker (“Marshal”) of the Sejm.

131. The OSCE/ODIHR thereby would like to reiterate that the findings and recommendations from its 2017 OSCE/ODIHR Final Opinion remain fully relevant, and recommends that the Draft Amendments to the 2011 Act on the National Council of the Judiciary, as adopted in July 2017, be reconsidered in their entirety.
132. Article 85 of the Draft Act also provides that an appeal against a Council resolution is not available in individual cases concerning the appointment to serve as a Supreme Court judge. This provision is at odds with the above-mentioned principle that decisions concerning judicial appointments should be subject to judicial review (see par 79 *supra*).

8. Additional Concerns Related to the Process of Preparing and Adopting the Draft Act

133. OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability” (1990 Copenhagen Document, par 5.8).³¹³ Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).³¹⁴
134. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.³¹⁵ According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally

³¹¹ The ECtHR has expressly held that cases where bodies appointing the vast majority of council members were from the executive and legislative branches constituted a structural deficiency that was not compatible with the principle of independence (see *op. cit.* footnote 18, pars 112 and 117, particularly par 112 (*Oleksandr Volkov v. Ukraine*, ECtHR judgment of 9 January 2013). See also 2015 GRECO’s Compliance Report of the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors for Serbia, par 99, where a majority of members of the Council for the Judiciary is elected by the Parliament, and where GRECO specifically recommended to change the composition of the High Judicial Council, in particular by excluding the National Assembly from the election of its members, provided that at least half of its members are judges elected by their peers and abolishing the *ex officio* membership of representatives of the executive and legislative powers. See also Venice Commission, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), par 70, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e)>; and Venice Commission, pars 36-37, *Preliminary Opinion on the Proposed Constitutional Amendments regarding the Judiciary of Ukraine*, CDL-PI(2015)016-e, 24 July 2015, pars 36-37, <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2015\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)016-e)>.

³¹² *Op. cit.* footnote 20, pars 23 and 32 (2007 CCJE Opinion No. 10 on the Council for the Judiciary at the Service of Society); *op. cit.* footnote 60, par 93 (2014 Report of the UNSR on Judicial Accountability); and *op. cit.* footnote 21, par 32 (2007 Venice Commission’s Report on Judicial Appointments).

³¹³ Available at <<http://www.osce.org/fr/odihr/elections/14304>>.

³¹⁴ Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

³¹⁵ See e.g., *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information.³¹⁶ To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,³¹⁷ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.³¹⁸ Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.

135. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "the importance of judges participating in debates concerning national judicial policy" and the fact that "the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system".³¹⁹ The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or any change proposed as to the basis for their remuneration, or as to their social welfare, including their retirement pension, to ensure that judges are not left out of the decision-making process in these fields.³²⁰
136. As mentioned in par 38 *supra*, the 2002 Act foresees an important consultative role for the Supreme Court in its Article 1 par 3, which stipulates that the Supreme Court shall issue opinions on acts and draft acts which concern the operation and functioning of judicial authorities in the country or in fact, any other acts it considers that its opinion may be relevant. While the Draft Act was being prepared, the Supreme Court issued its opinion³²¹ based on its existing powers, which have now been revoked in the Draft Act. Therefore, the Supreme Court will no longer have this advisory role, which runs counter to the above-mentioned principles concerning open and transparent democratic practices.
137. In addition, the Draft Act was submitted to the Sejm on 12 July³²² and even though it aims to reform the highest court in the country, it was not subjected to any legitimate consultation process prior to this date, either with the bodies of the judiciary and judges, or with the public or civil society organizations. This would likewise appear to be at odds with the foregoing principles.

³¹⁶ See e.g., OSCE/ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"*, 1 September 2016, pars 40-41, <<http://www.legislationline.org/documents/id/20027>>.

³¹⁷ See e.g., OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs, <<http://www.osce.org/odihr/119633>>.

³¹⁸ *ibid.*

³¹⁹ *Op. cit.* footnote 20, par 31 (2015 CCJE Opinion No. 18 on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy).

³²⁰ *Op. cit.* footnote 29, par 1.8 (1998 European Charter on the Statute for Judges). See also *op. cit.* footnote 20, par 9 (2010 CCJE Magna Carta of Judges), which states that "[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)"; and European Network of Councils for the Judiciary (ENCJ), *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, <https://www.encj.eu/index.php?option=com_content&view=article&id=119%3Aencjadoptsvilniusdeclaration&catid=22%3Anews&lang=fr>, which states that "[j]udiciaries and judges should be involved in the necessary reforms".

³²¹ See *op. cit.* footnote 39.

³²² See <<http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=79AFE72D21974105C125815B006FF6EC>>.

138. The legal drafters have prepared an Explanatory Statement to the Draft Act, which lists a number of reasons justifying the contemplated reform,³²³ but it does not mention the research and impact assessment on which these findings are based. In particular, no evidence is presented to demonstrate that the existing problems within the Polish judiciary require a legislative reform on this scale and could not be addressed through better implementation of the existing laws, for example. The Explanatory Statement also does not outline whether and to which extent the benefits of the measures chosen by the authors of the Draft Act outweigh their costs, including their negative impact on judicial independence. Given the potential impact of the Draft Act on the independence of the judiciary and the rule of law, it is essential that such legislation be preceded by an in-depth regulatory impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option (including the “no regulation” option).³²⁴
139. The Draft Act seeks to amend numerous provisions of other pieces of legislation, which were recently adopted or amended. This raises doubts as to whether these legal changes were preceded by proper policy-making and regulatory impact assessment. The volume of legislation amended in the field of the judiciary, its piecemeal structure, level of detail and frequent amendments, could lead to confusion, and to a situation where individuals, including even legal professionals, may have difficulties understanding and implementing the relevant legislation. The manner in which these laws were amended may have negative repercussions, not only with respect to the democratic legitimacy of the legislation, but also with respect to public confidence in public institutions in general. In future, it may be helpful to adopt a more comprehensive approach, involving a proper policy discussion and impact assessment at the outset, so that all necessary amendments to legislation may take place as part of one reform process. Moreover, such a process would help identify potential flaws and inconsistencies in the legal texts, such as those raised in earlier sections of this Opinion.
140. The first reading by the Sejm in plenary occurred on 18 July, and the second reading the day after. The third reading was organized on 20 July. On 22 July 2017, the Senate adopted the Draft Act without any amendment and the bill was sent for the President’s signature on 24 July 2017, although the President of the Republic decided to refer it back to the Sejm pursuant to Article 122 par 5 of the Constitution of the Republic of Poland (see par 5 *supra*).
141. Given the extremely short timeline for the adoption of the Draft Act, i.e. about a week since its submission to the Sejm, and the lengthy and complex nature of this legislation, it is highly unlikely that the deputies would have had sufficient time to review and evaluate the draft legislation, and to take professional account of the opinions of the staff and the relevant committee, or consider the views of civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international standards at all stages of the law-making process.³²⁵
142. In light of the above, the process by which the Draft Act was developed and adopted does not conform to the aforesaid principles of democratic law-making. Any legitimate

³²³ See <<http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1727>>.

³²⁴ See e.g., OSCE/ODIHR, *Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia* (October 2014), pars 47-48, <<http://www.legislationline.org/documents/id/19365>>.

³²⁵ *ibid.* par 12.

reform process of such calibre **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the Supreme Court, other members of the judiciary, relevant authorities, such as the Office of the Commissioner for Human Rights, civil society organisations and should involve a full impact assessment including of compatibility with relevant international standards, according to the principles stated above. Adequate time should also be allowed for all stages of the ensuing law-making process.** It would be advisable for relevant stakeholders to follow such processes in future legal reform efforts. The OSCE/ODIHR remains at the disposal of the Polish authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]

ANNEX 2 - Extracts of the Draft Act on the Supreme Court of Poland (as of 26 September 2017)

ACT

of 2017

on the Supreme Court

Chapter 1

General Provisions

Article 1. The Supreme Court shall be a judicial body appointed to perform the following tasks:

- 1) administer justice by means of:
 - a) ensuring compliance with the law and uniformity of judicial decisions of common and military courts by hearing appeals and adopting resolutions to resolve questions of law;
 - b) exercising extraordinary control over final judicial decisions to ensure the rule of law and social justice by hearing extraordinary complaints;
- 2) hearing disciplinary cases within the scope set forth in the Act;
- 3) hearing electoral protests and ruling on the validity of elections to the Sejm and Senate, the election of the President of the Republic of Poland and elections to the European Parliament and also hearing protests against the validity of national and constitutional referendums and ruling on the validity of referendums;
- 4) providing opinions on draft laws and other legal acts on the basis of which courts render their decisions and operate as well as other draft laws to the extent that they affect cases falling within the subject-matter jurisdiction of the Supreme Court;
- 5) perform other acts provided for by laws.

...

Article 3. Para. 1. The Supreme Court shall be divided into the following Chambers:

- a) Civil Chamber;
- b) Criminal Chamber;
- c) Labour and Social Security Chamber,
- d) Extraordinary Control and Public Affairs Chamber;
- e) Disciplinary Chamber.

Article 4. The President of the Republic of Poland, after consulting the Board of the Supreme Court (*Kolegium Sądu Najwyższego*), shall determine, by way of a regulation, the rules of procedure of the Supreme Court, which shall determine the number of positions of Supreme Court judges, including the number of Supreme Court judges' positions in individual chambers, the internal organisation of the Supreme Court, the rules of internal conduct as well as the detailed scope of duties of judicial assistants and the manner of their performance, having regard to the need to ensure the efficient and proper hearing of cases and the character of proceedings before the Supreme Court, including disciplinary proceedings, and also the need to ensure compliance with the law and uniformity of judicial decisions of common and military courts.

...

Art. 6. [...]

Para. 2. The President of the Supreme Court who directs the work of the Disciplinary Chamber shall submit to the competent authorities remarks concerning the irregularities or legal loopholes found whose removal may ensure the efficient hearing of cases falling within the jurisdiction of that Chamber or reduce the number of disciplinary offences.

Article 7. Para. 1. The minister in charge of public finance shall incorporate a draft of the Supreme Court's income and expenditure, in the wording adopted by the Board of the Supreme Court, in the draft state budget.

Para. 2. The Board of the Supreme Court shall incorporate a draft of the income and expenditure related to the operation of the Disciplinary Chamber, in the wording adopted by the Assembly of the Judges of the Disciplinary Chamber, in the draft of the Supreme Court's income and expenditure.

Para. 3. The amount of expenditure set forth in the draft of the income and expenditure related to the operation of the Disciplinary Chamber shall not exceed 15% of the average amount of Supreme Court expenditure set forth in the Budget Acts in force in the three years preceding the budget year in question.

Para. 4. As regards the implementation of the Supreme Court's budget, the First President of the Supreme Court shall have the powers of the minister in charge of public finance.

Para. 5. As regards the implementation of the Supreme Court's budget related to the operation of the Disciplinary Chamber, the President of the Supreme Court who directs the work of the Disciplinary Chamber shall have the powers of the minister in charge of public finance.

Article 8. Para. 1. Having regard to laws on the protection of classified information, laws on the protection of personal data and also the provisions of other Acts, the Supreme Court shall promptly publish the judgment it has rendered and, after the statement of reasons

has been drawn up, also the statement of reasons for the judgment in the Public Information Bulletin on the Supreme Court's website.

...

Article 11. Para. 1. The First President of the Supreme Court shall be appointed by the President of the Republic of Poland from among five candidates selected by the General Assembly of Supreme Court Judges for a six-year term of office and he or she may be re-appointed only once. A person appointed to the office of the First President of the Supreme Court may hold such office only until he or she retires, is retired, or his or her service relationship of a Supreme Court judge has expired.

Para. 2. The General Assembly of Supreme Court Judges shall select the candidates for the position of the First President of the Supreme Court from among active Supreme Court judges not later than 6 weeks before the end of the term of office of the First President of the Supreme Court or within 14 days of the date on which the Supreme Court judge who holds the position of the First President of the Supreme Court retires, is retired, his or her service relationship expires or he or she renounces the office of the First President of the Supreme Court.

Article 12. Para. 1. The General Assembly of Supreme Court Judges making the selection referred to in Article 11, para. 2 shall be presided over by the First President of the Supreme Court, and if this is not possible or if he or she has been nominated as a candidate – the most senior President of the Supreme Court. If the most senior President of the Supreme Court has also been nominated as a candidate for the First President of the Supreme Court, the General Assembly of Supreme Court Judges shall be presided over by the most senior Supreme Court judge who has not been nominated as a candidate.

Para. 2. A resolution by the General Assembly of Supreme Court Judges on the selection of candidates for the office of the First President of the Supreme Court shall require the presence of at least two-thirds of the judges from each Supreme Court chamber. If no resolution is adopted due to lack of required quorum, the presence of at least three-fifths of Supreme Court judges shall be required to adopt the resolution at the next meeting.

Para. 3. Each judge participating in the vote may only cast one vote. The vote shall be taken by secret ballot.

Para. 4. The candidates selected for the position of the First President of the Supreme Court by the General Assembly of Supreme Court Judges shall be those candidates who have received the highest number of votes. If two or more candidates for the position of the First President of the Supreme Court have received an equal number of votes, as a result of which it is not possible to select five candidates, another vote shall be held in which only these candidates shall participate. The provision of para. 3 shall apply.

Para. 5. Immediately after the selection of candidates for the position of the First President of the Supreme Court, the President of the General Assembly of Supreme Court Judges shall

submit to the President of the Republic of Poland the minutes of the meeting, which shall indicate the candidates selected and the number of votes cast for each of them.

Article 13. Para. 1. The First President of the Supreme Court shall direct the work of the Supreme Court and represent the Supreme Court vis-à-vis third parties, including without limitation:

- 1) appointing and dismissing, at the request of the President of the Supreme Court who directs the work of the relevant chamber, chairs of departments within that chamber;
- 2) representing the Supreme Court before the Constitutional Court or during the work undertaken by committees of the Sejm and of the Senate or appointing another person to represent the Supreme Court;
- 3) giving his or her opinion and presenting to the President of the Republic of Poland candidates for the office of the President of the Supreme Court selected by the assembly of judges of the relevant Supreme Court chamber;
- 4) giving his or her opinion on statements by persons who have attained the age of 65 years to the effect that they are willing to continue to serve as Supreme Court judges;
- 5) presenting to the General Assembly of Supreme Court Judges the draft of the information referred to in the first sentence of Article 5, para. 1;
- 6) determining, after consulting the Board of the Supreme Court, by way of an order, rules of procedure of the Office of the First President of the Supreme Court, the organisation and scope of tasks of court secretariats and other administrative units of the Supreme Court, rules of procedure of the Supreme Court Research and Analysis Bureau as well as the work and remuneration regulations applicable to Supreme Court employees other than judges;
- 7) performing the activities set forth in the Act related to the selection of lay Supreme Court judges;
- 8) performing other activities set forth in the Act, rules of procedure and other legislative acts.

Article 14. Para. 1. A President of the Supreme Court shall direct the work of the relevant chamber.

Para. 2. A President of the Supreme Court shall be appointed by the President of the Republic of Poland after consulting the First President of the Supreme Court from among three candidates selected by the assembly of judges of the chamber in question for a three-year term of office and he or she may be re-appointed only twice. A person appointed to the office of a President of the Supreme Court may hold such office only until his or her service relationship of a Supreme Court judge has expired.

Para. 3. The appointment of the President of the Supreme Court who directs the work of the Disciplinary Chamber shall not require consultation with the First President of the Supreme Court.

Para. 4. The provisions of Article 11, para. 2 and of Article 12 shall apply *mutatis mutandis* to candidates for the office of a President of the Supreme Court and to the selection of candidates by the assembly of judges of a Supreme Court chamber.

...

Article 16. Para. 1. Powers of the General Assembly of Supreme Court Judges shall include:

- 1) selecting five candidates for the position of the First President of the Supreme Court and presenting them to the President of the Republic of Poland;
- 2) considering and accepting the draft information of the First President of the Supreme Court on the activities of the Supreme Court and on the material problems identified in this area, including those arising from case law;
- 3) giving opinions on candidates for the position of Supreme Court judges;
- 4) considering other matters on the initiative of the First President of the Supreme Court, a President of the Supreme Court, the Board of the Supreme Court or at least five Supreme Court judges;
- 5) adopting resolutions on other important matters concerning the Supreme Court.

Article 18. Para. 1. Powers of the assembly of judges of a Supreme Court chamber shall include:

- 1) selecting three candidates for the position of the President of the Supreme Court who directs the work of the chamber in question;
[...]

Article 19. Para. 1. Within the scope of jurisdiction of the Disciplinary Chamber, its internal organisation and rules of internal conduct as well as other powers of the First President of the Supreme Court as stipulated in the Act, the powers of the First President of the Supreme Court referred to in Article 13, para. 1, point 1, Article 30, para. 1, Article 35, para. 5, Article 39, paras. 1 and 3, Article 43, paras. 4 and 5, Article 50, paras. 6 and 13 of the Act shall be exercised *mutatis mutandis* by the President of the Supreme Court who directs the work of the Disciplinary Chamber.

Para. 2. The powers referred to in Article 13, para. 1, points 2, 4 and 7, Article 34, para. 2 and the second sentence of Article 54, para. 3 shall be exercised by the First President of the Supreme Court in consultation with the President of the Supreme Court who directs the work of the Disciplinary Chamber.

...

Chapter 3

Jurisdiction of Supreme Court Chambers

Article 22. The jurisdiction of the Civil Chamber shall include civil law, commercial law and family and guardianship law cases as well as cases concerning the registration of entrepreneurs and the registration of pledges.

Article 23. The jurisdiction of the Criminal Chamber shall include cases heard pursuant to the provisions of the Act of 6 June 1997 – Code of Penal Procedure (Journal of Laws [Dz. U.] of 2016 item 1749 as amended), the Act of 10 September 1999 – Fiscal Penal Code (Journal of Laws [Dz. U.] of 2016 item 2137 as amended¹), the Act of 24 August 2001 – Code of Procedure in Cases Involving Petty Offences (Journal of Laws [Dz. U.] of 2016 item 1713 as amended²) as well as other cases to which the provisions of the Code of Penal Procedure apply as well as cases falling within the jurisdiction of military courts.

Article 24. The jurisdiction of the Labour and Social Security Chamber shall include cases related to labour law, social security, cases concerning claims for remuneration by inventors and authors of utility and industrial designs and layout designs of integrated circuits and registration cases, excluding the registration of entrepreneurs and the registration of pledges as well as cases concerning the retirement of Supreme Court judges.

Article 25. The jurisdiction of the Extraordinary Control and Public Affairs Chamber shall include the hearing of extraordinary complaints, hearing electoral protests and protests against the validity of national and constitutional referendums as well as ruling on the validity of elections and referendums, other matters of public law, including competition protection, energy, telecommunications and rail transport regulation cases and also cases where appeals against decisions by the President of the National Broadcasting Council have been lodged, appeals against resolutions of the National Council of the Judiciary and complaints concerning overly lengthy proceedings before common and military courts.

Article 26. The jurisdiction of the Disciplinary Chamber shall include:

- 1) disciplinary cases against Supreme Court judges;
- 2) disciplinary matters for which the Supreme Court is competent under separate statutes;
- 3) complaints concerning overly lengthy proceedings before the Supreme Court.

Article 27. Para. 1. Where a President of the Supreme Court finds that a case does not fall within the jurisdiction of the chamber whose work he or she directs, he or she shall refer the case to the competent chamber.

Para. 2. If the President of the Supreme Court who directs the work of the chamber to which the case has been referred finds that the chamber in question is not competent to hear the case, he or she shall request that the First President of the Supreme Court indicate the

competent chamber. The First President of the Supreme Court may refuse to refer the case to another chamber.

Chapter 4

Establishment, Changes and Expiry of the Service Relationship of a Supreme Court Judge

...

Article 29. Para. 1. A person appointed to serve as a Supreme Court judge shall:

- 1) only hold Polish citizenship and enjoy full civil and public rights;
- 2) ...
- 3) be at least 40 years of age;

...

- 9) not have served in, have worked in or have been a collaborator of the state security authorities listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws [Dz. U.] of 2016 items 1575 and ...).

...

Article 30. Para. 1. The President of the Republic of Poland, having consulted the First President of the Supreme Court, shall announce in the Polish Monitor [Monitor Polski] Official Journal of the Republic of Poland the number of vacant judicial positions to be filled in individual Supreme Court chambers.

Para. 2. Each person satisfying the requirements of the position of a Supreme Court judge shall be entitled to present their candidature to the National Council of the Judiciary within a month following the announcement referred to in para. 1.

Para. 3. The candidature shall be presented in the form of an application for the vacant position of a Supreme Court judge in the chamber indicated in the announcement; save where the candidate is a judge or a public prosecutor, such an application shall be accompanied by a statement about the candidate issued by the National Criminal Record and by a certificate stating that the candidate's health allows him or her to perform the judge's duties.

Para. 4. The President of the Republic of Poland shall determine, by way of a regulation, the specimen application form for candidates for vacant positions of Supreme Court judges, having regard to the need to ensure the transparency and efficiency of the procedure for selecting candidates for positions of Supreme Court judges.

Article 31. Relatives up to the second degree, relatives by affinity of the first degree and spouses shall not be Supreme Court judges at the same time.

...

Article 35. Para. 1. The service relationship of a Supreme Court judge shall expire in the event of:

- 1) his or her death;
- 2) his or her renouncement of the office of Supreme Court judge;
- 3) a final judgment convicting the judge of an intentional indictable offence pursued *ex officio* or an intentional fiscal offence or a final judgment conditionally discharging the judge of an intentional indictable offence or an intentional fiscal offence;
- 4) a final court judgment imposing a penalty on the judge in the form of depriving him or her of public rights or prohibiting him or her from occupying judicial positions;
- 5) a final disciplinary court judgment removing the judge from office;
- 6) the judge having lost his or her Polish citizenship;
- 7) the judge having acquired citizenship of a foreign country unless the judge renounces that citizenship within 30 days of its acquisition;
- 8) the judge having been found to have served in, have worked in or have been a collaborator of the state security authorities listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.

Para. 2. The Supreme Court judge concerned shall promptly notify the President of the Republic of Poland via the First President of the Supreme Court of the occurrence of the circumstances referred to in para. 1, points 2 to 7. If the circumstance in question concerns the First President of the Supreme Court, the First President of the Supreme Court shall notify the President of the Republic of Poland of that fact.

Para. 3. The date of expiry of the service relationship of a Supreme Court judge shall be determined by the President of the Republic of Poland no later than three months from:

- 1) the occurrence of the circumstance referred to in para. 1, point 1;
- 2) obtaining information of the occurrence of the circumstance referred to in para. 1, points 2–8.

Para. 4. Where the following circumstances occur:

- 1) the circumstance referred to in the first sentence of para. 2, the First President of the Supreme Court shall notify the National Council of the Judiciary and the President of the Republic of Poland of its occurrence;
- 2) the circumstance referred to in the second sentence of para. 2, the President of the Republic of Poland shall notify the National Council of the Judiciary of its occurrence.

Para. 5. The provision of para. 1, point 8 shall apply to persons born before 1 August 1972.

Para. 6. In order to determine whether the circumstance referred to in para. 1, point 8 has occurred, the First President of the Supreme Court shall request the President of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation to submit the information held by the Head of the Lustration Bureau of the Institute in this respect. If the information in question concerns the First President of the Supreme Court, the request shall be made by the President of the Republic of Poland.

Para. 7. Where information is presented that confirms the occurrence of the circumstance referred to in para. 1, point 8, the Head of the Lustration Bureau of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation shall indicate whether the aforementioned circumstance arises from::

- 1) the lustration declaration referred to in Article 7 of the Act of 18 October 2006 on the Disclosure of Information about State Security Authorities' Documents from the 1944–1990 Period and their Contents (Journal of Laws [Dz. U.] of 2016 items 1721, 1948, 2260 and 2261 and of 2017 items 1530 and 1600);
- 2) from the final regional court judgment referred to in Article 17 of the Act of 18 October 2006 on the Disclosure of Information about State Security Authorities' Documents from the 1944–1990 Period and their Contents that states that the person subject to lustration submitted an untrue lustration declaration referred to in Article 21a, para. 2 of that Act.

Para. 8. Where the President of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation or the Head of the Lustration Bureau of that Institute obtains the information referred to in para. 1, point 8, he or she shall promptly forward it to the First President of the Supreme Court and to the President of the Supreme Court who directs the work of the Disciplinary Chamber. Provisions of the Act of 18 October 2006 on the Disclosure of Information about State Security Authorities' Documents from the 1944–1990 Period and their Contents shall apply *mutatis mutandis*.

Para. 9. A Supreme Court judge who has renounced the office of a Supreme Court judge or the status of a retired Supreme Court judge shall have the right to be entered on the list of attorneys-at-law or legal counsels or be appointed to the position of a notary public without the need to meet the requirements set forth in the Act of 26 May 1982 – Law on the Bar (Journal of Laws [Dz. U.] of 2016 items 1999 and 2261 and of 2017 item 1139), the Act of 6 July 1982 on Legal Counsels (Journal of Laws [Dz. U.] from 2016 items 233, 1579 and 2261 and of 2017 item 1139) and the Act of 14 February 1991 – Law on Notaries Public (Journal of Laws [Dz. U.] of 2016 items 1796, 1948, 2175 and 2261) that apply to other judges.

Article 36. Para. 1. A Supreme Court judge shall retire upon attaining 65 years of age unless – not later than 6 months and not earlier than 12 months prior to attaining this age – he or she submits a statement to the effect that he or she is willing to continue to serve in his or her

position and submits a certificate stating that his or her health allows him or her to perform the judge's duties, which certificate shall be issued in accordance with the rules set for candidates for judicial positions, and the President of the Republic of Poland consents to the judge continuing to serve in the position of a Supreme Court judge. The President of the Republic of Poland may consult the National Council of the Judiciary before granting consent for the Supreme Court judge to continue to serve in his or her position.

Para. 2. The statement and the certificate referred to in para. 1 shall be submitted to the First President of the Supreme Court who shall promptly forward them to the President of the Republic of Poland together with his or her opinion. The First President of the Supreme Court shall submit his or her statement and certificate together with the opinion of the Board of the Supreme Court to the President of the Republic of Poland.

Para. 3. Where the proceedings related to the continued service of a Supreme Court judge have not been concluded by the time when he or she attains the age referred to in para. 1, the judge shall remain in office until the proceedings are completed.

Para. 4. The consent referred to in para. 1 shall be granted for a period of 3 years, no more than twice. A judge who has been granted consent to continue to serve in the position of a Supreme Court judge may retire at any time by submitting a statement to this effect to the First President of the Supreme Court who shall forward it promptly to the President of the Republic of Poland.

Para. 5. A Supreme Court judge may retire upon attaining 60 years of age in the case of female judges by submitting a statement to this effect to the President of the Republic of Poland via the First President of the Supreme Court.

...

Article 38. The date on which a Supreme Court judge retires or on which a Supreme Court judge is retired shall be determined by the President of the Republic of Poland.

...

Chapter 5

Rights and Duties of a Supreme Court Judge

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Article 43. Para. 1. A Supreme Court judge shall not be a party to another service relationship or employment relationship, with the exception of:

- 1) employment in teaching, teaching and research or research positions at a Polish higher education institution within the meaning of the Act of 27 July 2005 – Law on Higher Education (Journal of Laws [Dz. U.] of 2016 item 1842 as amended);
- 2) teaching at the National School of Judiciary and Public Prosecution and within the framework of training courses organised by the professional self-government bodies referred to in the Act of 26 May 1982 – Law on the Bar, the Act of 6 July 1982 on

Legal Counsels, the Act of 14 February 1991 – Law on Notaries Public, the Act of 29 August 1997 on Bailiffs and Enforcement (Journal of Laws [Dz. U.] of 2017 items 1277, 1343 and 1452)

– which shall not exceed 210 teaching hours in total.

Para. 2. A judge shall be prohibited from undertaking an occupation or income-earning activity other than listed in para. 1 which would interfere with the performance of judicial duties, might undermine trust in the judge's impartiality or compromise the dignity of judicial office. The First President of the Supreme Court shall be prohibited from undertaking an occupation or income-earning activity other than listed in para. 1.

Para. 3. A judge shall not:

- 1) be a member of the management board, supervisory board or audit committee of a commercial law company;
- 2) be a member of the management board, supervisory board or audit committee of a co-operative;
- 3) be a member of the management board of a foundation engaging in business activities;
- 4) hold more than 10 percent of shares in a commercial law company or shares representing more than 10 percent of its share capital;
- 5) engage in business activity on his or her own behalf or together with other persons as well as manage such activity or be a representative or attorney with regard to such activity.

Para. 4. A Supreme Court judge shall notify the First President of the Supreme Court of his or her intention to undertake the additional employment referred to in para. 1 as well as of his or her intention to undertake another occupation or income-earning activity.

Para. 5. The First President of the Supreme Court may object to the judge undertaking another occupation or income-earning activity if he or she decides that this occupation or income-earning activity will interfere with the performance of the duties of a Supreme Court judge, undermine trust in his or her impartiality or compromise the dignity of judicial office.

Para. 6. The provisions of paras. 2 to 5 shall apply *mutatis mutandis* to retired Supreme Court judges.

Para. 7. The First President of the Supreme Court shall promptly publish on the Supreme Court's website information on the Supreme Court judge having undertaken additional employment referred to in para. 1 as well as another occupation or income-earning activity, indicating the entity at which the judge undertook employment or another occupation or income-earning activity, the type of employment, occupation or income-earning activity and the number of hours devoted to it.

Article 44. Para. 1. The declarations of financial interests referred to in Article 87 of the Act of 27 July 2001 – Law on the Organisation of Common Courts shall be submitted in the following manner:

- 1) by Supreme Court judges – to the First President of the Supreme Court;
- 2) by the First President of the Supreme Court – to the President of the Republic of Poland.

Para. 2. The analysis of the data contained in a declaration of financial interests submitted by a Supreme Court judge shall be conducted by the First President of the Supreme Court. The first President of the Supreme Court shall notify the President of the Republic of Poland of any irregularities found.

...

Article 46. A Supreme Court judge shall promptly notify the First President of the Supreme Court and the President of the Supreme Court who directs the work of the Disciplinary Chamber of any pending court action in which he or she is involved as a party or a participant.

...

Article 50. Para. 1. A Supreme Court Judge shall be entitled to an additional leave amounting to 12 working days per year.

Para. 2. A judge may, at his or her request, be granted a paid leave for recuperation purposes.

Para. 3. A leave for recuperation purposes shall not be longer than six months.

Para. 4. A judge shall receive 80% of his or her monthly remuneration during the period of absence from work due to illness, but not longer than for a year. That period shall include previous interruptions of the service caused by an illness or paid leave for recuperation purposes if the period of the judge's active service did not exceed 30 days. After a year of absence from work due to illness, a judge shall continue to receive 50% of his or her monthly remuneration.

Para. 5. If the judge's absence is caused by:

- 1) an accident at work or on the way to work or from work;
- 2) an illness during pregnancy;
- 3) an illness resulting from the special nature of judicial duties or the conditions in which they are performed;
- 4) an illness caused by another person as a result of his or her committing an intentional offence in connection with the performance of the judge's judicial duties as determined by a ruling issued by a competent authority;

5) undergoing the medical examinations required from candidates for donors of cells, tissues and organs and the procedures of harvesting such cells, tissues and organs

– the judge shall retain the right to 100% of his or her remuneration, not longer, however, than for a year; the provisions of the second and third sentences of para. 4 shall apply.

Para. 6. Where a judge is found to have an illness that is suspected to have resulted from the special nature of judicial duties or the conditions in which they are performed, the First President of the Supreme Court shall refer the judge, *ex officio* or at the judge's request, to a medical examiner of the Social Insurance Institution. A judge may appeal the decision of the medical examiner to a medical board of the Social Insurance Institution within 14 days of the date of delivery of the decision.

Para. 7. An illness resulting from the special nature of judicial duties or the conditions in which they are performed shall be construed as an illness caused by the harmful factors present in the environment where judicial duties are performed.

Para. 8. The expenses associated with the examination and the issuance of the decision by the medical examiner and by the medical board of the Social Insurance Institution shall be borne by the Treasury from the funds at the disposal of the First President of the Supreme Court.

Para. 9. Where a judge is unable to perform his or her duties for other reasons entitling him or her to receive the benefits stipulated in the regulations on monetary social security benefits, the judge shall be entitled to remuneration in the amount of monetary social security benefits during the period stipulated in the aforementioned regulations.

Para. 10. The period of absence due to illness and the period of incapacity to perform the duties referred to in para. 9 shall be certified by a medical certificate issued in accordance with Article 55, para. 1 and Article 55a, para. 7 of the Act of 25 June 1999 on Monetary Social Security Benefits in the Event of Illness and Maternity (Journal of Laws [Dz. U.] of 2017 item 1368) or the printout of the medical certificate referred to in Article 55a, para. 6 of that Act, except that in the case:

- 1) of undergoing the medical examinations required from candidates for donors of cells, tissues and organs and incapacity for work as a result of undergoing the procedures of harvesting cells, tissues and organs – a certificate issued by a physician on an ordinary form pursuant to Article 53, para. 3 of the Act of 25 June 1999 on Monetary Social Security Benefits in the Event of Illness and Maternity;
- 2) referred to in Article 6, para. 2, point 1 of the Act of 25 June 1999 on Monetary Social Security Benefits in the Event of Illness and Maternity – a decision issued by a competent authority or an authorised entity under provisions on the prevention and control of infections and infectious diseases in humans;
- 3) of maternity leave – a medical certificate issued on an ordinary form specifying the expected date of childbirth – for the period before childbirth, and an abridged copy of the child's birth certificate or a copy thereof – for the period after childbirth;

- 4) of the need for a judge to personally care for the judge's own child or the child of the judge's spouse, the judge's adopted child or a child being brought up by the judge and dependent on the judge until he or she reaches the age of 8, in the case:
 - a) of an unforeseen closure of the crèche, children's day care centre, kindergarten or school which the child attends, as well as in the case of illness of the nanny with which the parents have entered into an activation agreement referred to in Article 50 of the Act of 4 February 2011 on Care for Children Under the Age of 3 (Journal of Laws [Dz. U.] of 2016 item 157 and of 2017 items 60 and 1428) or of the day caregiver who cares for the child;
 - b) where the judge's spouse or the parent of the judge's child gives birth or is ill where the childbirth or illness prevents that spouse or parent from taking care of the child;
 - c) where the judge's spouse or the parent of the judge's child who usually cares for the child is staying in a hospital or another medical establishment of a healthcare provider that provides 24-hour inpatient care– the judge's representation.

Para. 11. The medical certificate shall be delivered using the information profile referred to in Article 58, para. 1 of the Act of 25 June 1999 on Monetary Social Security Benefits in the Event of Illness and Maternity, on the terms stipulated in that Act. The First President of the Supreme Court shall use or create the contribution payer's information profile referred to in Article 58, para. 1 of that Act.

Para. 12. The judge shall deliver to the First President of the Supreme Court the printout of the medical certificate referred to in Article 55a, para. 6 of the Act of 25 June 1999 on Monetary Social Security Benefits in the Event of Illness and Maternity, the medical certificate referred to in Article 55a, para. 7 of that Act, the certificate issued by a physician on an ordinary form in the cases referred to in para. 10, points 1 and 3, the decision, the abridged copy of the child's birth certificate or a copy thereof within 7 days of their receipt.

Para. 13. The judge shall submit to the First President of the Supreme Court a representation concerning the occurrence of the circumstances referred to in para. 10, point 4 within 7 days of their occurrence.

Para. 14. In the event of a failure to comply with the obligation referred to in paras. 12 and 13, the absence shall be considered unjustified unless the failure to deliver the certificate, decision, abridged copy of the child's birth certificate or a copy thereof or the failure to submit the representation has been caused by reasons beyond the judge's control.

Para. 15. A judge shall be entitled to remuneration for other periods of justified absence.

Para. 16. Where the employees covered by the social insurance scheme are entitled to receive benefits irrespective of their right to receive remuneration, the judge shall be entitled to receive a cash benefit in the amount equal to the social insurance benefit.

Para. 17. A judge may be granted a rehabilitation leave on the terms set forth in Articles 94d–94g of the Act of 27 July 2001 – Law on the Organisation of Common Courts.

...

Article 54. Para. 1. A Supreme Court judge may not be deprived of liberty or be held criminally liable without permission from a disciplinary court. The above does not apply to apprehension *in flagranti delicto* if detaining the judge is necessary for ensuring the proper course of the proceedings. Until a resolution permitting the judge to be held criminally liable has been issued, only actions of utmost urgency may be undertaken.

Para. 2. If the application for permission to hold a judge criminally liable or to remand him or her in custody concerns a judge apprehended *in flagranti delicto* while committing a felony or misdemeanour for which the maximum period of imprisonment is at least 8 years, the offence referred to in Article 177, para. 1 of the Penal Code in connection with Article 178, para. 1 of the Penal Code or in Article 178a, paras. 1 or 4 of the Penal Code, and where the judge is still being detained, the disciplinary court shall adopt a resolution on the application promptly, not later than within 24 hours of the application being submitted to the disciplinary court. A resolution permitting a judge to be held criminally liable or remanded in custody shall be immediately enforceable.

Para. 3. The First President of the Supreme Court and the President of the Supreme Court who directs the work of the Disciplinary Board shall be promptly notified of a judge having been detained. The First President of the Supreme Court may order his or her immediate release.

Para 4. Within the period of seven days following the date of service of the resolution refusing to give consent to holding a Justice liable to responsibility, the body or the person who has applied for such consent, and the disciplinary commissioner, shall be entitled to lodge a complaint with a disciplinary court of second instance. Within the same time limit, the Justice concerned shall be entitled to lodge a complaint against the resolution giving consent to holding him/her liable to responsibility.

Article 57. A person who is in a relationship with a Supreme Court judge that would enable that person to refuse to give evidence under Article 261, para. 1 of the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws [Dz. U.] of 2016 item 1822 as amended ⁷) shall not be employed in the Supreme Court.

Chapter 6

Lay Supreme Court Judges

Article 58. Para. 1. Lay Supreme Court judges shall participate in hearing extraordinary complaints and the cases referred to in Article 26, points 1 and 2.

Para. 2. The following persons shall be eligible to serve as lay Supreme Court judges:

- 1) who only hold Polish citizenship and enjoy full civil and public rights;
- 2) who are of impeccable integrity;
- 3) who are at least 40 years of age;
- 4) who are no more than 60 years of age as at the date of their selection;
- 5) whose health allows them to perform the duties of lay Supreme Court judges;
- 6) who have at least secondary or secondary vocational education.

Article 59. The following persons may not be lay Supreme Court judges:

- 1) persons employed at the Supreme Court and at other courts as well as at a public prosecutor's office;
- 2) persons who are members of bodies whose rulings may form a basis for court proceedings;
- 3) persons who serve as lay judges in common courts or military courts;
- 4) persons who are police officers and other persons serving in agencies that are involved in prosecuting offences and petty offences;
- 5) persons who work at offices that serve central government authorities;
- 6) persons who practice professions for which the court competent in disciplinary matters may be the Supreme Court;
- 7) attorneys-at-law or trainee attorneys-at-law;
- 8) legal counsels or trainee legal counsels;
- 9) notaries public or trainee notaries public;
- 10) clergymen;
- 11) soldiers in active military service;
- 12) Prison Service officers;
- 13) deputies to the Sejm, senators, councillors of a municipality, district or province;
- 14) persons who served in, worked in or were collaborators of the state security authorities listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation.

Article 60. Para. 1. The number of lay Supreme Court judges shall be determined by the Board of the Supreme Court.

Para. 2. Lay Supreme Court judges shall be elected by the Senate of the Republic of Poland by secret ballot.

Para. 3. The term of lay Supreme Court judges shall be four calendar years beginning with the year following the elections. The mandate of a lay Supreme Court judge elected during the term of office of other lay Supreme Court judges shall expire upon the expiry of the term of office of other lay Supreme Court judges.

Para. 4. After his or her term of office has expired, a lay Supreme Court judge may only participate in the hearing of cases which were initiated earlier with his or her participation until their conclusion.

Para. 5. Lay Supreme Court judge elections shall be held not later than in October of the calendar year in which the term of office of the present lay Supreme Court judges expires.

Article 61. Para. 1. Candidates for lay Supreme Court judges shall be submitted to the Marshal of the Senate of the Republic of Poland. The First President of the Supreme Court shall notify the Marshal of the Senate of the Republic of Poland of the number of lay Supreme Court judges thirty days before the deadline for submitting candidates at the latest.

Para. 2. Candidates for lay Supreme Court judges may be nominated by associations, other community and professional organisations registered pursuant to separate laws, with the exception of political parties, as well as by at least one hundred citizens with voting rights by 30 June of the last year of the term of office.

Para. 3. The Marshal of the Senate of the Republic of Poland shall request information about candidates for lay Supreme Court judges from the Commander-in-Chief of the Police. Information about candidates for lay Supreme Court judges shall be obtained and drawn up according to the rules applicable to candidates for judicial positions in common courts.

Para. 4. Detailed procedure for handling the documents submitted to the Marshal of the Senate of the Republic of Poland when nominating candidates for lay Supreme Court judges shall be set forth in the Regulations of the Senate.

Para. 5. The specimen application form for candidates for lay Supreme Court judges and the manner of making it available shall be determined by the Marshal of the Senate of the Republic of Poland by way of an order. The Order of the Marshal of the Senate of the Republic of Poland shall be published in the Polish Monitor [Monitor Polski] Official Journal of the Republic of Poland.

Article 62. Para. 1. The Marshal of the Senate of the Republic of Poland shall promptly forward to the First President of the Supreme Court the list of elected lay Supreme Court judges together with the documents referred to in Article 61, para. 4.

Para. 2. The First President of the Supreme Court shall hand to lay Supreme Court judges notices of their election and shall receive their oath of office, the wording of which shall be as follows:

“I do solemnly vow, as a lay Supreme Court judge, that I will faithfully serve the Republic of Poland, guard the law and rule of law, conscientiously fulfil my duties as a lay judge, decide cases without any bias, according to my conscience and to the rules of law, keep the secret protected by law, and act according to the principles of dignity and

honesty”; the person taking this oath may finish it by adding the words “So help me God”.

Para. 3. A refusal to take the above oath of office shall be tantamount to the renouncement of the position of a lay Supreme Court Judge.

Para. 4. After having received the oath of office, the First President of the Supreme Court shall enter the lay Supreme Court judge in the list of lay Supreme Court judges who may be assigned to decide cases and shall issue an identity card to him or her.

Para. 5. The First President of the Supreme Court shall hold a training course for lay Supreme Court judges concerning extraordinary complaints and disciplinary proceedings. Attending the training course shall be mandatory for lay Supreme Court judges.

Article 63. Para. 1. The term of office of a lay Supreme Court judge shall expire in the event of his or her final conviction of an intentional indictable offence or an intentional fiscal offence or where it is found that a lay Supreme Court judge served in, worked in or was a collaborator of the state security authorities listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. The Marshal of the Senate of the Republic of Poland shall determine the expiration of the term of office for the above reasons and shall notify the First President of the Supreme Court of that fact.

Para. 2. The provisions of Article 35, paras. 5–8 shall apply *mutatis mutandis* to lay Supreme Court judges.

Article 64. A lay Supreme Court judge shall not be called upon to perform his or her duties in the following cases:

- 1) where circumstances preventing his or her election come to light;
- 2) where proceedings concerning the dismissal of the lay Supreme Court judge in question have been instituted – until the Senate of the Republic of Poland has adopted a resolution on his or her dismissal;
- 3) where proceedings have been instituted against the lay Supreme Court judge concerning an intentional indictable offence or an intentional fiscal offence – until the case has been finally decided.

Article 65. Where required, particularly due to a decrease in the number of lay Supreme Court judges during the term of office, the Senate of the Republic of Poland, upon the request of the First President of the Supreme Court, shall hold mid-term elections. The provision of Article 61 shall apply *mutatis mutandis*.

Article 66. Para. 1. With regard to their decisions, lay Supreme Court judges shall be independent and shall be subordinate only to the Constitution and the statutes.

Para. 2. A lay Supreme Court judge shall not preside over a trial or deliberation nor perform judicial duties outside a trial unless the statutes provide otherwise.

Article 67. Para. 1. A lay Supreme Court judge may be assigned to participate in cases for up to twenty days per year. The above number of days may be increased by the First President of the Supreme Court only for important reasons, including without limitation due to the necessity of concluding a trial in which the lay Supreme Court judge participates.

Para. 2. A lay Supreme Court judge shall receive cash compensation for the time during which he or she performs his or her duties in court. Such duties shall be construed to include attending a trial or sitting, attending deliberations on a judgment, drawing up a statement of reasons, attending mandatory training organised by the First President of the Supreme Court or attending a meeting of the Board of Lay Supreme Court Judges if he or she has been selected as its member.

Para. 3. The amount of compensation for lay Supreme Court judges who participate in hearing cases in the Supreme Court for each day of performing the duties of a lay judge in the Supreme Court shall be 1.9% of the amount constituting the basis for the calculation of a Supreme Court judge's basic salary referred to in Article 47, paras. 1–3.

Article 68. Lay judges resident outside Warsaw shall receive per diem allowances and reimbursement of travel and accommodation expenses pursuant to the principles stipulated for common court judges in this regard.

Article 69. Para. 1. Lay Supreme Court judges shall elect from among themselves the Board of Lay Supreme Court Judges, its chair and deputy chairs.

Para. 2. The responsibilities of the Board of Lay Supreme Court Judges shall include, without limitation, improving the quality of the lay Supreme Court judges' work and representing them as well as stimulating the lay Supreme Court judges' public educational activities.

Para. 3. The President of the Republic of Poland shall determine, by way of a regulation, the manner of election, the composition and organisational structure, the operating procedure and detailed tasks of the Board of Lay Supreme Court Judges, taking into account the mandatory nature of the Board of Lay Supreme Court Judges as the professional self-government organisation that represents lay Supreme Court judges, the scope of its cooperation with the First President of the Supreme Court and with the President of the Supreme Court who directs the work of the Disciplinary Chamber, the need to include the chair and deputy chairs in its structure and to determine their tasks.

Article 70. Provisions of Section IV, Chapter 7 of the Act of 27 July 2001 – Law on the Organisation of Common Courts shall apply *mutatis mutandis* to lay Supreme Court judges in all matters not regulated in this Chapter.

Chapter 7

Disciplinary Responsibility

Article 71. Para. 1. A Supreme Court judge shall be liable to disciplinary action for service-related offences and for any offence against the dignity of his or her office.

Para. 2. A judge shall also be liable to disciplinary action for his or her conduct before assuming his or her position if he or she has failed to perform the duties of a civil servant properly or proved unworthy of holding a judicial office.

Para. 3. A judge who has committed a petty offence shall only be liable to disciplinary action.

Para. 4. The judge may consent to be held criminally liable for a petty offence referred to in Chapter XI of the Act of 20 May 1971 – Code of Petty Offences (Journal of Laws [Dz. U.] of 2015 items 1094, 1485, 1634 and 1707 and of 2017 item 966). The consent shall be given by way of the judge accepting a penalty notice or paying a fine if he or she is fined in his or her absence pursuant to the provision of Article 98, para. 1, point 3 of the Act of 24 August 2001 – Code of Procedure in Cases Involving Petty Offences.

Para. 5. The judge's consent to being held criminally liable according to the procedure referred to in para. 4 shall exclude disciplinary liability.

Article 72. Para. 1. The following disciplinary courts shall hear disciplinary cases against Supreme Court judges:

- 1) in the first instance – a Supreme Court bench composed of two judges sitting in the Disciplinary Chamber and one lay Supreme Court judge;
- 2) in the second instance – a Supreme Court bench composed of three judges sitting in the Disciplinary Chamber and two lay Supreme Court judges.

Para. 2. Lay Supreme Court judges who hear disciplinary cases shall be appointed by the First President of the Supreme Court in each case.

Article 73. The Supreme Court Disciplinary Commissioner and his/her deputy shall be elected by the Board of the Supreme Court for a term of four years.

Article 74. Para. 1. Disciplinary penalties shall include:

- 1) admonition;
- 2) reprimand;

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- 3) a reduction of the judge's basic salary by 5% to 50% for a period ranging from six months to two years;
- 4) removal from the function held;
- 5) removal of the judge from office.

Para. 2. The court shall publish a final disciplinary judgment by posting it on the Supreme Court's website. The judgment shall be published with the exclusion of data concerning the identity of a natural or other person if this is necessary to protect the legitimate interests of those persons.

Para. 3. The court shall notify the President of the Republic of Poland of the final disciplinary judgment.

Para. 4. The imposition of the penalty referred to in para. 1, points 2 to 4 shall result in the inability to participate in the Board of the Supreme Court, adjudicate cases in the disciplinary court and hold functions at the Supreme Court for five years. A judge on whom the disciplinary penalty referred to in the first sentence has been imposed and who sits in the Disciplinary Chamber shall be appointed by the First President of the Supreme Court to hear cases in another chamber for a period of five years.

Para. 5. The imposition of the penalty referred to in para. 1, point 5 shall prevent the reinstatement of the person on whom the penalty has been imposed to the office of a judge.

Para. 6. In the event of a minor disciplinary offence or a minor petty offence, the disciplinary court may refrain from imposing a penalty.

Article 75. Para. 1. The Disciplinary Proceedings Representative of the Supreme Court shall institute an inquiry at the request of the First President of the Supreme Court, the President of the Supreme Court who directs the work of the Disciplinary Chamber, the Board of the Supreme Court, the General Public Prosecutor, the National Public Prosecutor or on his or her own initiative, after preliminary examination of the circumstances required to determine whether an offence has been committed and after receiving a statement from the judge in question unless such statement cannot be made. The inquiry shall be conducted within 30 days of the first action taken by the Disciplinary Proceedings Representative of the Supreme Court.

Para. 2. After conducting the inquiry, where there are grounds for instituting disciplinary proceedings, the Disciplinary Proceedings Representative of the Supreme Court shall institute disciplinary proceedings and present charges against the judge in writing. After receiving the charges, the defendant may within 14 days make a statement and apply for evidence to be examined.

Para. 3. After the period referred to in para. 2 has elapsed and, if necessary, after examining further evidence, the Disciplinary Proceedings Representative of the Supreme Court shall

petition the disciplinary court of the first instance to hear the disciplinary case. The petition shall include a precise specification of the act which is the matter of proceedings, the list of evidence to substantiate the petition and a justification.

Para. 4. Where the Disciplinary Proceedings Representative of the Supreme Court does not find sufficient grounds for instituting disciplinary proceedings at the request of a competent authority, he or she shall issue a decision to refuse to institute proceedings. A copy of the decision shall be delivered to the authorities referred to in para. 1 and to the President of the Republic of Poland. Within 30 days of the date of delivery of the decision each authority referred to in para. 1 may appeal it to the disciplinary court of the first instance.

Para. 5. Where the Disciplinary Proceedings Representative of the Supreme Court does not find sufficient grounds for requesting that the disciplinary case be heard, he or she shall issue a decision to discontinue disciplinary proceedings. A copy of the decision shall be delivered to the defendant, the authorities referred to in para. 1 and to the President of the Republic of Poland. Within 30 days of the date of delivery of the decision each authority referred to in para. 1 may appeal it to the disciplinary court of the first instance.

Para. 6. The appeal shall be heard within 14 days of its filing with the court. Where the decision appealed against is set aside, the disciplinary court's instructions concerning further proceedings shall be binding on the Disciplinary Proceedings Representative of the Supreme Court.

Para. 7. Disciplinary rulings shall not be subject to cassation.

Para. 8. The President of the Republic of Poland may appoint an Extraordinary Disciplinary Proceedings Representative in order to conduct a specific case concerning a Supreme Court judge from among Supreme Court judges, common court judges or military court judges. The appointment of an Extraordinary Disciplinary Proceedings Representative shall be tantamount to demanding an inquiry. The Extraordinary Disciplinary Proceedings Representative may institute disciplinary proceedings or may accede to proceedings that are already pending. The appointment of the Extraordinary Disciplinary Proceedings Representative shall exclude the participation of the Disciplinary Proceedings Representative of the Supreme Court or his or her deputy in the case in question. The provisions of paras. 1–6 shall apply *mutatis mutandis* to the actions taken by the Extraordinary Disciplinary Proceedings Representative. The mandate of an Extraordinary Disciplinary Proceedings Representative shall expire at the time when the ruling to refuse to institute disciplinary proceedings or the ruling to discontinue disciplinary proceedings becomes final or the ruling that concludes disciplinary proceedings becomes final.

Proceedings before the Supreme Court

...

Article 77. Para. 1. Cases shall be allocated and court benches shall be decided by the President of the Supreme Court who directs the work of the relevant chamber.

Para. 2. Cases shall be heard in the order of their receipt by the Supreme Court unless a special provision provides otherwise. In particularly justified cases, the President of the Supreme Court may order a case to be heard out of order.

...

Article 81. A decision to submit a question of law and a resolution of the Supreme Court shall be accompanied by a written statement of reasons.

Article 82. Para. 1. A sitting of the entire Supreme Court bench or a sitting of the bench of a chamber or joint chambers shall be notified to the General Public Prosecutor.

Para. 2. The sitting of a Supreme Court that is scheduled to adjudicate a question of law shall also be notified to defence counsels and attorneys such as attorneys-at-law and legal counsels as well as to persons authorised to draw up cassation appeals in civil law matters.

Para. 3. In the absence of the General Public Prosecutor, sittings may be attended by a public prosecutor from the National Public Prosecutor's Office or a prosecutor from another organisational unit of the public prosecutor's office seconded to the National Public Prosecutor's Office who has been designated by the General Public Prosecutor or his or her deputy to attend Supreme Court sittings.

Para. 4. A failure by the persons referred to in paras. 1–3, if properly notified, to appear at the sitting shall not cause the proceedings to be suspended.

Para. 5. A President of the Supreme Court may oblige the entities notified of the sitting to submit written motions concerning the direction of the adjudication of the question submitted prior to the sitting.

Article 83. Para. 1. If a Supreme Court bench decides that the question submitted requires clarification, and that the discrepancies revealed need to be resolved, it shall adopt a resolution. Otherwise, it shall refuse to adopt a resolution and if the resolution no longer needs to be adopted, it shall discontinue the proceedings.

Para. 2. If the bench of a chamber finds it justified from the point of view of court practice, the significance of the doubts to be resolved or the protection of human and civil freedoms and rights, it may submit a question of law to the entire chamber, and the chamber may submit it to two or more joint chambers or to the entire Supreme Court bench.

Article 84. Para. 1. Upon their adoption, resolutions of the entire Supreme Court bench, of joint chambers or of an entire chamber shall become legal principles. A bench of seven judges may decide to grant a resolution the power of a legal principle.

Para. 2. Resolutions that have been granted the power of legal principles shall be published together with a statement of reasons in the Public Information Bulletin on the Supreme Court website.

...

Article 86. Para. 1. Each final judgment that concludes proceedings in a case may be appealed against by means of an extraordinary complaint where this is necessary to ensure the rule of law and social justice and:

- 1) the judgment violates the principles or human and civil freedoms and rights stipulated in the Constitution;
- 2) the judgment is in flagrant breach of the law through its misinterpretation or misapplication;
- 3) the material findings of the court clearly contradict the evidence collected in the case – and the judgment cannot be set aside or amended using other extraordinary appeal measures.

Para. 2. An extraordinary complaint may be lodged by the General Public Prosecutor, the Ombudsman, a group of at least 30 deputies or 20 senators, and, within its jurisdiction, the President of the Office of the General Counsel to the Republic of Poland (*Prokuratoria Generalna Rzeczypospolitej Polskiej*), the Ombudsman for Children, the Patient's Ombudsman, the Chair of the Polish Financial Supervision Authority and the Financial Ombudsman. An extraordinary complaint by a group of deputies or senators shall be submitted via the Marshal of the Sejm or the Marshal of the Senate who may, in addition to the representative indicated by the group of deputies or senators, authorise an employee of the Chancellery of the Sejm or Chancellery of the Senate, respectively, an attorney-at-law or legal counsel to support the complaint.

Para. 3. An extraordinary complaint shall be lodged within 5 years of the contested judgment having become final. An extraordinary complaint against a defendant that is lodged more than 6 months after the judgment has become final or the cassation has been adjudicated shall not be allowed.

Article 87. Para. 1. An extraordinary complaint may only be lodged once against a judgment on behalf of a given party.

Para. 2. An extraordinary complaint may not be based on allegations that were raised in the cassation appeal or cassation accepted for examination by the Supreme Court.

Para. 3. An extraordinary complaint shall not be admissible against a judgment concerning the non-existence of a marriage, annulling a marriage or granting a divorce if at least one of the parties has entered into a marriage after such a judgment became final.

Article 88. Para. 1. If an extraordinary complaint is allowed, the Supreme Court shall set aside the contested judgment and, in accordance with the outcome of the trial, shall decide on the merits of the case or remand the case to the competent court, setting aside the judgment of the court of the first instance if necessary, or shall discontinue the proceedings. The Supreme Court shall dismiss the extraordinary complaint if it finds no grounds for setting aside the contested judgment.

Para. 2. If, while hearing the extraordinary complaint, the Supreme Court finds that the violation of the principles or human and civil freedoms and rights stipulated in the Constitution has been caused by the fact that an Act is unconstitutional, it shall refer a legal question to the Constitutional Court. The Supreme Court may suspend proceedings *ex officio* if the outcome of the case depends on the outcome of the proceedings pending before the Constitutional Court.

Article 89. The Supreme Court may request the preparation of a statement of reasons if such a statement is not included in the contested judgment.

Article 90. Para. 1. If the First President of the Supreme Court or a President of the Supreme Court finds that this is justified by the need to protect the principles or human and civil freedoms and rights stipulated in the Constitution, including without limitation when hearing an extraordinary complaint, he or she may appoint a participant of the proceedings who shall act as a public interest advocate (*rzecznik interesu społecznego*), including without limitation a person who meets the requirements to serve as a Supreme Court Judge. The purpose of the public interest advocate shall be to safeguard constitutional principles, including without limitation the common good and social justice and the protection of human dignity in the exercise of human and civil freedoms and rights.

Para. 2. The public interest advocate shall be notified of the Supreme Court sitting in the case for which he or she has been appointed. The public interest advocate may make written submissions, attend the sitting and speak.

Article 91. Para. 1. An extraordinary complaint shall be heard by a Supreme Court bench consisting of two Supreme Court judges sitting in the Extraordinary Control and Public Affairs Chamber and one lay Supreme Court judge.

Para. 2. If the extraordinary complaint concerns a Supreme Court judgment, the case shall be heard by a Supreme Court bench consisting of five Supreme Court judges sitting in the Extraordinary Control and Public Affairs Chamber and two lay Supreme Court judges.

Para. 3. If the Supreme Court bench indicated in para. 1 or para. 2 intends to depart from a legal principle adopted by a Supreme Court chamber, it shall submit the resulting question of law for adjudication to:

- 1) the entire bench of the Extraordinary Control and Public Affairs Chamber – if the Supreme Court intends to depart from a legal principle adopted by a bench of the Extraordinary Control and Public Affairs Chamber; the question shall be resolved by way of a resolution adopted by the entire bench of the Chamber;
- 2) a bench of the Extraordinary Control and Public Affairs Chamber and of the chamber that adopted the legal principle in question – if it intends to depart from a legal principle adopted by a chamber other than the Extraordinary Control and Public Affairs Chamber; the question shall be resolved by way of a resolution adopted by the entire bench of both chambers.

Para. 4. In the case indicated in para. 3, point 2, the provision of the second sentence of Article 85, para. 3 shall apply *mutatis mutandis*.

Article 92. Provisions of the Act of 17 November 1964 – the Code of Civil Procedure concerning cassation appeals shall apply *mutatis mutandis* to extraordinary complaint proceedings in cases not regulated by the provisions of this Act, with the exclusion of Article 398⁴, para. 2.

Article 93. Para. 1. Upon the motion of the General Public Prosecutor, the Supreme Court shall annul a final judgment concerning the case which at the time of its adjudication did not fall under the jurisdiction of Polish courts on account of the person, or in which at the time of its adjudication the suit was inadmissible, if such judgment cannot be challenged in accordance with the procedure provided for in the statutes on judicial proceedings.

Para. 2. The motion referred to in para. 1 shall satisfy the requirements applicable to pleadings and shall include:

- 1) the indication of the judgment which it concerns, indicating the scope of the challenge;
- 2) grounds for the motion and their justification;
- 3) the demonstration that the contested judgment cannot be challenged in accordance with the procedure provided for in the relevant statute on court proceedings;
- 4) the motion for the contested judgment to be annulled, and if the judgment was given by a court of the second instance, also a motion for the preceding judgment of the court of the first instance to be annulled.

Para. 3. In addition to the copies to be delivered to participants in the case, the General Public Prosecutor shall also provide two copies for Supreme Court files.

Para. 4. The Supreme Court shall hear the motion in an *in camera* session unless the General Public Prosecutor requested that the motion be heard during trial or there are other important reasons for that.

Para. 5. The Supreme Court, after hearing the case, shall dismiss the motion or annul the contested judgment. Where the motion is allowed, if the judgment was given by a court of the second instance, the Supreme Court shall also annul the judgment of the court of the first instance.

Para. 6. The Supreme Court's decision together with the statement of reasons shall be delivered to the General Public Prosecutor and to the parties to, or participants in, the proceedings in which the contested judgment was given.

Para. 7. Provisions of the Act of 17 November 1964 – the Code of Civil Procedure concerning cassation appeals or of the Act of 6 June 1997 – the Code of Penal Procedure concerning cassation shall apply *mutatis mutandis* to proceedings concerning the annulment of judgments in cases not regulated by the provisions of this Article.

Article 94. ...

Para. 3. Where an irregularity has been pointed out, the Supreme Court may petition the disciplinary court to hear a disciplinary case. The Supreme Court shall be the disciplinary court of the first instance.

...

Chapter 9

Office of the First President of the Supreme Court, Office of the President of the Supreme Court Who Directs the Work of the Disciplinary Chamber and Supreme Court Research and Analysis Bureau

Article 95. ...

Para. 3. The rules of procedure of the Office of the President of the Supreme Court who directs the work of the Disciplinary Chamber shall be determined by the President of that Chamber after consulting the Board of the Supreme Court.

Article 97. Para. 1. The Office of the President of the Supreme Court who directs the work of the Disciplinary Chamber shall perform tasks related to the performance of duties by the President of that Chamber concerning its functioning, including without limitation with respect to financial matters, human resources and administrative and maintenance matters.

Para. 2. The Office of the President of the Supreme Court who directs the work of the Disciplinary Chamber shall be headed by the Head of the Office of the President of the Supreme Court who directs the work of the Disciplinary Chamber, who shall be appointed and dismissed by the President of that Chamber.

Article 98. Para. 1. The Supreme Court Research and Analysis Bureau shall perform, without limitation, the tasks related to the performance by the First President of the Supreme Court and by the Supreme Court of the functions related to ensuring compliance with the law and uniformity of judicial decisions of common and military courts and assessing the coherence and uniformity of the law applied by the courts, including with respect to disciplinary judgments.

Article 100. ...

Para. 3. The remuneration of Supreme Court Research and Analysis Bureau employees other than judges shall be equal to the basic salary of an appellate court judge calculated according to the basic rate, with the proviso that this remuneration shall be increased by the amount of the employee's mandatory social security contributions.

Para. 4. The persons referred to in para. 3 may undertake additional employment or other occupation or income-earning activity exclusively with the consent of the First President of the Supreme Court. That consent may be withdrawn at any time.

Chapter 10

Amendments to Existing Provisions, Transitional and Final Provisions

Article 101. In the Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws [Dz. U.] of 2016 item 1822 as amended⁸⁾), in Article 626¹¹, paras 2 and 3 shall read as follows:

“Para. 2. Where a cassation appeal or an extraordinary complaint referred to in Article 86 of the Act of on the Supreme Court (Journal of Laws [Dz. U.] item ...) has been lodged, the entry concerning the cassation appeal or extraordinary complaint shall be made *ex officio* immediately after the person concerned has presented a notice that the cassation appeal or extraordinary complaint has been lodged.

Para. 3. The provision of Article 626⁷ shall apply *mutatis mutandis* to the entry concerning an appeal, a cassation appeal or the extraordinary complaint referred in Article 86 of the Act of on the Supreme Court.”.

Article 103. The Act of 21 August 1997 – Law on the Organisation of Military Courts (Journal of Laws [Dz. U.] of 2016 items 358, 2103 and 2261 and of 2017 item 1452) shall be amended as follows: [...]

4) in Article 22:

a) in para. 1, point 1 shall read as follows:

“1) only holds Polish citizenship and enjoys full civil and public rights and has not been finally convicted of an intentional indictable offence or of an intentional fiscal offence.”;

[...]

9) after Article 39a, the following Articles 39b–39d shall be added:

“Article 39b. Para. 1. The Minister of Justice shall entrust the duties of a disciplinary court judge at a regional military court to a military court judge who has served as a judge for at least ten years, after consulting the National Council of the Judiciary.

Para. 2. The performance of duties of a disciplinary court judge at a regional military shall be independent of the performance of the duties related to the judge’s position.

Para. 3. The term of office of a disciplinary judge at a regional military court shall be six years.

Para. 4. After his or her term of office has expired, a disciplinary judge at a regional military court may participate in the hearing of cases which were initiated earlier with his or her participation until their conclusion.

Para. 5. The term of office of a disciplinary judge at a regional military court shall expire prematurely in the following cases:

- 1) the termination or expiry of the judge’s service relationship;
- 2) the judge having retired or having been retired;
- 3) the imposition of the disciplinary penalty set forth in Article 39, para. 1, points 2–4 on the judge.

Article 39c. Para. 1. The President of the disciplinary court at the regional military court shall be appointed from among the judges of the disciplinary court by the President of the Supreme Court who directs the work of the Disciplinary Chamber. The term of office of the President of the disciplinary court at the regional military court shall be three years.

Para. 2. The President of the disciplinary court at the regional military court may be dismissed by the President of the Supreme Court who directs the work of the Disciplinary Chamber during his or her term of office in the following cases:

- 1) a flagrant or persistent failure to perform his or her duties;
- 2) where the further performance of his or her function would be detrimental to the judiciary for other reasons;

- 3) his or her resignation.

Para. 3. Where the President of the disciplinary court at the regional military court is absent, the most senior judge of the disciplinary court at the regional military court shall perform his or her duties.

Para. 4. The President of the regional military court shall ensure appropriate premises and technical conditions as well as administrative and financial support for the disciplinary court at the regional military court.

...

- 10) after Article 40, Articles 40a and 40b shall be added, which shall read as follows:

...

Article 40b. Para. 1. The Minister of Justice may appoint a Disciplinary Proceedings Representative of the Minister of Justice in order to conduct a specific case concerning a military court judge. The appointment of the Disciplinary Proceedings Representative of the Minister of Justice shall exclude the participation of any other disciplinary proceedings representative in the case in question.

Para. 2. The Disciplinary Proceedings Representative of the Minister of Justice shall be appointed from among military court judges or common court judges.

Para. 3. The Disciplinary Proceedings Representative of the Minister of Justice may institute proceedings at the request of the Minister of Justice or may accede to proceedings that are already pending.

Para. 4. The appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall be tantamount to demanding an inquiry or disciplinary proceedings.

Para. 5. The mandate of a Disciplinary Proceedings Representative of the Minister of Justice shall expire at the time when the ruling to refuse to institute disciplinary proceedings or the ruling to discontinue disciplinary proceedings becomes final or the ruling that concludes disciplinary proceedings becomes final. The expiry of the mandate of a Disciplinary Proceedings Representative of the Minister of Justice shall not prevent the Minister of Justice from re-appointing a Disciplinary Proceedings Representative of the Minister of Justice in the same matter.”;

- 12) in Article 41:

- a) para. 1 shall read as follows:

“Para. 1. The Disciplinary Proceedings Representative for Military Court Judges shall take disciplinary action at the request of the National Council of the Judiciary, the Minister of Justice, the Minister of National Defence, Presidents of the relevant military courts, the board and also on his or her own initiative, after preliminary examination of the circumstances required to determine whether a

disciplinary offence has been committed. The Disciplinary Proceedings Representative for Military Court Judges shall be bound by the instructions of the competent authority with regard to the inquiry. The inquiry shall be conducted within 30 days of the first action taken by the Disciplinary Proceedings Representative for Military Court Judges.”;

b) paras. 2–5 shall be repealed;

13) in Article 41a, para. 3 shall read as follows:

“Para. 3. The defendant and the Disciplinary Proceedings Representative for Military Court Judges as well as the National Council of the Judiciary, the Minister of Justice and the Minister of National Defence, to whom copies of the judgment shall be delivered, shall have the right to appeal against the disciplinary court judgment given in the first instance as well as against decisions and orders preventing a judgment from being given.”;

...

15) after Article 41c, the following Article 41d shall be added:

“Article 41d. The Minister of Justice shall have access to information about the actions taken by the disciplinary court of the first instance.”;

...

Article 104. In Article 51 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws [Dz. U.] of 2016 item 1575):

...

2) after para. 5, the following paras. 6–11 shall be added:

“6. The Minister of Justice may appoint a Disciplinary Proceedings Representative of the Minister of Justice in order to conduct a specific case concerning a public prosecutor of the Institute of National Remembrance. The appointment of the Disciplinary Proceedings Representative of the Minister of Justice shall exclude the participation of any other disciplinary proceedings representative in the case in question.

7. The Disciplinary Proceedings Representative of the Minister of Justice shall be appointed from among the public prosecutors indicated by the National Public Prosecutor in each case. In justified cases, including without limitation in the case of death or long-term obstacles to the performance of the duties of the Disciplinary Proceedings Representative of the Minister of Justice, the Minister of Justice shall appoint in the place of this person another public prosecutor from among those indicated by the National Public Prosecutor.

8. The Disciplinary Proceedings Representative of the Minister of Justice may institute proceedings at the request of the Minister of Justice or may accede to proceedings that are already pending.

9. The appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall be tantamount to demanding an inquiry or disciplinary proceedings.

10. The mandate of a Disciplinary Proceedings Representative of the Minister of Justice shall expire at the time when the ruling to refuse to institute disciplinary proceedings or the ruling to discontinue disciplinary proceedings becomes final or the ruling that completes disciplinary proceedings becomes final. The expiry of the appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall not prevent the Minister of Justice from re-appointing a Disciplinary Proceedings Representative in the same matter. The Minister of Justice shall have access to information about the actions taken by the disciplinary court, he or she may point to any irregularities found, demand clarification and demand that effects of irregularities be removed; these activities must not encroach on the independence of members of disciplinary courts.”.

Article 105. The Act of 27 July 2001 – Law on the Organisation of Common Courts (Journal of Laws [Dz. U.] of 2016 item 2062 as amended¹⁰⁾) is hereby amended as follows:

...

3) in Article 61, para. 1, point 1 shall read as follows:

“1) holds only Polish citizenship and enjoys full civil and public rights and has not been finally convicted of an intentional indictable offence or of an intentional fiscal offence;”;

...

9) in Article 86:

...

d) para. 7 shall be added as follows:

“Para. 7. The President of the relevant court shall promptly publish in the Public Information Bulletin on the relevant court’s website information on the judge having undertaken additional employment referred to in para. 1 as well as another occupation or income-earning activity, indicating the entity at which the judge undertook employment or another occupation or income-earning activity, the type of the employment, occupation or income-earning activity and the number of hours devoted to it.”;

...

15) after Article 109, Articles 109a and 109b shall be added, which shall read as follows:

“Article 109a. Para. 1. Where the defendant has been finally convicted, the judgment of the disciplinary court shall be published.

Para. 2. The disciplinary court may refrain from publishing the judgment where this is unnecessary for achieving the purposes of disciplinary action or where this is necessary in order to protect legitimate private interests.

Para. 3. Where the defendant has been finally acquitted, the judgment of the disciplinary court shall be published upon the defendant judge’s request submitted to the disciplinary court of the first instance not later than fourteen days after the judgment has become final.

Para. 4. The disciplinary court judgment shall be published by being posted on the Supreme Court’s website. The judgment shall be published with the exclusion of data concerning the identity of a natural or other person if this is necessary to protect the legitimate interests of those persons.

...

18) Article 112 shall read as follows:

Para. 3. The Disciplinary Proceedings Representative for Common Court Judges and two Deputy Disciplinary Proceedings Representatives for Common Court Judges shall be appointed by the Minister of Justice for four-year terms of office.

19) after Article 112, Articles 112a–112c shall be added, which shall read as follows:

“Article 112a. Unless the Act provides otherwise, provisions on the Disciplinary Proceedings Representative for Common Court Judges shall apply *mutatis mutandis* to Deputy Disciplinary Proceedings Representatives for Common Court Judges and the Disciplinary Proceedings Representative of the Minister for Justice as well as to the deputy Disciplinary Proceedings Representative of an Appeals Court and the deputy Disciplinary Proceedings Representative of a Regional Court.

[...]

Article 112c. Para. 1. The Minister of Justice may appoint a Disciplinary Proceedings Representative of the Minister of Justice in order to conduct a specific case concerning a judge. The appointment of the Disciplinary Proceedings Representative of the Minister of Justice shall exclude the participation of any other disciplinary proceedings representative in the case in question.

Para. 2. The Disciplinary Proceedings Representative of the Minister of Justice shall be appointed from among common court judges or Supreme Court judges.

Para. 3. The Disciplinary Proceedings Representative of the Minister of Justice may institute proceedings at the request of the Minister of Justice or may accede to proceedings that are already pending.

Para. 4. The appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall be tantamount to demanding an inquiry or disciplinary proceedings.

Para. 5. The mandate of a Disciplinary Proceedings Representative of the Minister of Justice shall expire at the time when the ruling to refuse to institute disciplinary proceedings or the ruling to discontinue disciplinary proceedings becomes final or the ruling that concludes disciplinary proceedings becomes final. The expiry of the appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall not prevent the Minister of Justice from re-appointing a Disciplinary Proceedings Representative in the same matter.

22) Article 114 shall read as follows:

“Article 114. Para. 1. The Disciplinary Proceedings Representative shall institute an inquiry at the request of the Minister of Justice, the president of an Appeals Court or the president of a Regional Court, the Board of an Appeals Court or the Board of a Regional Court, the National Council of the Judiciary and also or on his or her own initiative, after preliminary examination of the circumstances required to determine whether a disciplinary offence has been committed. The inquiry shall be conducted within 30 days of the first action taken by the Disciplinary Proceedings Representative.

...

Para. 9. Where the Disciplinary Proceedings Representative does not find sufficient grounds for instituting disciplinary proceedings at the request of a competent authority, he or she shall issue a decision to refuse to institute proceedings. Copies of the decision shall be delivered to the authority which has requested the institution of proceedings, to the Board of a Regional Court or of an Appeals Court as appropriate and to the defendant. A copy of the decision shall also be delivered to the Minister of Justice who may object to it within thirty days. The raising of an objection shall be tantamount to the obligation to institute disciplinary proceedings, and instructions of the Minister of Justice concerning the further course of proceedings shall be binding on the Disciplinary Proceedings Representative. [...]

24) after Article 115, Articles 115a–115c shall be added, which shall read as follows:

...

Article 115b. Para. 1. The disciplinary court, having found on the basis of the material collected by the Disciplinary Proceedings Representative that the circumstances of the offence and the defendant's guilt are not in doubt, and that the penalties prescribed in Article 109, para. 1, points 1–3 will be sufficient, may give a summary judgment.

Para. 2. A summary judgment shall be given by a disciplinary court consisting of a single judge.

Para. 3. Where imposed by a summary judgment, the penalty referred to in Article 109, para. 1, point 2a shall range from 5% to 10% of remuneration for a period from six months up to one year.

Para. 4. A summary judgment may be opposed by the defendant, the Disciplinary Proceedings Representative, the National Council of the Judiciary and the Minister of Justice.

Para. 5. The opposition shall be lodged with the disciplinary court that gave the summary judgment within a final time limit of seven days of its delivery.

...

Article 122. Para. 1. A judgment of the disciplinary court shall not be subject to cassation.

Para. 2. A judgment of the disciplinary court of the second instance may be appealed against to another bench of the same court if a disciplinary penalty was imposed on the defendant in the judgment in question despite the fact that the court of the first instance previously acquitted the defendant or discontinued proceedings.

Para. 3. The judgment referred to in para. 2 shall become final after the ineffective expiry of the time limit for lodging an appeal to another bench of the disciplinary court of the second instance.

Para. 4. The time limit for bringing an appeal to another bench of the disciplinary court of the second instance shall be thirty days of the date on which the judgment is delivered. Provisions concerning proceedings before the disciplinary court of the second instance shall apply *mutatis mutandis* to the appeal to another bench of the disciplinary court of the second instance.”;

...

Article 107. The Act of 28 January 2016 – Law on the Public Prosecutor's Office (Journal of Laws [Dz. U.] item 177 as amended¹¹⁾) is hereby amended as follows:

[...]

11) after Article 153, Articles 153a and 153b shall be added, which shall read as follows:

“Article 153a. ...

Para. 5. The mandate of a Disciplinary Proceedings Representative of the Minister of Justice shall expire at the time when the ruling to refuse to institute disciplinary proceedings or the ruling to discontinue disciplinary proceedings becomes final or the ruling that completes disciplinary proceedings becomes final. The expiry of the appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall not prevent the Minister of Justice from re-appointing a Disciplinary Proceedings Representative in the same matter.”

Article 108. Para. 1. A Supreme Court judge who attains 65 years of age before the entry of the Act into force or attains 65 years of age within three months of the entry of the Act into force shall retire on the date falling three months after the entry of the Act into force unless within one month of the entry of the Act into force he or she submits the statement referred to in Article 36, para. 1, and the President of the Republic of Poland consents to the judge continuing to serve in the position of a Supreme Court judge. The provision of Article 36, paras. 2–4 shall apply *mutatis mutandis*.

Para. 2. Within six months of the entry of the Act into force, a Supreme Court judge may retire, submitting a statement to this effect to the President of the Republic of Poland via the First President of the Supreme Court.

Para. 3. On the date of entry of the Act into force, Supreme Court judges who sit in the Military Chamber shall be retired.

Para. 4. If the circumstances referred to in the first sentence of para. 1 or in para. 2 occur and it is necessary to elect the First President of the Supreme Court or a President of the Supreme Court, until the elected judge takes up his or her position, the President of the Republic of Poland shall entrust directing the work of the Supreme Court or of the relevant chamber thereof to the Supreme Court judge he or she designates. The General Assembly of Supreme Court Judges shall submit to the President of the Republic of Poland the candidates referred to in Article 11, para. 1 after at least two-thirds of the number of judges in individual chambers of the Supreme Court set forth in the rules of procedure of the Supreme Court issued pursuant to Article 4 of the Act have been appointed to chambers of the Supreme Court. The assembly of Supreme Court chamber judges shall submit to the President of the Republic of Poland the candidates referred to in Article 14, para. 2 after at least two-thirds of the number of judges in the Supreme Court chamber in question set forth in the rules of procedure of the Supreme Court issued pursuant to Article 4 of the Act have been appointed to that Supreme Court chamber.

Article 109. Para. 1. If the circumstances referred to in the first sentence of Article 108, para. 1 or in para. 2 occur and it is necessary to supplement the Board of the Supreme Court, the assembly of judges of the relevant Supreme Court chamber shall elect the new member or deputy member of the Board. If the circumstances referred to in the first sentence of para. 1 or

in para. 2 occur and the number of judges in a given chamber is less than two-thirds of the number of Supreme Court judges set forth for the chamber in question in the rules of procedure of the Supreme Court issued pursuant to Article 4 of the Act, the election shall take place as soon as the number of judges in the chamber has reached at least two-thirds of the prescribed number of judges.

Para. 2. The Supreme Court chambers referred to in Article 3, para. 1, points 4 and 5 of the Act shall elect two members and a deputy member of the Board of the Supreme Court as soon as at least two-thirds of the number of judges in the Supreme Court chamber in question set forth in the rules of procedure of the Supreme Court issued pursuant to Article 4 of the Act have been appointed.

Article 110. The first rules of procedure of the Supreme Court issued pursuant to Article 4 of the Act shall not require an opinion by the Board of the Supreme Court.

Article 111. Para. 1. A Supreme Court judge and the First President of the Supreme Court shall comply with the requirements referred to in Article 43, paras. 1 and 2 within 6 months of the entry of the Act into force.

Para. 2. A failure to comply with the requirements referred to in para. 1 shall result in the expiry of the service relationship of a Supreme Court judge.

Article 112. Para. 1. As of the date of entry of the Act into force, the Labour, Social Security and Public Affairs Chamber and the Military Chamber shall be abolished.

Para. 2. As of the date of entry of the Act into force, the Labour and Social Security Chamber, the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber shall be established.

Para. 3. Cases pending before the Military Chamber shall be taken over and conducted by the Criminal Chamber.

Article 113. As of the date of entry of the Act into force, Supreme Court judges sitting in the Labour, Social Security and Public Affairs Chamber shall become judges sitting in the Labour and Social Security Chamber.

Article 114. Proceedings concerning the appointment to the position of a Supreme Court judge that were initiated and not concluded before the date of entry of this Act into force shall be discontinued unless the National Council of the Judiciary has submitted to the President of the Republic of Poland a motion for the appointment of the judge to the position of a Supreme Court judge.

Article 115. Para. 1. Within three years from the date of entry of the Act into force, an extraordinary complaint may be lodged against final judgments concluding proceedings in cases that became final after 17 October 1997. The first sentence of Article 86, para. 3 shall not apply.

Para. 2. If 5 years have passed since the contested judgment became final and the judgment has caused irreversible legal effects or this is warranted by the principles of human and civil freedoms and rights stipulated in the Constitution, the Supreme Court may confine itself to finding that the contested judgment was given in breach of the law and indicating the reasons for this decision.

Article 116. Para. 1. Terms of office of Disciplinary Proceedings Representatives for Common Court Judges, Disciplinary Proceedings Representatives for Military Court Judges and their deputies appointed to perform these functions under the provisions of the Act amended in Article 103 and of the Act amended in Article 105 in their current wording shall expire 30 days after the entry of this Act into force.

Para. 2. The Disciplinary Proceedings Representatives and their deputies referred to in para. 1 shall perform their duties until the appointment of Disciplinary Proceedings Representatives and their deputies pursuant to the provisions of the Act amended in Article 103 and of the Act amended in Article 105 as amended by this Act.

Article 117. Para. 1. A judge or trainee judge who does not comply with the requirement of holding exclusively Polish citizenship as at the date of entry of the Act into force shall renounce his or her citizenship of a foreign country within 6 months of entry of the Act into force.

Para. 2. In the event of the ineffective expiry of the period referred to in para. 1, the service relationship of the judge or trainee judge shall expire.

Article 118. The provision of Article 35, para. 1, point 3 and para. 8 shall apply to persons appointed to the position of a Supreme Court judge after the date of entry of the Act into force.

Article 119. Article 91a, para. 6 of the Act amended in Article 105 in its current wording, until the effect stipulated therein ceases, shall be applicable to a judge on whom before the date of entry of the Act into force a disciplinary penalty was imposed or who was twice alerted to shortcomings pursuant to Article 37, para. 4 of the Act amended in Article 105 or to whom irregularities were twice pointed out pursuant to Article 40 of the Act amended in Article 105.

Article 120. Provisions on the statute of limitations for disciplinary offences in the wording provided for in this Act shall apply to acts committed before the date of entry of the Act into force unless the statute of limitations expired before the date of entry of the Act into force.

Article 121. Provisions on disciplinary liability in the wording provided for in this Act shall apply to acts committed before the date of entry of the Act into force unless the time limit for lodging a cassation expired before the date of entry of this Act into force.

Article 122. Disciplinary proceedings conducted pursuant to:

- 1) the Act of 26 May 1982 – Law on the Bar;
- 2) the Act of 6 July 1982 on Legal Counsels;
- 3) the Act of 14 February 1991 – Law on Notaries Public;
- 4) the Act of 21 August 1997 – Law on the Organisation of Military Courts;
- 5) the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation;
- 6) the Act of 27 July 2001 – Law on the Organisation of Common Courts

– shall be conducted pursuant to previous provisions until the inquiry or proceedings in the current instance are concluded.

Article 123. Actions taken in disciplinary proceedings before the date of entry of the Act into force shall remain in force if they were taken in compliance with previous laws.

Article 124. Para. 1. Disciplinary proceedings that were concluded with a final ruling issued by a Disciplinary Proceedings Representative before the date of entry of the Act into force may be resumed upon the motion of the Minister of Justice if an offence was committed in connection with the proceedings and there are reasonable grounds to believe that this offence could have affected the ruling or if new facts or evidence are revealed after the ruling was issued.

Para. 2. A decision to dismiss the motion or leave the motion unconsidered may be appealed against to the disciplinary court of the second instance.

Para. 3. When setting aside the decision referred to in para. 2, the disciplinary court shall indicate the reasons for the decision being set aside, and, where required, also the circumstances that need to be clarified or the steps that need to be taken. These indications shall be binding on the Disciplinary Proceedings Representative.

Article 125. The President of the Council of Ministers shall, by way of a regulation, transfer the planned budgetary revenue and expenditure, including remuneration, from the section of the budget corresponding to common courts and common organisational units of the public prosecutor's office to the Supreme Court section for the purpose of establishing and enabling the operation of new Supreme Court chambers, the appointment of Supreme Court judges to these chambers and the selection and enabling the operation of lay Supreme Court judges.

Article 126. The Supreme Court shall promptly, but not later than within 2 years of the entry of the Act into force, publish in the Public Information Bulletin on the Supreme Court website the judgments, including statements of reasons, given by the Supreme Court before the entry of the Act into force.

Article 127. Para. 1. The selection of lay Supreme Court judges for the first term of office by the Senate of the Republic of Poland shall take place within three months of the entry of the Act into force.

Para. 2. Within one month of the date of entry of the Act into force, the Board of the Supreme Court shall determine the number of lay Supreme Court judges.

Para. 3. The First President of the Supreme Court shall notify the Marshal of the Senate of the Republic of Poland of the number of lay Supreme Court judges not later than on the day following the determination of the number of lay Supreme Court judges by the Board of the Supreme Court.

Para. 4. The first term of office of lay Supreme Court judges shall begin on the day on which lay Supreme Court judges take their oaths of office and it shall end on 31 December 2021.

Article 128. Para. 1. Until the date on which the first term of office of lay Supreme Court judges commences, the duties of lay Supreme Court judges shall be performed by the lay judges designated by the First President of the Supreme Court from among those lay judges of the Regional Court in Warsaw and of the Regional Court for Warsaw-Praga in Warsaw who have declared themselves willing to adjudicate on disciplinary matters.

Para. 2. On the day following the date of entry of the Act into force, the President of the Regional Court in Warsaw and the President of the Regional Court for Warsaw-Praga in Warsaw shall notify the lay judges of the Regional Court in Warsaw and of the Regional Court for Warsaw-Praga in Warsaw of their option to adjudicate disciplinary proceedings in the Supreme Court. Within 30 days of the date of entry of the Act into force, the regional court lay judges referred to in the first sentence may notify the First President of the Supreme Court of their willingness to adjudicate on disciplinary matters.

Para. 3. In appointing the lay judges referred to in para. 1, the First President of the Supreme Court shall cooperate with the President of the Regional Court in Warsaw and with the President of the Regional Court for Warsaw-Praga in Warsaw so that the proceedings involving those lay judges that are conducted at, respectively, the Regional Court in Warsaw and the Regional Court for Warsaw-Praga in Warsaw are not disrupted.

Para. 4. Article 62, para. 5 shall apply *mutatis mutandis* to the lay judges referred to in para. 1.

Para. 5. After the commencement of the term of office of lay Supreme Court judges, a lay judge referred to in para. 1 may only participate in the hearing of cases initiated earlier with his or her participation until their conclusion.

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