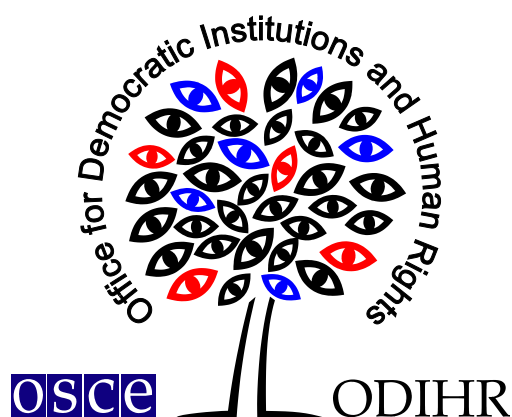


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**OPINION**

**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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## **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 Poland<sup>1</sup> 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.<sup>2</sup>*
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 Poland<sup>3</sup> (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*

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<sup>1</sup> 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”.

<sup>2</sup> 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>>.

<sup>3</sup> *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”),<sup>4</sup> 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.<sup>5</sup> 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 Women<sup>6</sup> (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality<sup>7</sup> 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

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<sup>4</sup> 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>>.

<sup>5</sup> See <<http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1423>>.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> Any matter not regulated by the 2002 Act shall be governed by the Act on the Organisation of Common Courts<sup>9</sup> (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 Court<sup>10</sup> into two Chambers dealing with public and private law respectively, as well as the establishment of a new

<sup>8</sup> 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>>.

<sup>9</sup> 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](http://www.legislationline.org/download/action/download/id/6754/file/Poland_Law_Common_Court_Organisation_2016_en.pdf)>.

<sup>10</sup> 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.<sup>11</sup> As stated in the OSCE Copenhagen

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<sup>11</sup> 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](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.<sup>12</sup> 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*<sup>13</sup> (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),<sup>14</sup> and have been further elaborated in the *Bangalore Principles of Judicial Conduct* (2002).<sup>15</sup> 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,

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<sup>12</sup> 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>>.

<sup>13</sup> 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.

<sup>14</sup> *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>>.

<sup>15</sup> *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](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](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”.<sup>16</sup>
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*<sup>17</sup> (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.<sup>18</sup>
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*,<sup>19</sup> 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),<sup>20</sup> 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”).<sup>21</sup>
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

<sup>16</sup> 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%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en).

<sup>17</sup> 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.

<sup>18</sup> 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>.

<sup>19</sup> 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).

<sup>20</sup> Available at [http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](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=FD864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FD864&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).

<sup>21</sup> 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).

of law, as stated in Article 2 of the Treaty on European Union.<sup>22</sup> 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).<sup>23</sup> In the 1991 Moscow Document,<sup>24</sup> 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.<sup>25</sup> 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").<sup>26</sup>
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;<sup>27</sup>
  - the reports and other documents of the European Network of Councils for the Judiciary (ENCJ);<sup>28</sup>
  - the *European Charter on the Statute for Judges* (1998);<sup>29</sup> and
  - the opinions of the OSCE/ODIHR dealing with issues pertaining to judicial councils and the independence of the judiciary.<sup>30</sup>

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<sup>22</sup> 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."

<sup>23</sup> 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>>.

<sup>24</sup> 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>>.

<sup>25</sup> 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>>.

<sup>26</sup> 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>>.

<sup>27</sup> Available at <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>.

<sup>28</sup> Available at <<https://www.encj.eu/>>.

<sup>29</sup> *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>>.

<sup>30</sup> 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.<sup>31</sup> As stated in the OSCE/ODIHR publication on *Resolving Election Disputes in the OSCE Area: Toward a Standard Election Dispute Monitoring System* (2000),<sup>32</sup> 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.<sup>33</sup>

### **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”.<sup>34</sup> 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).<sup>35</sup> 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

<sup>31</sup> 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](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”.

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

<sup>32</sup> 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)>.

<sup>34</sup> ECtHR, *Frani v. Slovakia* (Application no. 8014/07, judgment of 21 June 2011), par 134, <<http://hudoc.echr.coe.int/eng?i=001-105236>>.

<sup>35</sup> *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”.<sup>36</sup> 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.<sup>37</sup>

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 [...]”.<sup>38</sup> 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,<sup>39</sup> 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

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<sup>36</sup> 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)>.

<sup>37</sup> 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](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.”

<sup>38</sup> 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)>.

<sup>39</sup> 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](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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> In principle, the allocation of cases to individual judges

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<sup>40</sup> *Op. cit.* footnote 37, pars 26 (c) (2007 UNODC’s Commentary on the Bangalore Principles of Judicial Conduct).

<sup>41</sup> *Op. cit.* footnote 20, pars 48 (ii) and 49 (iii) (2002 CCJE Opinion No. 3 on the Principles and Rules Governing Judges’ Professional Conduct).

<sup>42</sup> See e.g., although in cases of constitutional justice, ECtHR, *Stißmann 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

#### **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,<sup>46</sup> 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

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<sup>43</sup> *Op. cit.* footnote 21, pars 80-81 (2010 Venice Commission's Report on the Independence of the Judicial System).

<sup>44</sup> *ibid.*

<sup>45</sup> 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)>.

<sup>46</sup> 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 Representative<sup>47</sup> 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

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<sup>47</sup> 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.<sup>48</sup> Disciplinary proceedings or the threat of such proceedings may be misused by placing improper pressure on the judges concerned.<sup>49</sup> 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”.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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”.<sup>53</sup> 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

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<sup>48</sup> 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).

<sup>49</sup> 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](http://zdruzenie.sk/wp-content/uploads/2016/10/resolution_slovakia_from_istanbul_-_4th_september_2011.pdf)>.

<sup>50</sup> *Op. cit.* footnote 26, par 9 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

<sup>51</sup> 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).

<sup>52</sup> 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)>.

<sup>53</sup> *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”.<sup>54</sup>

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.<sup>55</sup> 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,<sup>56</sup> 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”.<sup>57</sup>
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.**

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<sup>54</sup> 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](http://ec.europa.eu/newsroom/document.cfm?doc_id=46116)>.

<sup>55</sup> 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>>.

<sup>56</sup> *ibid.*

<sup>57</sup> *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).<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>
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 hearing<sup>61</sup> and assisted by a lawyer of his or her choice.<sup>62</sup> Moreover, the decision of the disciplinary court should be motivated and state the essential findings, evidence and legal reasoning.<sup>63</sup>
58. The involvement of executive organs in disciplinary proceedings against judges, possibly leading to their early dismissal, severely politicizes this process, and greatly

<sup>58</sup> 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).

<sup>59</sup> *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).

<sup>60</sup> 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](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/>>.

<sup>61</sup> 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.

<sup>62</sup> 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.

<sup>63</sup> 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.<sup>64</sup>

59. In addition, the principle of equality of arms, which applies in principle to civil as well as to criminal cases,<sup>65</sup> 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.<sup>66</sup> 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

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<sup>64</sup> 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.

<sup>65</sup> 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>>.

<sup>66</sup> 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.<sup>67</sup> 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).<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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

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<sup>67</sup> *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).

<sup>68</sup> 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>>.

<sup>69</sup> *ibid.* par 57, regarding different levels of remuneration for judges solely by virtue of a judge's specialization.

<sup>70</sup> 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.<sup>71</sup> Judges must have guaranteed tenure until they reach the retirement age or the expiry of their term of office, where this exists.<sup>72</sup> 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,<sup>73</sup> misbehavior that renders them unfit to discharge their duties,<sup>74</sup> serious grounds of misconduct or incompetence,<sup>75</sup> or serious breaches of disciplinary or criminal provisions established by law.<sup>76</sup> 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*).<sup>77</sup> Cases of early retirement should be possible only at the request of the judge concerned or on medical grounds<sup>78</sup> and the body taking decisions on retirement should not be able to exert any discretion in this regard.<sup>79</sup>

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<sup>71</sup> *Op. cit.* footnote 19, par 49 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>72</sup> *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.

<sup>73</sup> *ibid.* Principle 18 (UN Basic Principles on the Independence of the Judiciary).

<sup>74</sup> *ibid.*

<sup>75</sup> *Op. cit.* footnote 16, par 20 (UNHRC General Comment No. 32).

<sup>76</sup> *Op. cit.* footnote 19, par 50 (CoE Recommendation CM/Rec(2010)12).

<sup>77</sup> *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).

<sup>78</sup> *Op. cit.* footnote 19, par 50 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>
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.<sup>84</sup> 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.<sup>85</sup>
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

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<sup>80</sup> 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](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/42)>.

<sup>81</sup> *Op. cit.* footnote 14, Principles 17-20 (1985 UN Basic Principles).

<sup>82</sup> 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](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?pdfid=CDL-AD\(2015\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2015)007-e)>.

<sup>83</sup> *ibid.*, par 74.

<sup>84</sup> *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)>.

<sup>85</sup> *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.<sup>86</sup> 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.<sup>87</sup>

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,<sup>88</sup> 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.<sup>89</sup> 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,<sup>90</sup> and cassation hearings in disciplinary cases against lawyers, legal counsellors, notaries

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<sup>86</sup> See e.g., *op. cit.* footnote 15, par 16.3 (2010 Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct).

<sup>87</sup> *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).

<sup>88</sup> See *op. cit.* footnote 21, par 80 (2016 Venice Commission’s Rule of Law Checklist).

<sup>89</sup> 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).

<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup>
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.<sup>95</sup> 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.<sup>96</sup>
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**

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<sup>91</sup> See Article 9 of the Law on Lawyers; Article 62<sup>2</sup> 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.

<sup>92</sup> 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).

<sup>93</sup> 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)>.

<sup>94</sup> 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).

<sup>95</sup> 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).

<sup>96</sup> 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,<sup>97</sup> while ensuring that the composition of the judiciary reflects the composition of the population as a whole<sup>98</sup> and is balanced in terms of gender.<sup>99</sup> 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,<sup>100</sup> which should be subject to a full judicial review, on procedure and on substance.<sup>101</sup> 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*.<sup>102</sup> 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.<sup>103</sup>
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

<sup>97</sup> 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).

<sup>98</sup> *ibid.* par 24 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

<sup>99</sup> 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).

<sup>100</sup> 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).

<sup>101</sup> 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)>.

<sup>102</sup> *Op. cit.* footnote 19, pars 46-47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>103</sup> 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,<sup>104</sup> 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.<sup>105</sup>
  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”,<sup>106</sup> 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.<sup>107</sup>
  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*).<sup>108</sup> 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

<sup>104</sup> 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)>.

<sup>105</sup> *Op. cit.* footnote 4, pars 12-15 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

<sup>106</sup> 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).

<sup>107</sup> 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).

<sup>108</sup> 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](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.<sup>109</sup> These principles require clearly established and transparent procedures and safeguards, based on clear and objective criteria,<sup>110</sup> 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.<sup>111</sup> 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,<sup>112</sup> but not those of Article 25 pars 2 and 3 generally applicable for all appointments of Supreme Court judges. The latter provision provides

<sup>109</sup> 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)>.

<sup>110</sup> *ibid.*

<sup>111</sup> 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).

<sup>112</sup> 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 Council<sup>113</sup> 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.<sup>114</sup>
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.<sup>115</sup> The aim of such arrangements is to ensure that judges are selected based on candidates' merits rather than on political considerations.<sup>116</sup> Moreover, where legislation provides that the government and/or the legislative power shall take decisions concerning the selection and career of judges, CoE Recommendation

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<sup>113</sup> 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).

<sup>114</sup> 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>>.

<sup>115</sup> 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).

<sup>116</sup> 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].<sup>117</sup> 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.<sup>118</sup>

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 Constitution<sup>119</sup> 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*.<sup>120</sup>
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).<sup>121</sup> 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).

<sup>117</sup> *ibid.* par 47 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>118</sup> *ibid.* par 44 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>119</sup> 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”.

<sup>120</sup> 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>>.

<sup>121</sup> 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).<sup>122</sup>
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.<sup>123</sup> 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".<sup>124</sup> 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.<sup>125</sup> 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**

<sup>122</sup> *Op. cit.* footnote 4, pars 60 and 70 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

<sup>123</sup> *Op. cit.* footnote 26, par 23 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence).

<sup>124</sup> 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>>.

<sup>125</sup> *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.<sup>126</sup> Early removal can only occur pursuant to established and transparent procedures and safeguards regarding removal, based on clear and objective criteria,<sup>127</sup> 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.<sup>128</sup>
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”.<sup>129</sup> 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.<sup>130</sup>
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.<sup>131</sup> In cases where these office-holders/court

<sup>126</sup> *Op. cit.* footnote 109, par 46 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

<sup>127</sup> *ibid.* par 46 (CCJE Opinion No. 19 on the Role of Court Presidents).

<sup>128</sup> *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).

<sup>129</sup> 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>>.

<sup>130</sup> *ibid.* par 60.

<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>
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.**

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<sup>132</sup> *ibid.* pars 120-122.

<sup>133</sup> *Op. cit.* footnote 109, pars 37-40 and 53 (2016 CCJE Opinion No. 19 on the Role of Court Presidents).

<sup>134</sup> *ibid.* par 53 (CCJE Opinion No. 19 on the Role of Court Presidents).

<sup>135</sup> *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".<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>
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

<sup>136</sup> *Op. cit.* footnote 16, par 19 (UN HRC General Comment No. 32 (2007)).

<sup>137</sup> 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>>.

<sup>138</sup> 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”.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup>

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*<sup>143</sup> 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”.<sup>144</sup> 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).<sup>145</sup>
116. Article 31 par 1 is also contrary to Article 3 of the International Covenant on Economic, Social and Cultural Rights<sup>146</sup> 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.<sup>147</sup>
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-consider the earlier optional retirement age for women Supreme Court judges, as**

<sup>139</sup> See International Association of Judges, *International Charter of the Judge* (1999), Article 8, <<http://www.iaj-uim.org/universal-charter-of-the-judges/>>.

<sup>140</sup> *Op. cit.* footnote 129 (CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012).

<sup>141</sup> *ibid.* par 68 (CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012).

<sup>142</sup> *ibid.* pars 65-81 (CJEU, *European Commission v. Hungary*, Case C-286/12, 6 November 2012).

<sup>143</sup> ECtHR, *Konstantin Markin v. Russia* (Application no. 30078/06, judgment of 22 March 2012), <<http://hudoc.echr.coe.int/eng?i=001-109868>>.

<sup>144</sup> *ibid.* par 141.

<sup>145</sup> *ibid.* par 139-151.

<sup>146</sup> *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”.

<sup>147</sup> See e.g., Committee on the Elimination of Discrimination against Women, *Concluding Observations on the 4<sup>th</sup> and 5<sup>th</sup> 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](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/>>.

**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.<sup>148</sup>
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.<sup>149</sup> For instance, in international courts, there is a growing tendency to disallow the extension of judges' mandates, so as not to jeopardize judicial independence.<sup>150</sup> 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.<sup>151</sup> 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.
121. Finally, this new extension mechanism may subject individual judges to improper influence, pressure, threat or fear of interference, direct or indirect, from authorities

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<sup>148</sup> *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)>.

<sup>149</sup> *ibid.* pars 30-31 (2014 Venice Commission's Opinion - Judicial Code of Armenia).

<sup>150</sup> 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)".

<sup>151</sup> *Op. cit.* footnote 4, Sub-Section 4 (2017 OSCE/ODIHR Final Opinion on the National Council of the Judiciary of Poland).

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.<sup>152</sup> 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).<sup>153</sup> According to the Charter, remunerated activities should also require prior authorization.<sup>154</sup> 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”.<sup>155</sup>
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 though arguably, they would be in a much better position to assess whether the court's case load permits additional absence of the judge).

<sup>152</sup> *Op. cit.* footnote 19, par 22 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities).

<sup>153</sup> *Op. cit.* footnote 29, par 4.2 (1998 European Charter on the Statute for Judges).

<sup>154</sup> *ibid.*

<sup>155</sup> *Op. cit.* footnote 37, pars 182 (2007 UNODC's Commentary on the Bangalore Principles of Judicial Conduct).

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.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup> 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 3/5<sup>th</sup> 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 real and perceived independence of this council,<sup>159</sup> as this means that political

<sup>156</sup> 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)>.

<sup>157</sup> ECtHR, *Niemitz v. Germany* (Application no. 13710/88, judgment of 16 December 1992), par 29, <<http://hudoc.echr.coe.int/eng?i=001-57887>>.

<sup>158</sup> 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#)>.

<sup>159</sup> 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

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).<sup>160</sup> 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).<sup>161</sup> 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).<sup>162</sup>
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.<sup>163</sup> According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally 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

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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)>.

<sup>160</sup> *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).

<sup>161</sup> Available at <<http://www.osce.org/fr/odihr/elections/14304>>.

<sup>162</sup> Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

<sup>163</sup> 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>>.

the proposed draft act and supporting data/information.<sup>164</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,<sup>165</sup> 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.<sup>166</sup> 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".<sup>167</sup> 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.<sup>168</sup>
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 opinion<sup>169</sup> 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 July<sup>170</sup> 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.
138. The legal drafters have prepared an Explanatory Statement to the Draft Act, which lists a number of reasons justifying the contemplated reform,<sup>171</sup> but it does not mention the

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<sup>164</sup> 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>>.

<sup>165</sup> 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>>.

<sup>166</sup> *ibid.*

<sup>167</sup> *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).

<sup>168</sup> *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](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".

<sup>169</sup> See *op. cit.* footnote 39.

<sup>170</sup> See <<http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=79AFE72D21974105C125815B006FF6EC>>.

<sup>171</sup> See <<http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1727>>.

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).<sup>172</sup>

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.<sup>173</sup>
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 reform process of such calibre **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the Supreme**

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<sup>172</sup> 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>>.

<sup>173</sup> *ibid.* par 12.



**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**

Draft

*(reflecting amendments of 19 July 2017)*

**A C T**

of 2017

**on the Supreme Court**

**Article 3.** Para. 2. The President of the Republic of Poland, upon the request of the Minister of Justice and after consulting the National Council of the Judiciary, shall determine, by way of a regulation, the rules of procedure of the Supreme Court, which shall determine the total number of positions of Supreme Court judges, the number of judges' positions in individual Supreme Court chambers, the internal organisation of the Supreme Court, the detailed division of cases between the chambers and 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 functioning of the Supreme Court and of its chambers and the efficient performance of duties by Supreme Court bodies, taking into account the number and types of cases heard by the Supreme Court, and having regard to the special nature of the Disciplinary Chamber.

**Article 31.** Para. 1. A Supreme Court judge may retire upon attaining 60 years of age in the case of female judges. 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 National Council of the Judiciary, after consulting the Minister of Justice, consents to the judge continuing to serve in the position of a Supreme Court judge.

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 Minister of Justice together with his or her opinion. The First President of the Supreme Court shall submit his or her statement and certificate to the Minister of Justice.

Para. 3. Within 21 days, the Minister of Justice shall forward the documents referred to in para. 2 together with his or her opinion to the National Council of the Judiciary, which shall decide whether to grant consent for the Supreme Court judge to continue to serve in his or her position.

Para. 4. Where the proceedings related to the continued service of a Supreme Court judge have not been completed 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. 5. Where consent has been granted for his or her continued service as a Supreme Court judge, the judge may continue to serve in this position until attaining 70 years of age at the latest unless he or she is granted renewed consent to continue to serve as a Supreme Court judge. Such consent may be renewed for a period of 5 years, at most twice; the provisions of paras. 1–4 shall apply *mutatis mutandis*. Such judge may retire at any time by submitting a statement to this effect to the National Council of the Judiciary through the Minister of Justice.

**Article 37.** Para. 1. A Supreme Court judge shall not be a party to another service relationship or employment relationship, with the exception of employment in teaching, teaching and research or academic positions.

Para. 2. A judge shall also be prohibited from undertaking another occupation or income-earning activity which would interfere with the performance of judicial duties, might undermine trust in his or her impartiality or compromise the dignity of judicial office.

Para. 3. The number of annual teaching hours of a Supreme Court judge referred to in para. 1 shall not exceed 50.

Para. 4. The number of annual teaching hours of a Supreme Court judge shall not exceed 140 if at least three-fourths of these teaching hours consist of teaching at the National School of Judiciary and Public Prosecution or teaching at a university law faculty within the meaning of Article 3, para. 1 of the Act of 27 July 2005 – Law on

Higher Education (Journal of Laws [Dz. U.] of 2016 item 1842 as amended<sup>174)</sup>) in one of the positions referred to in para. 1.

Para. 5. In exceptional cases, the Minister of Justice may grant consent for the number of teaching hours to be higher than that specified in paras. 3 and 4. The relevant application shall be submitted to the Minister of Justice with notification to the First President of the Supreme Court, and in the case of judges sitting in the Disciplinary Chamber – to the President of that Chamber. The Minister of Justice shall decide on the application within 30 days of its submission.

Para. 6. 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 proxy with regard to such activity.

Para. 7. A Supreme Court judge shall notify the Minister of Justice 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 at least 14 days before undertaking additional employment or undertaking another occupation or income-earning activity.

Para. 8. The Minister of Justice may object to the judge taking up or continuing the additional employment referred to in para. 1 if he or she decides that this employment 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.

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<sup>174)</sup> Amendments to the consolidated text of the Act concerned were published in Journal of Laws [Dz. U.] items 1933, 2169 and 2260 and of 2017 items 60, 777, 858 and 859.

Para. 9. A Supreme Court judge may undertake another occupation or income-earning activity, including teaching other than in one of the positions set forth in para. 1, exclusively with the consent of the Minister of Justice.

Para. 10. The provisions of para. 2 and paras. 6–9 shall apply *mutatis mutandis* to retired Supreme Court judges. The Minister of Justice may object to the notice referred to in para. 7 that has been submitted by a retired Supreme Court judge if he or she decides that taking up the additional employment referred to in para. 1 or of another occupation or income-earning activity may compromise the dignity of judicial office.

Para. 11. During the period when a Supreme Court judge sits in the Disciplinary Chamber, he or she shall not remain in another service relationship or employment relationship or engage in any other occupation or income-earning activity unless the Minister of Justice grants his or her consent, except for participation in conferences or training courses for which the judge does not receive remuneration. Participation in conferences or training courses shall require the consent of the President of the Supreme Court who directs the work of the Chamber.

**Article 41.** Para. 7. A judge who sits in the Disciplinary Chamber and a judge who is seconded to perform duties in that Chamber shall be entitled to an additional allowance amounting to 40% of his or her basic salary and his or her functional allowance combined. The allowance shall not be paid for periods of absence from work due to the judge's illness unless total absence from work due to illness does not exceed 30 days per calendar year.

**Article 54.** 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 Supreme 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 the public prosecutors indicated by the National Public Prosecutor. 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 his or

her place another public prosecutor from among those indicated by the National Public Prosecutor.

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.

Para. 5. The appointment of a Disciplinary Proceedings Representative of the Minister of Justice shall expire at the time when the decision to refuse to institute disciplinary proceedings or the decision to discontinue disciplinary proceedings becomes final or the decision 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 56.** 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 Supreme Court Board, 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 accused 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 an authorised body, he or she shall issue a decision to refuse to institute proceedings. The copy of the decision shall also be delivered to the Minister of Justice. Within 30 days of the date of delivery of this decision, the authority that requested that disciplinary proceedings be instituted shall have the right to appeal to the disciplinary court of first instance and the Minister of Justice shall be entitled to raise an objection. 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 of the Supreme Court.

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. The copy of the decision shall be delivered to the defendant and to the Minister of Justice. Within 30 days of the date of delivery of this decision, the authority that requested that disciplinary proceedings be instituted shall have the right to appeal to the disciplinary court of first instance and the Minister of Justice shall be entitled to raise an objection. The raising of an objection shall be tantamount to the obligation to institute and continue disciplinary proceedings, and instructions of the Minister of Justice concerning the further course of proceedings shall be binding on the Disciplinary Proceedings Representative of the Supreme Court.

Para. 6. The appeal shall be heard within 14 days of its filing with the court. Where this decision 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 decisions shall not be subject to cassation.

**Article 57.** Para. 1. After conducting the inquiry, where there are no grounds for instituting disciplinary proceedings, the Disciplinary Proceedings Representative of the Minister of Justice shall issue a decision to refuse to institute disciplinary proceedings. The copy of the decision shall be delivered to the Minister of Justice.

Para. 2. Within 30 days of the date of delivery of the decision referred to in para. 1, the Minister of Justice may raise an objection. 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 of the Minister of Justice.

Para. 3. After conducting the inquiry, where there are grounds for instituting disciplinary proceedings, the Disciplinary Proceedings Representative of the Minister of Justice 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. 4. After the period referred to in para. 3 has elapsed and, if necessary, after examining further evidence, the Disciplinary Proceedings Representative of the Minister of Justice shall petition the disciplinary court 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. 5. Where the Disciplinary Proceedings Representative of the Minister of Justice does not find sufficient grounds for requesting that the disciplinary case be heard, he or she shall issue a decision to discontinue disciplinary proceedings. The copy of the decision shall be delivered to the accused and to the Minister of Justice.

Para. 6. Within 30 days of the date of delivery of the decision referred to in para. 5, the defendant and the Minister of Justice may appeal to the disciplinary court.

Para. 7. The appeal shall be heard within 30 days of its filing with the court.

**Article 60.** Labour law and social security cases concerning Supreme Court judges and cases concerning the retirement of a Supreme Court judge shall be heard by:

- 1) in the first instance – the Supreme Court composed of a single judge sitting in the Disciplinary Chamber;
- 2) in the second instance – the Supreme Court composed of three judges sitting in the Disciplinary Chamber.

**Article 62.**

Para. 1. Cases shall be allocated and court formations shall be decided by the President of the Supreme Court who directs the work of the chamber in question.



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 87.** On the day following the date of entry of this Act into force, Supreme Court judges appointed pursuant to previous regulations shall be retired, except for the judges whose continued active status has been approved by the President of the Republic of Poland in accordance with the procedure referred to in Art. 88.

**Article 88.** Para. 1. Within 14 days of the date of entry of this Act into force, the Minister of Justice shall submit to the National Council of the Judiciary a request for the designated Supreme Court judges to remain active, having regard to the need to implement the organisational changes arising from the change of the organisation of the Supreme Court and to preserve the continuity of its work. In the request, the Minister of Justice shall designate the Supreme Court chamber where the Supreme Court judge will perform his or her duties, having regard to the position hitherto held by that judge and the needs related to the cases heard by the Supreme Court.

Para. 2. Within 14 days of receiving the request referred to in para. 1, the National Council of the Judiciary shall adopt the relevant resolution separately with respect to each of the judges designated in the request. This competence shall be exercised by the First Assembly of the National Council of Judiciary and by the Second Assembly of the National Council of the Judiciary. Provisions of Article 31a, paras. 1 and 3 and of Article 31b, para. 1, the first sentence of para. 2, and para. 3 of the Act amended in Article 85 shall apply *mutatis mutandis*. The National Council of the Judiciary shall submit its resolution to the President of the Republic of Poland who shall decide whether to approve the judge's continued active status within 14 days of receipt of the resolution or of the ineffective expiry of the time limit referred to in the first sentence. The President of the Republic of Poland shall not be bound by the resolution of the National Council of the Judiciary.

Para. 3. A Supreme Court judge whose continued active status has not been approved by the President of the Republic of Poland shall be retired on the date following the date of issue by the President of the Republic of Poland of the decision referred to in para. 2.

Para. 4. On the date of entry of this Act into force, the Minister of Justice, by means of a notice in the Official Gazette of the Minister of Justice, shall designate the Supreme Court judges with respect to whom he or she intends to submit the request referred to in para. 1. The judges designated in the notice shall remain active until the President of the Republic of Poland issues the decision concerning the approval of their continued active status. In the notice, the Minister of Justice shall designate the Supreme Court chamber where the Supreme Court judge will perform his or her duties until the President of the Republic of Poland issues the decision concerning the approval of his or her continued active status, having regard to the position hitherto held by that judge and the needs related to the cases heard by the Supreme Court.

Para. 5. A Supreme Court judge designated in the notice referred to in para. 4 and not designated in the request referred to in para. 1 shall be retired as of the day following the date on which the time limit for the submission of the request referred to in para. 1 elapses.

**Article 89.** Para. 1. Supreme Court judges who have been retired pursuant to Article 87 or Article 88, para. 3 or 5 shall be entitled to remuneration equal to the salary received in their last positions held as Supreme Court judges until they attain 65 years of age.

Para. 2. A Supreme Court judge who has been retired pursuant to Article 87 or Article 88, para. 3 or 5 may, within 14 days of the date of his or her retirement, request that the Minister of Justice transfer him or her to a position at a common, military or administrative court. The Minister of Justice, having regard to the rational use of judiciary personnel and the needs related to the workload of individual courts, may grant the request, refuse to grant the request or indicate a different position at a common, military or administrative court.

Para. 3. A Supreme Court judge who has been retired pursuant to Article 87 or Article 88, para. 3 or 5 shall be transferred to the position of a common, military or administrative court judge on the date on which his or her request has been granted or on which he or she consents to being transferred to a position other than that specified in the request referred to in para. 2. In this case, the judge shall be entitled to salary in the amount equal to that received in his or her last position held as a Supreme Court judge.

Para. 4. A judge transferred pursuant to para. 3 may use the title “former judge of the Supreme Court”.

Para. 5. The provision of Article 74, para. 1 of the Act amended in Article 83 shall not apply to Supreme Court judges who have been retired pursuant to Article 87 or Article 88, para. 3 or 5.

Para. 6. Proceedings concerning the appointment to the position of a Supreme Court judge that were initiated and not completed before the date of entry of this Act into force shall be discontinued.

**Article 90.** A person who, in connection with his or her resignation from the position of a Supreme Court judge before the date of entry of this Act into force, has the right to return to the formerly held position of a Supreme Court judge, may return to the position of a retired Supreme Court judge. The provisions of Article 98, paras. 4 and 5 of the Act amended in Article 83 shall apply *mutatis mutandis*.

**Article 91.** If the Supreme Court judge who holds the position of the First President of the Supreme Court has been retired pursuant to Article 87 or Article 88, para. 3 or 5, the tasks and powers of the First President of the Supreme Court shall be exercised by the Supreme Court judge designated by the President of the Republic of Poland.

**Article 95.** Para. 1. Within 7 days of the date on which the President of the Republic of Poland issues the last of the decisions referred to in Article 88, para. 2, the Minister of Justice 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. Within 14 days of the announcement referred to in para. 1, the Minister of Justice may propose to the National Council of the Judiciary one candidate for each position of a Supreme Court judge from among the persons who meet the conditions set forth in Article 24. The provision of Article 25, paras. 2 and 3 shall not apply to the filling of the positions for which the Minister of Justice has proposed candidates.

Para. 3. The National Council of the Judiciary shall examine and assess the candidates for the positions of Supreme Court judges proposed in the manner referred to in para. 2 and shall submit to the President of the Republic of Poland requests for candidates to be

appointed to positions of Supreme Court judges within 14 days of the date on which they are proposed.

Para. 4. In the case of the ineffective expiry of the time limit referred to in para. 3 for the submission to the President of the Republic of Poland of the request for a candidate to be appointed to the position of a Supreme Court judge, a favourable resolution on the candidate by one of the assemblies of the National Council of the Judiciary shall be sufficient. The provisions of Article 31b, paras. 2 and 3 and of Article 31c, paras. 1–4 of the Act amended in Article 85 shall not apply. The request shall be signed by the chair of the First Assembly of the National Council of Judiciary or of the Second Assembly of the National Council of the Judiciary.

Para. 5. Within 7 days of the time limit referred to in para. 2 having elapsed, the Minister of Justice shall announce in the Polish Monitor [Monitor Polski] Official Journal of the Republic of Poland the number of vacant judicial positions remaining to be filled in individual Supreme Court chambers as a result of him or her not having proposed candidates in accordance with the procedure referred to in para. 2.

Para. 6. Any person who meets the requirements for the position of a Supreme Court judge may apply within 21 days of the announcement referred to in para. 5.

Para. 7. The National Council of the Judiciary shall examine and assess the candidates for the positions of Supreme Court judges and shall submit to the President of the Republic of Poland requests for candidates to be appointed to positions of Supreme Court judges within 14 days of the time limit referred to in para. 6 having elapsed.

**Article 96.** Para. 1. The selection of candidates for the First President of the Supreme Court shall be conducted within 14 days of the date on which the last vacant Supreme Court judge position referred to in Art. 95, para. 1 is filled.

Para. 2. The selection of candidates for the President of the Supreme Court of the Public Law Chamber, the President of the Supreme Court of the Private Law Chamber and the President of the Supreme Court of the Disciplinary Chamber shall be conducted within 14 days of the date on which the last vacant Supreme Court judge position referred to in Art. 95, para. 1 in the Chamber in question is filled.

Para. 3. Until the President of the Supreme Court of the Public Law Chamber, the President of the Supreme Court of the Private Law Chamber and the President of the Supreme Court of the Disciplinary Chamber are appointed, their tasks shall be

performed and their competences shall be exercised by the Supreme Court judges designated by the President of the Republic of Poland.