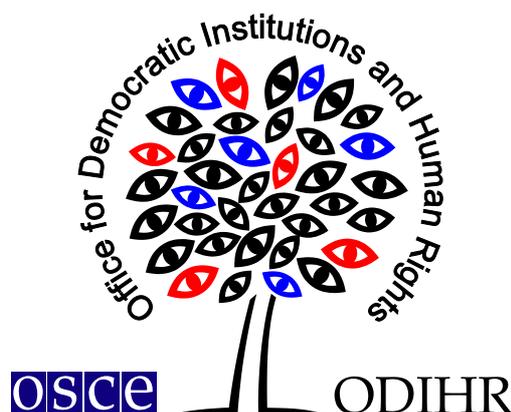


Warsaw, 14 January 2020

Opinion-Nr.: JUD-POL/365/2019 [AIC]

<http://www.legislationline.org/>



URGENT INTERIM OPINION

**ON THE BILL AMENDING THE ACT ON THE
ORGANIZATION OF COMMON COURTS, THE ACT
ON THE SUPREME COURT AND CERTAIN OTHER
ACTS OF POLAND (AS OF 20 DECEMBER 2019)**

**based on an unofficial English translation of the Laws commissioned by the
OSCE Office for Democratic Institutions and Human Rights**

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The Opinion represents the position of the OSCE Office for Democratic Institutions and Human Rights only and does not necessarily reflect the position of the experts

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

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I. INTRODUCTION

1. *On 18 December 2019, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Commissioner for Human Rights of Poland to review the Draft Act amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland. ODIHR agreed to carry out a legal review of this document to assess its compliance with OSCE human dimension commitments and international human rights and rule of law standards.*
2. *The first, second and third readings by the Sejm in plenary occurred on 19 and 20 December 2019, and the adopted text as amended (hereinafter “the Bill”/Ustawa) was sent to the Senate on 23 December 2019. These amendments have been taken into account in the legal analysis contained in this legal review. According to Article 121 of the Constitution of the Republic of Poland, the Senate has 30 days to review the Bill and either adopt it or send it back to the Sejm with adopted amendments or a rejection in its entirety.*
3. *Taking into consideration the time constraint for preparing this legal review and considering that the Bill may be amended in the coming days, ODIHR decided to prepare an Urgent Interim Opinion, which does not provide a detailed analysis of all the provisions of the Bill but primarily focuses on the most concerning issues relating to the independence of the judiciary in Poland. This Urgent Interim Opinion may be followed by the publication of a Final Opinion on the revised Bill at a later stage.*
4. *This Urgent Interim Opinion should be read together with the previous legal reviews on the independence of the judiciary in Poland that have been published by ODIHR in 2017,¹ especially in so far as the main findings and recommendations contained therein have not been addressed and the suggested amendments may exacerbate concerns emanating from previous amendments.*
5. *This Urgent Interim Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.²*

II. SCOPE OF REVIEW

6. *The scope of this Urgent Interim Opinion covers only the Bill submitted for review and due to its urgent character, focuses primarily on the most pressing issues relating to the independence of the judiciary in Poland. As this legal review is limited, it does not constitute a full and comprehensive review of each and every provision of the Bill nor of the entire legal and institutional framework regulating the judiciary in Poland.*
7. *The Urgent Interim Opinion raises key issues and provides indications of the main areas of concern. The ensuing recommendations are based on international and regional*

¹ See ODIHR, *Opinion on Certain Provisions of the Bill on the Supreme Court of Poland (as of 26 September 2017)*, 13 November 2017, in [English](#) and in [Polish](#); *Opinion on Certain Provisions of the Bill on the Supreme Court of Poland*, 30 August 2017, in [English](#) and in [Polish](#); and *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, in [English](#) and in [Polish](#).

² See especially *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

standards, norms and practices as well as relevant OSCE human dimension commitments. The Urgent Interim Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. In that respect, ODIHR would like to caution against replicating country examples without considering broader national institutional and legal framework, as well as country legal and social context and political culture.

8. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women³ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality⁴ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the analysis seeks to take into account the potentially different impact of the Bill on women and men, as judges or lay persons.
9. The Urgent Interim Opinion is based on an unofficial English translation of the Bill commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Polish language. However, the English version remains the only official version of the Opinion.
10. In view of the above, ODIHR would stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on the Bill and other respective legal acts or related legislation regulating the judiciary in Poland in the future.

III. EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

11. While recognizing the right of every state to reform its judicial system, any judicial reform process should not aim to undermine and/or result in jeopardizing the independence of the judiciary. It should always comply with the country’s constitutional norms as well as international rule of law and human rights standards and OSCE commitments. Any such reform must also be based on a proper comprehensive impact assessment to identify structural deficiencies in the existing judicial system, evaluate legislative options before suggesting areas for reform, while ensuring that adequate time is dedicated to the legislative process to allow proper assessment, as well as inclusive public consultation and discussions (at all stages of the law making process). ODIHR welcomes the fact that the Senate has planned for a broader and more open debate around the bill and consulted, as appropriate, with national and international stakeholders and experts.
12. Several provisions reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence. A number of the breaches of these standards are so fundamental that they may put into question the very legitimacy of the Bill, which should be reconsidered in its entirety and should not be adopted as it is. At a minimum, the reviewed provisions that violate international standards should be rejected, as they would further undermine judicial independence, the separation of powers and the rule of law in Poland. The most significant concern raised by the Bill pertain to the articles, which preclude any review or questioning of the status of any individual appointed by the President of the Republic to a judicial position or of any court, tribunal or other state body. These provisions undermine the core function of the court to

³ *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.

⁴ 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).

adjudicate on disputes in an independent and impartial manner. Moreover, they limit the discretion to apply the norms of European and international law if and when necessary thus violating international and European law. The revision and toughening of the disciplinary legal regime is also extremely problematic since its vague, imprecise and broad wording may be abused to exert undue pressure on judges when exercising their judicial functions. The new provisions also have the potential to unduly limit the judges' right to freedom of expression, especially when judges take part in the public debate on a matter pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in Poland, in violation of fundamental rights protected under international and European human rights law. Accordingly, ODIHR concludes that these provisions violate international standards and contradict OSCE commitments on the independence of the judiciary and should therefore be removed completely. In this context, the most recent findings and recommendations made by various international human rights monitoring bodies concerning the reform of the judiciary in Poland should also be noted.⁵

13. Additionally, the increased prerogatives given to the executive concerning certain key aspects of the administration of justice, such as disciplining judges or determining the Supreme Administrative Court's Rules of Procedure are not in line with the principles of judicial independence and of the separation of powers, and should be reconsidered entirely. Such a reform will exacerbate even more the interference in judicial independence already brought by previous changes made to the composition, powers, administration and functioning of the judicial branch.
14. In light of these findings, ODIHR recommends that most of the reviewed provisions of the Bill be rejected, as follows:
 - A. to remove the provisions preventing judges or courts from questioning the powers of state bodies, including the review of the validity of judicial appointments (Articles 1(19), 2(6), 3(2) and 4(1)(b) of the Bill) and those imposing disciplinary liability for judges in such cases (Articles 1(32), 2(8), and 3(3)); [par 41]
 - B. to ensure that no provision of the Bill (or of the existing legal framework on the judiciary) should be worded or interpreted as excluding or limiting the discretion of Polish courts of any instance from requesting a preliminary ruling from the CJEU should they consider it necessary; [par 48]
 - C. to remove the provision concerning the exclusive competence of the Extraordinary Appeals and Public Affairs Chamber of the Supreme Court for matters relating to the questioning of the appointment of judges or the powers of courts or other authorities; [par 52]
 - D. to remove Articles 1(32), 2(8) and 3(3) of the Bill that introduce a new ground of disciplinary liability for judges in case of "*public activities that are incompatible with the principles of judicial independence and the impartiality of judges*" and to ensure that any restriction of judges' freedom of expression adheres to the principles of legal certainty, necessity and proportionality, in line with Article 10 of the ECHR and Article 19 of the ICCPR, while striking a reasonable balance between freedom of expression of judges and the need for them to be and be seen as independent and

⁵ See, among others, Council of Europe (CoE), Commissioner for Human Rights, [Letter to the Marshal of the Senate of the Republic of Poland](#), 9 January 2020; CoE Parliamentary Assembly (PACE), Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, [Report on the Functioning of Democratic Institutions in Poland](#), Doc. 15025, 6 January 2020; CoE Group of States against Corruption (GRECO), [Second Addendum to the Second Compliance Report on the Fourth Evaluation Round on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors](#), 6 December 2019; UN Special Rapporteur on the Independence of Judges and Lawyers, [Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland \(23-27 October 2017\)](#), 5 April 2018; [Third Cycle Report of the Working Group on the Universal Periodic Review \(UPR\) for Poland](#), A/HRC/36/14, 18 July 2017, Recommendations 120.84 to 120.101.

impartial in the discharge of their duties and specifying that statements intended as part of a public debate on matters pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law cannot lead to disciplinary liability; [par 61]

- E. to repeal provisions concerning compulsory disclosure of judges' membership in associations and the fact that this information is made public; [par 66]
- F. to not pursue the introduction of the new substantive disciplinary grounds in Articles 1(32), 2(8) and 3(3) of the Bill as they pose serious risk to judicial independence; [par 76]
- G. to reconsider the severity of the disciplinary sanctions imposed on judges; [pars 59, 60, 75 and 77]
- H. to remove all provisions pertaining to the Extraordinary Disciplinary Officers of the President of the Republic and their special role in disciplinary proceedings against administrative judges; [pars 79 and 82]
- I. to not entrust the responsibility for lifting immunity of judges to the Supreme Court Disciplinary Chamber; [par 84]
- J. to remove the content-based restrictions imposed on the deliberation of judicial self-governing bodies provided in Article 1(2) of the Bill; [par 91]
- K. to remove draft Article 37h (6) of the Act on the Organization of Common Courts (as per Article 1(17) of the Bill) which provides that the refusal of the Minister of Justice to accept the annual information constitute a failure of the President of the Court of Appeal to fulfil his/her official duties within the meaning of Article 27(1)(1) of the Act on the Organization of Common Courts thus providing a ground for dismissal of the President of the Court of Appeal; [par 92] and
- L. to remove Article 4(7) of the Bill that allows the President of the Republic to determine the rules of the Supreme Administrative Court. [par 94]

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

IV. ANALYSIS AND RECOMMENDATIONS

1. Relevant International Standards and OSCE Commitments

15. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law and an integral part of the fundamental democratic principle of the separation of powers.⁶ The principle of the independence of the judiciary is also crucial to upholding other international human rights standards.⁷ This

⁶ 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, 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”. As stated in the [OSCE Copenhagen 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).

⁷ 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.

independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is treated equally before the law and seen as being treated equally, and that no one is above the law. Public confidence in the courts as independent from political influence is vital in a democratic society that respects the rule of law.

16. 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*”, as stated in Article 14 of the *International Covenant on Civil and Political Rights*⁸ (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),⁹ and have been further elaborated in the [Bangalore Principles of Judicial Conduct](#) (2002).¹⁰ International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee¹¹ 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, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them*”.¹²
17. 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*¹³ (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 (including against the direct or indirect interference from the executive) and whether the body presents an *appearance of independence*.¹⁴ In that respect, the ECtHR has emphasized the importance to “*look*

⁸ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

⁹ [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.

¹⁰ [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. See also [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#) (2010), prepared by the Judicial Group on Strengthening Judicial Integrity (hereinafter “*Bangalore Implementation Measures*”).

¹¹ See especially, CCPR, [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.

¹² 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.

¹³ 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.

¹⁴ See European Court of Human Rights (ECtHR), [Ramos Nunes de Carvalho e Sá v. Portugal](#) [GC] (Applications nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; [Campbell and Fell v. the United Kingdom](#) (Application no. 7819/77, 7878/77, judgment of 28 June 1984), par 78; and [Incal v. Turkey](#) [GC] (Application no.

behind appearances” to ascertain whether there is a real risk that the other branches may exercise undue influence undermining judicial independence.¹⁵

18. 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*,¹⁶ 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),¹⁷ 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”).¹⁸
19. As a Member State of the European Union (EU), Poland is also bound by EU treaties and is obliged to respect the common values upon which the EU is based, including the rule of law, as enshrined in Article 2 of the Treaty on European Union (TEU).¹⁹ 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”. In that respect, the Court of Justice of the European Union has held that “[the] guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it”.²⁰ Moreover, pursuant to Article 19(1) sub-par 2, Member States are to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law. In that respect, the CJEU held that the “requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded”.²¹

22678/93, judgment of 9 June 1998), par 71, where the ECtHR held that “[e]ven appearances may be of a certain importance [since] [w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (...)”. See also *Olujic v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38; and *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), par 103.

¹⁵ ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18, judgment of 12 March 2019 – not final), par 103.

¹⁶ Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, 17 November 2010.

¹⁷ Available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly CCJE, *Opinion no. 3 (2002) on the Principles and Rules Governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality*, 19 November 2002. See also CCJE, *Opinion no. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 23 November 2001; *Magna Carta of Judges*, 17 November 2010, par 13; 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.

¹⁸ In particular, European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e, 22 June 2007; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004, 16 March 2010; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

¹⁹ 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.” See also Court of Justice of the European Union (CJEU), *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, par 42.

²⁰ See e.g., CJEU, *H. & D. v. Refugee Applications Commissioner*, Case C-175/11, 31 January 2013, par 97.

²¹ See e.g., CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, par 58.

20. To counter threats to security and prevent conflicts that may arise from practices that fall short of rule of law standards, OSCE participating States have recognized that “[T]he development of societies based on pluralistic democracy and the rule of law are prerequisites for a lasting order of peace, security, justice and co-operation in Europe” (Moscow Document, 1991). Poland, as an OSCE participating State, has committed to ensure “the independence of judges and the impartial operation of the public judicial service” as one of the elements of justice ([1990 Copenhagen Document](#)).²² In the [1991 Moscow Document](#),²³ 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” 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”. Moreover, in its [Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (2008), the OSCE Ministerial Council 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.²⁴ Further and more detailed guidance is provided by the [ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010) (ODIHR Kyiv Recommendations).²⁵ While these recommendations have been formulated to address reform initiatives in a specific geographic region at the time, its guiding principles can be analogously applied to judicial administration of any OSCE participating State.
21. Finally, the ensuing recommendations will also make reference, as appropriate, to other specialized documents of a non-binding nature elaborated in various international and regional *fora*, since they provide useful and more practical guidance and examples of good practices to help ensure the independence of the judiciary.²⁶

2. National Legal Framework on the Judiciary and Background

22. 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, the Constitution states that “[t]he courts and tribunals shall constitute a separate power and shall be independent of other branches of power” (Article 173) and “[t]he administration of justice in the Republic of Poland shall be implemented by the

²² CSCE/OSCE, [1990 Copenhagen Document](#), pars 5 and 5.12.

²³ CSCE/OSCE, [1991 Moscow Document](#), pars 19.1 and 19.2.

²⁴ OSCE, [Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area](#) (Helsinki, 4-5 December 2008).

²⁵ [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.

²⁶ These include, among others: the reports of the UN Special Rapporteur on the independence of judges and lawyers (available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>), especially the [2019 Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors](#), A/HRC/41/48, 29 April 2019; the [Universal Charter of the Judge](#) (1999, as last updated in 2017), adopted by the International Association of Judges; and the opinions of ODIHR (available at <http://www.legislationline.org/search/runSearch/1/type/2/topic/9>) and of the Venice Commission (available at <https://www.venice.coe.int/webforms/documents/?topic=27&year=all>) dealing with issues pertaining to the independence of the judiciary. Other useful documents elaborated at the European level also include the [European Charter on the Statute for Judges](#) (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, DAJ/DOC (98)23; the CCJE [Magna Carta of Judges](#), 17 November 2010; the reports and other documents of the European Network of Councils for the Judiciary (ENCJ), available at <https://www.ency.eu/https://www.ency.eu/>; see e.g., 2013 “[Sofia Declaration on Judicial Independence and Accountability](#)”.

Supreme Court, the common courts, administrative courts and military courts” (Article 175). Article 178 par 1 of the Constitution further provides that “[j]udges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes”. The Constitution also states that the Supreme Court is mandated to exercise supervision over common and military courts regarding judgments and other activities specified by the Constitution and statutes (Article 183).

23. 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 judges from different courts as well as their disciplinary responsibility, and the proceedings before the respective courts are laid out in various acts which have been repetitively amended in the past years and are again being amended by the Bill, including the *Act on the Organization of Common Courts* (2001, as last amended in 2019),²⁷ *Act on the Supreme Court* (2017, as last amended in 2019),²⁸ the *Act on the Organization of Military Courts* (1997, as last amended in 2019), the *Act on the Organization of Administrative Courts* (2002, as last amended in 2019)²⁹ and the *Act on the Public Prosecutor’s Office* (2016, as last amended in 2019).
24. The Bill was introduced into the Polish Parliament on 12 December 2019 on the initiative of members of parliament,³⁰ which means that the Bill is not formally required to be subject to public consultations, and seeks to amend the above-mentioned laws on the judiciary. The Preamble of the Bill refers to the need to provide for “*effective procedures which do not allow the status of judge to be unduly undermined by any executive, legislative or judicial body, or by any person, institution, including other judges*” in order to ultimately provide citizens with a sense of security and stability of judgments handed down by the courts. Accordingly, the proposed draft legislation appear to be a response to the recent judgment of the Supreme Court of Poland of 5 December 2019,³¹ which held that the current National Council of the Judiciary (NCJ) is not an impartial body independent of the legislative and the executive authorities and that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of European Union law and thus, not a court within the meaning of national law.³² The 5 December ruling of the Supreme Court of Poland directly applied the preliminary judgment of the Court of Justice of the European Union (“CJEU”) in the cases C-585/18, C-624/18 and C-625/18 issued on 19 November 2019.³³ In this judgment, the CJEU answered the requests for a preliminary ruling submitted by the Supreme Court in September and October 2018, by holding that concerning the status of the NCJ and the Disciplinary Chamber of the Supreme Court, it is for the Supreme Court of Poland to assess these institutions’ independence in the light of the criteria set out by the CJEU.
25. The Bill has to be understood in this broader context. They imply that contrary to the judgment of the Supreme Court of 5 December 2019, the appointment of judges by the President of the Republic cannot be judicially challenged. In the same vein, the powers of the courts or tribunals composed by such judges cannot be contested, irrespective of whether the process leading to their appointment or the bodies they have been appointed to do not comply with judicial independence requirements laid down in international and

²⁷ See <<https://www.legislationline.org/documents/id/22640>> (English version).

²⁸ Available at <<https://www.legislationline.org/documents/id/22639>> (English version). The said Act has been amended eight times since 2018, after the amendments to the Act of 8 December 2017 on the Supreme Court.

²⁹ Available at <<https://www.legislationline.org/documents/id/22641>> (English version).

³⁰ *Sejm*, Doc No. 69, of 12 December 2019.

³¹ See the ruling of the Supreme Court sygn. III PO 7/18, available at <<http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20po%207-18-2.pdf>> (in Polish).

³² *ibid.*

³³ CJEU [GC], *A. K. and Others v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, 19 November 2019.

regional standards, and Polish constitutional law and legislation. Judges or judicial formation that attempt to do that would lead to disciplinary action.

3. General Comments

26. The content of the Preamble and of the Explanatory Statement to the Bill³⁴ suggest that the Bill is, at least in part, a reaction to the judgment of the CJEU on 19 November 2019 and a subsequent ruling of the Supreme Court of 5 December 2019 on the independence of new and restructured institutions of the Polish court system.
27. First, it is important to underline that the executive and legislative powers should exercise restraint towards the judiciary. This means that they should recognize and respect the judiciary's legitimate constitutional function of adjudicating on all legal disputes and of interpreting and applying the law, which is fundamental to the well-being of a modern democratic state governed by the rule of law as are the functions of the legislative and executive powers.³⁵ Indeed, a State's obligation to ensure a trial by an "*independent and impartial tribunal*" under Article 6 par 1 of the ECHR also implies obligations on any State authority, including the legislature, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them.³⁶ In principle, with the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers must not take decisions that invalidate judicial decisions.³⁷ The State authorities' respect for the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. This not only requires constitutional or legal safeguards of judicial independence, but also the effective incorporation of such safeguards into everyday administrative attitudes and practices.³⁸
28. It must be emphasized that Polish courts are simultaneously national and EU courts and are obliged to implement European Union law and thus set aside any domestic law which conflicts with European Union law.³⁹ As EU courts, national authorities are under a strict obligation to ensure judicial independence under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the EU for upholding respect for the rule of law in the Union legal order. In that respect, Article 9 of the Polish Constitution provides moreover that Poland must adhere to international law and Articles 91 (1) and (2) of the Constitution refer to the direct applicability and primacy of ratified international agreements.
29. Interference in a substantive way, deciding *de facto* the outcome of past and future litigation by making the claims non-justiciable can be a violation of the rule of law and

³⁴ Available at <<https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=69>>.

³⁵ See *op. cit.* footnote 17, pars 39 and 43 (CCJE Opinion no. 18 (2015)).

³⁶ See ECtHR, *Agrokompleks v. Ukraine* (Application no. 23465/03, judgment of 6 October 2011), par 136. See also e.g., ECtHR, *Zielinski and Pradal and Gonzalez and Others v. France* [GC] (Application nos. 24846/94 and 34165/96 to 34173/96, judgment of 28 October 1999), par 57.

³⁷ See e.g., *op. cit.* footnote 16, par 17 (2010 CoE Recommendation CM/Rec(2010)12).

³⁸ See ECtHR, *Agrokompleks v. Ukraine* (Application no. 23465/03, judgment of 6 October 2011), par 136.

³⁹ See e.g., CJEU, Case C-409/06, *Wimmer Wetten GmbH*, par 55, which reads: "It is also settled case-law that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation pursuant to the principle of cooperation set out in Article 10 EC, fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union (see to that effect, in particular, *Simmenthal*, paragraphs 16 and 21, and *Factortame*, paragraph 19)." See also e.g., CJEU [GC], *A. K. and Others v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, par 166; CJEU [GC], *Melki and Abdeli*, Joined Cases C-188/10 and C-189/10, 22 June 2010, par 57; and CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, pars 54-58.

of the principle of separation of powers, as emphasized by the ECtHR,⁴⁰ and also runs contrary to the EU obligations of the state under the TEU and TFEU (see also Sub-Section 4.3 *infra*).

30. Finally, it is also worth emphasizing that the adoption, in short succession, of new legislation and numerous amendments to the various laws on the judiciary, in haste and without proper consultation in the past few years⁴¹ is not congruent with the principle of legal certainty, which implies a certain stability and consistency of legislative or executive action⁴² (see also Sub-Section 9 *infra* on additional comments on the legislative process). Indeed, rapidly changing legislation may be contrary to the principle of legal certainty⁴³ and too many changes within a short period of time should be avoided, at the very least in the area of the administration of justice.⁴⁴
31. The above-mentioned considerations should be taken into consideration in the context of the Bill.

4. Restrictions on the Jurisdiction or Competence of Courts and Judges to rule on Judicial Appointments and Other Issues

4.1. Definition of a “Judge”

32. Article 1(20) of the Bill, concerning common courts, establishes judges as those who are “appointed” to this position by the President of the Republic of Poland and who have taken an oath before the President, thus removing any reference to the appointment by the NCJ. Similar provisions are made in relation to the other courts covered by the Bill.⁴⁵ The intended effect of these provisions appears to be that if individual appointed by the President as a judge takes the oath of office, he/she acquires the status of judge that is conclusive and legally unassailable, even in case of doubts about the legality of the selection process that led to the appointment. This may also mean that an appointment could not be contested any longer after the appointment by the President even for a judge who would not meet the legal criteria, which are imposed by law on the NCJ for the selection of individuals to become judges.
33. It is worth reiterating ODIHR’s concerns regarding the new election modalities of the judicial members of the NCJ, particularly with respect to the actual and perceived independence of the Council.⁴⁶
34. Moreover, according to international and regional recommendations, the selection of judges should be based on merit, according to objective, pre-established, and clearly

⁴⁰ See e.g., ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece* (Application no. 13427/87, judgment of 9 December 1994); and *Zielinski and Pradal and Gonzalez and Others* (Application nos. [24846/94](#) and [34165/96](#) to [34173/96](#), judgment of 28 October 1999). See also ECtHR, *Agrokompleks v. Ukraine* (Application no. 23465/03, judgment of 6 October 2011), par 131.

⁴¹ *Op. cit.* footnote 16, par 17 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)). As published in the Official Gazette, as of 14 January 2020, the *Act on the Organization of Common Courts* (2001, as last amended in 2019) was amended sixteen times in 2018 and 2019; the *Act on the Supreme Court* (2017, as last amended in 2019) was amended eight times since passed in 2017; the *Act on the Organization of Military Courts* (1997, as last amended in 2019) was amended four times in 2018 and 2019; the *Act on the Organization of Administrative Courts* (2002, as last amended in 2019) was amended four times in 2018 and 2019; and the *Act on the Public Prosecutor’s Office* (2016, as last amended in 2019) was amended five times in 2018 and 2019.

⁴² See *op. cit.* footnote 18, par 60 (2016 Venice Commission’s Rule of Law Checklist).

⁴³ *Op. cit.* footnote 17, par 3 ([CCJE Opinion no. 18 \(2015\)](#)).

⁴⁴ *ibid.* par 45 ([CCJE Opinion no. 18 \(2015\)](#)).

⁴⁵ See Article 2(6) of the Bill, amending Article 29 of the Act on the Supreme Court; Article 3(1) of the Bill, amending Article 23 of the Act on the Organization of Military Courts; and Article 4(1) of the Bill, amending Article 5 of the Act on the Organization of Administrative Courts.

⁴⁶ See *op. cit.* footnote 1, par 143 (November 2017 ODIHR Opinion). Of note, the NCJ was suspended from membership in the European Network of Council of the Judiciary (ENCJ) on 17 January 2018 in light of its lack of actual and perceived independence (see <https://www.ency.eu/node/495>).

defined criteria,⁴⁷ aiming to assess candidates' ability, integrity and experience.⁴⁸ Notwithstanding the doubtful status and lack of independence of the newly formed NCJ, as recently established by Poland's Supreme Court in the judgment of 5 December 2019, a set of such criteria should nonetheless exist for the selection of judges, rather than the sole requirement to have been appointed by the President. Such a change excludes the possibility of remedying errors and eventual inappropriateness in the appointment procedure or may even give the executive and legislative branches direct control to steer the appointments and nomination process of judges without the necessity of meeting any criteria, circumventing the constitutional role of the NCJ or ensuring the openness and transparency of the nomination and selection process. Consequently, **it is recommended that provisions from Articles 1(20), 2(6), 3(1) and 4(1) of the Bill should be removed in their entirety.**

4.2. Exclusion of Any Review of Judicial Appointments

35. The Bill appears to prevent courts from ruling on a wider category of state actions, including but not limited the validity of judicial appointments, irrespective of relevant requirements established in the Polish Constitution, EU and/or regional or international standards may have been violated. More specifically, the introduced provisions would preclude scrutiny by common courts, the Supreme Court, military and administrative courts or their organs, of "*the powers of courts and tribunals, constitutional state bodies and law enforcement and control bodies*" and from determining or assessing the compliance of a judge's appointment and entitlement to serve as a judge.⁴⁹ What is more, the Bill introduces disciplinary liability of common court judges, Supreme Court judges, administrative judges and military court judges if they take "*3) actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland*" (Articles 1(32), 2(8), 3(3) and 4(11) of the Bill, read together with Article 29 of the Act on the Organization of Administrative Courts). A similar provision introducing disciplinary liability of public prosecutors is introduced for "*acts that question the existence of the official tenure of a prosecutor or a judge or the effectiveness of the appointment of a prosecutor or of a judge, or the constitutional mandate of an organ of the Republic of Poland*" (Article 6(3)).
36. The proposed provision would *de facto* limit the scope of judges' adjudicative functions by preventing them from ruling on the independence or impartiality of a tribunal, whereas this is a key component of the right to a fair trial guaranteed by Article 6 of the ECHR and Article 14 of the ICCPR. This provision also conflicts with Poland's obligation under EU law to guarantee the power of courts to refer cases to the CJEU if and when the issue of the status of a judge is linked with interpretation and/or requirements of the Treaties.⁵⁰
37. The principle of judicial independence means that each individual judge in the exercise of his or her adjudicative function and decision-making is independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference,

⁴⁷ See e.g., *op. cit.* footnote 11, par 19 (2007 UNHRC [General Comment no. 32](#)); *op. cit.* footnote 16, par 44 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); *op. cit.* footnote 25, par 21 (2010 ODIHR [Kyiv Recommendations](#)); *op. cit.* footnote 26 par 2.1. and 2.2. (1998 [European Charter](#)); CCJE, [Opinion no. 10 \(2007\) on the Council for the Judiciary at the Service of Society](#), pars 50-51.

⁴⁸ *Op. cit.* footnote 9, Principle 13 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); and *op. cit.* footnote 17, pars 17 and 29 (CCJE [Opinion no. 1 \(2001\)](#)).

⁴⁹ See Article 1(19) of the Bill, inserting Article 42a in the Act on the Organization of Common Courts; Article 2(6) of the Bill, amending Article 29 of the Act on the Supreme Court; Article 3(2) of the Bill, inserting Article 23a into the Act on the Organization of Military Courts; Article 4(1) of the Bill, amending Article 5 of the Act on the Organization of Administrative Courts.

⁵⁰ See e.g., CJEU, [European Commission v. Republic of Poland](#), C-619/18, 24 June 2019, pars 45 and 55-56.

direct or indirect, from any authority.⁵¹ In that respect, the fact that the legislator specifically provides in Article 8 of the Bill that Article 55 par 4 of the Act on the Organization of Common Courts is also applicable to cases commenced or concluded before the date of entry into force of the Act is especially problematic. In the first place, this provision disestablishes checks and balances over certain types of state actions, thus preventing them from ever being scrutinized. Second, the fact that the legislature is allowed to have a direct influence on the outcome of concluded, pending and future cases, is in violation of the individual independence of judges. In principle, judges should have an unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts,⁵² and the assessment of whether a judge or a tribunal is independent or impartial should be part of such functions. The institutional relations between the judiciary and the other branches of power “*must not interfere with the judiciary’s liberty in adjudicating individual disputes and in upholding the law and values of the constitution*”.⁵³ The said provisions enable the other branches to “*interfere in matters that are directly and immediately relevant to the adjudicative function*”, which the *UNODC Commentary on the Bangalore Principles* describes as breaching a minimum condition for the institutional independence of the judiciary.⁵⁴ The intervention of the legislator in the situation under review runs counter to this principle.

38. Also, a provision of this nature may confer the impression to the public that the legislature may in some circumstances overturn court judgments, thus implying a type of hierarchical relationship between the two powers. In order to comply with the requirements of judicial independence and separation of powers, the court concerned must however be and must be seen to be independent of the executive and the legislature at all stages of the proceedings.⁵⁵
39. Moreover, the possibility to initiate disciplinary proceedings against a judge for exercising his/her core adjudicative functions, including the assessment of the independence or impartiality of other judges, exacerbates the threat to the individual independence of a judge. Disciplinary liability of judges should never apply in cases where they simply exercise their very function in a democracy (see Sub-Section 6 *infra*). In principle, the legislature should protect the functional immunity for judges’ acts performed in the exercise of their judicial functions. This is essential to ensure that judges can engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of criminal, civil or disciplinary proceedings, including by state authorities.⁵⁶ It is important to emphasize that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to disciplinary liability,⁵⁷ except eventually in cases of malice and

⁵¹ *Op. cit.* footnote 16, par 22 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)). See also CJEU, [Associação Sindical dos Juizes Portugueses v. Tribunal de Contas](#), 27 February 2018, case C-64/16, par 44, where the Court held that “[t]he concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions”.

⁵² *ibid.*, par 5 (2010 CoE [Recommendation CM/Rec\(2010\)12](#));

⁵³ UNODC, [Commentary on the Bangalore Principles of Judicial Conduct](#) (September 2007), par 26 (c).

⁵⁴ UNODC, [Commentary on the Bangalore Principles of Judicial Conduct](#) (September 2007), par 26. See also ODIHR, [Opinion on Certain Provisions of the Bill on the Supreme Court of Poland \(as of 26 September 2017\)](#), 13 November 2017, par 86.

⁵⁵ ECtHR, [Öcalan v. Turkey](#) [GC] (Application no. 46221/99, judgment of 12 May 2005), par 114.

⁵⁶ See ODIHR-Venice Commission, [Joint Opinion on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic](#) (CDL-AD(2014)018), par 37. See also e.g., ECtHR, [Ernst v. Belgium](#) (Application no. 33400/96, judgment of 15 October 2003), par 85, holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued. See also e.g., Venice Commission, [Amicus Curiae Brief for the Constitutional Court on the Criminal Liability of Judges](#), CDL-AD(2017)002, par 49.

⁵⁷ See e.g., Venice Commission, [Amicus Curiae for the Constitutional Court of Albania on the Law on the Transitional Re-evaluation of Judges and Prosecutors \(the Vetting Law\)](#), CDL-AD(2016)036, 12 December 2016, par 35. See also *op. cit.* footnote 25, par 25 (2010 ODIHR [Kyiv Recommendations](#)), which states that “[d]isciplinary proceedings against judges shall deal with alleged

gross negligence or when there is clear and consistent pattern of erroneous judgements that indicates clear lack of professionalism.⁵⁸ This also means that judges should not be removed from office for other reasons, for example because of alleged mistakes in applying the law or because their decisions have been considered to amount to a violation of law, or if applicable, have been overturned on appeal or review by a higher judicial body.⁵⁹

40. Finally, if judicial appointment have to comply with certain legal requirements, it is necessary that those requirements be overseen by courts on the basis of clearly defined procedure and criteria. Indeed, it is a key requirement of the rule of law that public authorities act on the basis of, and in accordance with, applicable law, and that there is a mechanism to ensure respect for both procedural and substantive law.⁶⁰
41. In light of the foregoing, **the provisions preventing judges or courts from questioning the powers of state bodies, including the review of the validity of judicial appointments** (Articles 1(19), 2(6), 3(2) and 4(1)(b) of the Bill) **should be removed in their entirety, as should the provisions imposing disciplinary liability for judges in such cases** (Articles 1(32), 2(8), and 3(3)).

4.3. Wider Restrictions on Judicial Review

42. The wide restriction which the Bill seeks to impose on courts “*questioning the power*” of state bodies violates fundamental principles of the rule of law and separation of powers, which include as a key principle the “supremacy of the law”.⁶¹ Rule of law safeguards in a democratic state generally require that decisions of the executive branch of government are subject to judicial review.⁶²
43. If courts are prohibited or deterred from determining whether a state body has acted within the scope of its powers on a particular occasion, then state bodies are left effectively at large to decide for themselves what the limits of their powers are, which would be antithetical to the rule of law. The [Bangalore Implementation Measures](#) capture the problem well when they state that “*the judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, and that no organ other than the court may decide conclusively its own jurisdiction and competence, as defined by law*”.⁶³
44. Precluding the courts mentioned in the Bill from questioning the powers of state bodies also prevents them from carrying out their duty to set aside domestic legislation that conflicts with directly applicable EU law, a well-established and fundamental duty of EU members states which the CJEU reaffirmed when answering preliminary reference

instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts.”

⁵⁸ See *op. cit.* footnote 16, par 66 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)); and e.g., *ibid.* par 35 (2016 Venice Commission’s [Amicus Curiae for the Constitutional Court of Albania on the Vetting Law](#)).

⁵⁹ See e.g., ODIHR, [Opinion on the Law on the Selection, Performance Evaluation and Career of Judges of Moldova](#), 13 June 2014, par 25. See also [2009 Report of the UN SRIJL](#), A/HRC/11/41, 24 March 2009, par 58; UN Human Rights Committee, [CCPR/CO/75/VNMCCPR/CO/75/VNM](#), par 10; [CCPR/CO/71/UZB](#), par 14; and *op. cit.* footnote 25, par 25 (2010 ODIHR [Kyiv Recommendations](#));

⁶⁰ See e.g., *op. cit.* footnote 18, pars 45 and 66 (2016 Venice Commission’s Rule of Law Checklist). There are well known examples of courts in constitutional democracies reviewing decisions about the validity of judicial appointments and compliance with selection procedures, even at the highest level: see e.g., the Canadian Supreme Court in *Reference Re Supreme Court Act, ss 5 and 6* (2014 SCC 21), determined whether a person appointed by the Prime Minister to the Supreme Court was eligible for the position on the basis of his practice as a lawyer in the province of Quebec.

⁶¹ See e.g., *op. cit.* footnote 18, pars 44-45 (2016 Venice Commission’s Rule of Law Checklist).

⁶² *ibid.* par 44.

⁶³ See also [Bangalore Implementation Measures](#), par 10.1(e).

questions of the Polish Supreme Court in *AK v. National Council of the Judiciary; CP & DO v Supreme Court* (C-585/18, C-624/18 and C-625/18), discussed above.

45. The provision in question is interlinked with other provisions establishing the jurisdiction of the courts affected by the Bill. For example, the Act on the Organization of Administrative Courts establishes that those courts have the function of “*resolving disputes as to competence and jurisdiction between local government authorities, appellate boards of local government, and between these authorities and government administration authorities*”.⁶⁴ It is hard to see how the administrative courts can effectively exercise their jurisdiction if they are restricted from questioning the power of state bodies in the manner set out in the Bill.
46. Furthermore, the respective provisions are far too vaguely worded resulting in an excessive risk of violating the principle of foreseeability, an aspect of legal certainty⁶⁵ crucial for the rule of law.⁶⁶ The vagueness increases the likelihood that judges, anticipating a broad rather than narrow application of new disciplinary grounds for disciplinary sanctions (see Sub-Section 6.1. *infra*) and potential abuses of disciplinary proceedings as may have happened in the past,⁶⁷ will experience *de facto* pressure which may impact their decision-making.
47. These provisions are also likely to be interpreted as limiting the possibility for any judge or court to send requests for a preliminary ruling to the CJEU requesting guidance on the interpretation of EU law in relation to the independence or impartiality of a specific tribunal. Indeed, limiting the ability of national courts to turn to the CJEU is in itself a violation of EU law, especially of Article 267 TEU. As specifically acknowledged in the case law of the CJEU, “*national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law [...] [and] [a] rule of national law cannot prevent a national court, where appropriate, from using that discretion*”.⁶⁸ The CJEU further states that “*where a national court before which a case is pending considers that a question concerning the interpretation [...] of EU law has arisen in that case, it has the discretion, or is under an obligation, to request a preliminary ruling from the Court of Justice, and national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation*”.⁶⁹ The provisions of national law cannot prevent any national court, including a court of final instance, from making a request to the CJEU for a preliminary ruling.⁷⁰ What is more, a national court which has to apply EU law is under a duty to give full effect to those provisions. This implies for the national court to, if necessary, disregard conflicting provisions of national legislation, even if adopted subsequently. In so doing the court does not have to request or await the prior setting aside of such provision by legislative or other constitutional means.⁷¹
48. Furthermore, Article 267 TFEU contains an obligation to refer to the Court of Justice “*a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law*”. In substance, Article 267 TFEU precludes Member States from enacting legislation that would prevent national courts or tribunals

⁶⁴ Article 1(1) of the Act on the Organization of Administrative Courts. While the main focus is on local government, the reference at the end of the sentence to “government administration authorities” is potentially very broad.

⁶⁵ See e.g., *op. cit.* footnote 18, pars 58-59 (2016 Venice Commission’s Rule of Law Checklist).

⁶⁶ See e.g., *op. cit.* footnote 18, pars 58-59 (2016 Venice Commission’s Rule of Law Checklist).

⁶⁷ See e.g., the mention of abuse of disciplinary proceedings against judges and prosecutors in Poland, in *op. cit.* footnote 2 (2020 PACE Monitoring Committee’s [Report on the Functioning of Democratic Institutions in Poland](#)).

⁶⁸ See e.g., CJEU [GC], [Pulignica Facility Esco SpA \(PFE\)](#), Case C-689/13, 5 April 2016, par 32.

⁶⁹ *ibid.* par 34.

⁷⁰ *ibid.* par 36.

⁷¹ See e.g., CJEU [GC], [Melki and Abdeli](#), Joined Cases C-188/10 and C-189/10, 22 June 2010, par 43.

from exercising their right or fulfilling their obligation to refer questions to the CJEU for a preliminary ruling.⁷² Rather, national courts or tribunals must be able to refer to the CJEU, at whatever stage of the proceedings they consider appropriate, any question which they consider necessary, and to disapply any national legislative provision they consider to be contrary to EU law.⁷³ The proposed Article 26 par 3 of the Act on the Supreme Court as amended by Article 2(4) of the Bill, however, would seem to prevent courts from referring cases to the CJEU seeking to assess “*the legality of the appointment of a judge or his authority to perform judicial tasks*” in case of potential conflict with EU law, contrary to Article 267 of the TFEU. Accordingly, **no provision of the Bill or of the existing legal framework on the judiciary should be worded or interpreted as excluding or limiting the discretion of Polish courts of any instance from requesting a preliminary ruling from the CJEU should they consider it necessary.**

4.4. The Competence of the Supreme Court’s Chamber for Extraordinary Appeals and Public Affairs

49. The Bill provides that other courts must transfer to the Extraordinary Chamber any cases in which the independence of a court has been questioned or questioning the appointment of a judge.⁷⁴
50. As noted by ODIHR in its 2017 Opinion, the fact that the new Extraordinary Appeals and Public Affairs Chamber of the Supreme Court is composed entirely of judges appointed all at the same time, by the President of the Republic upon the selection by the newly formed NCJ whose independence also raises concern, could not exclude the risk of politicization of the appointment of its members,⁷⁵ thus potentially raising questions as to the independence and impartiality of this Chamber and sitting judges as has been done for the Disciplinary Chamber.
51. Also, the exclusive jurisdiction of that Chamber to decide on such issues emanating from any court in Poland may potentially slow down even more the underlying judicial proceedings. This must be considered in the broader context of an already overloaded judicial system, as demonstrated by the abundant recent case-law of the ECtHR concerning Poland on the excessive length of judicial proceedings.⁷⁶ The ECtHR regularly emphasizes, when faced with allegations of proceedings not conducted within a reasonable time, that the Convention obliges the State parties to “*organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time*”.⁷⁷ In that respect, structural features in a legal system that cause delays in judicial proceedings are not an excuse under Article 6 of the ECHR or Article 14 of the ICCPR.⁷⁸
52. Further, the newly appointed judges sitting in the Supreme Court’s Chamber for Extraordinary Appeals and Public Affairs may also end up reviewing the legality of their own appointment made by the President, on the basis of the selection made by the newly formed NCJ. This would run counter to the principle of *nemo iudex in casa sua*, that is,

⁷² *ibid.*, par 57.

⁷³ *ibid.*, par 57.

⁷⁴ Article 2(4) of the Bill, amending Article 26 of the Supreme Court Act (new Article 26(4)).

⁷⁵ *Op. cit.* footnote 1, pars 61-63 (November 2017 ODIHR Opinion).

⁷⁶ See, in particular, the pilot-judgment, ECtHR, *Rutkowski and Others v. Poland* (Applications nos. 72287/10, 13927/11 and 46187/11 - and 591 other applications, judgment of 7 July 2015), which notes in particular “the scale and complexity of the problem of excessive length of proceedings”.

⁷⁷ ECtHR, *Süßmann v. Germany* (Application no. 20024/92, judgment of 16 September 1996), par 55.

⁷⁸ Venice Commission and CoE DHR-DGI, *Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine*, CDL-AD(2010)026-e, par 22.

“no one can be a judge in their own cause”. The fact that the Chamber judges will themselves rule on an issue, for which they may be challenged themselves, could shed doubts upon their impartiality.⁷⁹ Indeed, it is important to also have regard to appearances, and the need for the judges to be seen not to lack independence or impartiality, even where they do not decide their own case. The fact that the issues are similar can give rise to the impression to the public that the judge in question may actually decide on the motion directed against her/him.⁸⁰ Other options should actually be considered by the legislator to avoid this perception of a lack of impartiality, e.g., providing for the competence of another Chamber (except the Disciplinary Chamber, which is not considered a court within the meaning of EU and Polish law as confirmed by Poland’s Supreme Court), or a Panel of Supreme Court judges who would not have been appointed by the President of the Republic based on the selection made by the newly formed NCJ. Accordingly, **the provision concerning the exclusive competence of the Extraordinary Appeals and Public Affairs Chamber of the Supreme Court for matters relating to the questioning of the appointment of judges or the powers of courts or other authorities should be removed entirely.** ODIHR would also like to reiterate the concerns raised in its November 2017 Opinion regarding the lack of independence of this Chamber.⁸¹

5. Restrictions of the Rights of Judges

5.1. Freedom of Expression of Judges

53. The Bill introduces a new ground of disciplinary liability for judges in case of “*public activities that are incompatible with the principles of judicial independence and the impartiality of judges*” (Article 1 (32)).⁸² Similar grounds of disciplinary liability are introduced for Supreme Court judges and military court judges.⁸³
54. In principle, like all individuals, judges are entitled to freedom of expression, association and peaceful assembly and to take part in public debate (Articles 10 and 11 of the ECHR and Articles 19 and 21-22 of the ICCPR).⁸⁴ Any restriction to these rights must meet the three-part test i.e., be “prescribed by law”, pursue a “legitimate aim” provided by international human rights law (Article 10(2) and 11(2) of the ECHR and Articles 19(3), 21 and 22(2) of the ICCPR) and be “necessary in a democratic society”, and as such respond to a pressing social need. It is important to emphasize that the European Court of Human Rights explicitly stated, in the recent *Baka v. Hungary* case, that any interference with judicial freedom of expression “*calls for close scrutiny*”, with a narrow “*margin of appreciation*” for the state considering interfering in the judge’s freedom of expression.⁸⁵
55. First, the wording chosen in the draft amendments, “*public activities incompatible with the principles of judicial independence and the impartiality of judges*”, is extremely

⁷⁹ See e.g., ECtHR, *A.K. v. Liechtenstein* (Application no. 38191/12, judgment of 9 July 2015), especially pars 79-85.

⁸⁰ *ibid.*, par 81.

⁸¹ *Op. cit.* footnote 1, pars 61-63 (November 2017 ODIHR Opinion).

⁸² This general wording is borrowed from Article 178 par 3 of the Constitution of Poland.

⁸³ See Article 2(8) of the Bill, amending Article 72 of the Act on the Supreme Court; and Article 3(3) of the Bill, amending Article 37 of the Act on the Organization of Military Courts.

⁸⁴ *Op. cit.* footnote 17, par 42 (CCJE *Opinion no. 18 (2015)*); CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, pars 27-36; *op. cit.* footnote 9, Principle 8 (1985 *UN Basic Principles on the Independence of the Judiciary*); *op. cit.* footnote 26, pars 66 and 110-111, *2019 Report of the UN Special Rapporteur on the independence of judges and lawyers*; and Venice Commission, *Report on the Freedom of Expression of Judges*, 23 June 2015.

⁸⁵ ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgement of 23 June 2016), par 171. See also ECtHR, *Wille v. Liechtenstein* [GC] (Application no. 28396/95, judgment of 28 October 1999), par 70.

vague, too broad in scope and could be subject to different and potentially arbitrary interpretation and abuse, thus failing to fulfil the requirement of legal certainty and foreseeability.⁸⁶

56. Second, legitimate restrictions to judges' right to freedom of expression primarily derive from the principle of confidentiality, binding judges to professional secrecy with regard to their deliberations and information obtained in the course of their functions.⁸⁷ Professional secrecy also means that judges must refrain from expressing their views or opinions in relation to cases currently or previously before the court, in order to maintain the perception of independence and impartiality.⁸⁸ Beyond the context of specific cases before them, legitimate restrictions of judges' freedom of expression and association result from the requirement in international law that courts and tribunals need to be "independent and impartial", which implies that in addition to being free of actual bias "the tribunal must also appear to a reasonable observer to be impartial".⁸⁹ Judges are therefore bound by "a duty of loyalty, reserve and discretion" to the public, which means that they are expected to "show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question".⁹⁰
57. Consequently, judges should avoid commenting on cases before them,⁹¹ and their engagement in activities outside their judicial mandate needs to be compatible with their impartiality and independence.⁹² As recently reiterated by the UN Special Rapporteur on the independence of judges and lawyers, there are a number of situations in which a judge may speak about matters that are politically sensitive, for instance in order to comment on legislation and policies that directly affect the operation of courts, the independence of the judiciary, or fundamental aspects of the administration of justice.⁹³ The [Bangalore Principles of Judicial Conduct](#) (2002) consider to be an individual right of judges to write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters.⁹⁴
58. Moreover, judges have a duty to speak out even on a politically controversial topic if this is in defence of the constitutional order and the restoration of democracy where democracy, the integrity and independence of the judiciary and the rule of law are threatened.⁹⁵ Judges are also entitled to publicly criticise legal reforms and pieces of legislation, especially when they concern the functioning of the justice system and issues relating to the separation of powers, even if this may have so-called political implications, all the more since the public would generally have a legitimate interest in being informed

⁸⁶ On the notion of "political activities", see e.g., ODIHR-Venice Commission, [Joint Interim Opinion on the Draft Law amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic](#), 16 October 2013, paras 49-53.

⁸⁷ *Op. cit.* footnote 26, paras 53 and 89 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also *op. cit.* footnote 9, Principle 15 (1985 [UN Basic Principles on the Independence of the Judiciary](#)).

⁸⁸ *Op. cit.* footnote 26, par 53 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

⁸⁹ See e.g., *op. cit.* footnote 11, par 21 (2007 UNHRC [General Comment no. 32](#)); *op. cit.* footnote 17, par 42 ([CCJE Opinion no. 18 \(2015\)](#)); CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), paras 27-36; *op. cit.* footnote 9, Principle 8 (1985 [UN Basic Principles on the Independence of the Judiciary](#)); *op. cit.* footnote 26, paras 66 and 110-111, [2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#); and Venice Commission, [Report on the Freedom of Expression of Judges](#), 23 June 2015.

⁹⁰ *Op. cit.* footnote 26, par 33 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

⁹¹ *ibid.* paras 101-106 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

⁹² See *op. cit.* footnote 16, par 21 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

⁹³ *Op. cit.* footnote 26, par 13 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also *op. cit.* footnote 10, paras 134-140 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)).

⁹⁴ See Principle 4.11 of the [Bangalore Principles of Judicial Conduct](#):

⁹⁵ *ibid.* paras 90 and 102 (2019 Report of the UN Special Rapporteur on the judiciary). See also, EN CJ, [Sofia Declaration on Judicial Independence and Accountability](#), 7 June 2013, Principle (vii). See also, for instance, for the purpose of comparison, Inter-American Court of Human Rights, [case of Lopez Lone et al. v. Honduras](#), judgment of 5 October 2015, paras 169-173, especially par 173; and the Canadian [Ethical Principles for Judges](#).

about it.⁹⁶ In this vein, the CCJE stated that courts may “criticise another power of the state or a particular member of it [...] when it is necessary in the interests of the public”⁹⁷, as well as “legislation or the failure of the legislative to introduce what the court would regard as adequate legislation”,⁹⁸ though this must be undertaken in a “climate of mutual respect”.⁹⁹ Moreover, it is of constitutional importance that judges be able to express their collective position in such matters. In light of the foregoing, restrictions of judges’ freedom of expression must not be used to impose disciplinary sanctions on judges who publicly comment on issues pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in Poland.

59. Third, it is important to emphasize that the Bill provides for the most serious disciplinary sanctions for judges who are found to have engaged in the above-mentioned conduct (Articles 1(34), 2(9) and 3(4) of the Bill). The default penalties are removal from judicial office, or enforced transfer to another judicial post,¹⁰⁰ though only removal from office is considered for Supreme Court judges (Article 2(9)(b) of the Bill).¹⁰¹ Even in less serious cases, the most lenient punishments, a warning or reprimand, are not available and the judge will at a minimum be subject to financial penalties or dismissal from a function which he or she currently exercises.¹⁰² Accordingly, the most serious sanction (removal from office), is contemplated for such so-called disciplinary offences and the disciplinary body will be somewhat bound to impose such severe sanctions.
60. The underlined nature and severity of the sanctions imposed are important factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression.¹⁰³ It should be noted that mandatory minimum penalties have generally been criticized at the international level as they limit the adjudicative functions of the court/tribunal and may result in disproportionately higher sanctions.¹⁰⁴ In principle, disciplinary measures must be in proportion to the gravity of the infraction committed¹⁰⁵ and it is acknowledged that having a reasonable range of possible sanctions facilitates compliance with the principle of proportionality when the competent body has to decide on a sanction.¹⁰⁶ In that respect, limiting the range of sanctions to the most serious ones for such vaguely framed disciplinary offence which may not necessarily reach the level of seriousness of the misbehaviour would appear disproportionate. Indeed, dismissal as a disciplinary sanction should be reserved to the most serious cases of misconduct,¹⁰⁷ e.g., serious grounds of misconduct or incompetence that justify the inevitable conclusion

⁹⁶ See ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgement of 23 June 2016), pars 162-167 and 171. See also e.g., ODIHR, *Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan* (2018), par 42.

⁹⁷ *Op. cit.* footnote 17, par 42 (CCJE Opinion no. 18 (2015)).

⁹⁸ *ibid.* par 42 (CCJE Opinion no. 18 (2015)).

⁹⁹ *ibid.* par 42 (CCJE Opinion no. 18 (2015)).

¹⁰⁰ See existing Article 109 par 1 item 4 or 5 of the Act on the Organization of Common Courts; Article 75 par 1 item 5 of the Act on the Supreme Court; and Article 39 par 1a of the Act on the Organization of Military Courts.

¹⁰¹ See existing Article 75 par 1 item 5 of the Act on the Supreme Court.

¹⁰² Articles 1(34), 2(9) and 3(4) of the Bill referring respectively to penalties mentioned in Article 109 par 1 items 2a (reduction of the basic salary by 5 to 50% for a period from 6 months up to 2 years), new draft 2b (penalty payment of one month’s basic salary plus other allowances) and 3 (dismissal from function held) of the Act on the Organization of Common Courts; in Article 75 par 1 item 3 (reduction of the basic salary by 5 to 50% for a period from 6 months up to 2 years), new draft 3a (penalty payment of one month’s basic salary plus other allowances) or 4 (removal from function held) of the Act on the Supreme Court; and Article 39 par 1 (2a), (2b) or (3) of the Act on the Organization of Military Courts.

¹⁰³ See e.g., ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgement of 23 June 2016), par 160.

¹⁰⁴ See e.g., UN Special Rapporteur on the independence of judges and lawyers, *Mission to South Africa: Report of the Special Rapporteur on the independence of judges and lawyers* (25 January 2001), E/CN.4/2001/65/Add.2, page 4. See also e.g., the *Law Council of Australia Mandatory Sentencing Discussion Paper* (May 2014).

¹⁰⁵ See e.g., *op. cit.* footnote 56, par 66 (2014 ODIHR-Venice Commission *Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic*); and *Bangalore Implementation Measures*, par 15.8.

¹⁰⁶ *ibid.* par 64 (2014 ODIHR-Venice Commission *Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic*).

¹⁰⁷ See e.g., *ibid.* par 67. See also *op. cit.* footnote 16, par 15 (2010 CoE *Recommendation CM/Rec(2010)12*); *op. cit.* footnote 9, Principle 18 (1985 *UN Basic Principles on the Independence of the Judiciary*); and *op. cit.* footnote 11, par 20 (2007 UNHRC *General Comment no. 32*).

that the judge in question is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard (objectively judged) bringing the administration of justice into disrepute,¹⁰⁸ or serious breaches of disciplinary or criminal provisions established by law.¹⁰⁹ The ECtHR has also specifically noted the “chilling effect” that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary.¹¹⁰ Given the impact that a disciplinary sanction has on a judge’s career, the result may indeed well be deterrence of judges from exercising their right to freedom of expression under Article 10 of the ECHR and Article 19 of the ICCPR.¹¹¹

61. In light of applicable regional and international standards and recommendations, **the above-mentioned provisions should be removed and it should be ensured that any restriction of judges’ freedom of expression adheres to the principles of legal certainty, necessity and proportionality, in line with Article 10 of the ECHR and Article 19 of the ICCPR, while striking a reasonable balance between freedom of expression of judges and the need for them to be and be seen as independent and impartial in the discharge of their duties.** This is all the more important since the fear of sanctions is likely to have a chilling effect on members of the judiciary and the way they exercise their freedom of expression.¹¹² **At a minimum, the Parliament should consider including defences or exceptions, for instance when the statements were intended as part of a public debate on matters pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in Poland.**¹¹³
62. More generally, as specifically recommended by the UN Special Rapporteur on the independence of judges and lawyers, an explicit general provision should be added to national legislation on the organization and functioning of the judiciary **recognizing that judges are entitled to exercise the right to freedom of expression, belief, association and assembly, as well as political rights, on an equal basis with others, and that the exercise of these rights can only be subject to those restrictions that are necessary in a democratic society to maintain the authority of the judiciary, as well as the independence and impartiality of individual judges.**¹¹⁴

5.2. Freedom of Association of Judges

63. The Bill also introduces certain provisions that may unduly impact the right to freedom of association for judges (Article 1(29) of the Bill). All judges will be required to provide written statements on their associational life, including details of any association, including society, they belong to and any “*function performed in the governing body of a foundation not conducting business activity*”.¹¹⁵ Such statements must be provided annually, and within 30 days of any change. In addition, judges must provide details of any political party membership held before they became a judge, or during their early

¹⁰⁸ See e.g., *op. cit.* footnote 17, par 62 (CCJE [Opinion no. 1 \(2001\)](#)); par 29 (CCJE [Opinion no. 17 \(2014\)](#)); and *op. cit.* footnote 11, par 20 (UNHRC [General Comment no. 32](#)).

¹⁰⁹ *Op. cit.* footnote 16, par 50 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

¹¹⁰ See e.g., ECtHR, [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgement of 23 June 2016), pars 167 and 173.

¹¹¹ See e.g., *op. cit.* footnote 2 (2020 PACE Monitoring Committee’s [Report on the Functioning of Democratic Institutions in Poland](#)) referring to the chilling effect of the abuse of disciplinary proceedings against judges and prosecutors in Poland.

¹¹² See e.g., ECtHR, [Baka v. Hungary](#) [GC] (Application no. 20261/12, judgement of 23 June 2016), pars 162-167 and 171; and *op. cit.* footnote 96, par 42 (2018 ODIHR [Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan](#)).

¹¹³ See e.g., OSCE Representative on Freedom of the Media, [Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression](#) (May 2015), pages 9-10.

¹¹⁴ *Op. cit.* footnote 26, pars 93 and 101 ([2019 Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

¹¹⁵ New draft Article 88a(1) of the Act on the Organization of Common Courts, as inserted by Article 1(29) of the Bill.

career in the case of judges who were appointed before 29 December 1989.¹¹⁶ Under the Bill, the statements provided by judges must be made publicly available in the Public Information Bulletin.¹¹⁷ An identical provision is also introduced for public prosecutors (Article 6(1) of the Bill).

64. As mentioned in par 54 *supra*, judges like other individuals have a right to freedom of association, even though restrictions on this right may be justified in order to preserve the independence and impartiality of judges and the appearance thereof, in particular when it is deemed necessary to maintain their political neutrality.¹¹⁸ In the context of legal opinions, ODIHR and the Venice Commission have specifically acknowledged the possibility of imposing restrictions on the exercise of the right to freedom of association of some public officials in cases “*where forming or joining an association would conflict with the public duties and/or jeopardize the political neutrality of the public officials concerned*”.¹¹⁹ At the same time, judges should not be prevented from forming or joining a trade union or association or other organization to represent or defend the interests of judges.¹²⁰ These views are supported by the [Commentary on the Bangalore Principles of Judicial Conduct](#). According to these, a judge can be a member of a trade union¹²¹ or non-profit organisations of various types, such as “*charitable organizations, university and school councils, lay religious bodies, hospital boards*” and so on, although not if its “*objects [sic] are political*”.¹²² Also, it is generally acknowledged that it would not be appropriate for a judge to hold membership in any organization that discriminates on the basis of race, religion, gender, national origin, ethnicity or sexual orientation, mainly because such membership might give rise to the perception that the judge’s impartiality is impaired.¹²³ Additionally, the ODIHR-Venice Commission Guidelines on Freedom of Association state that “[l]egislation should also contain safeguards to ensure the respect of the right to privacy of clients, members and founders of associations, as well as provide redress for any violation in this respect”.¹²⁴ As such, the right to privacy of judges as members of association should be safeguarded, except if restrictions on this right may be justified in order to preserve the independence and impartiality of judges and the appearance thereof.
65. ODIHR acknowledges legitimate measures by way of national legislation to prevent conflict of interests of judges, appearance of favouritism or partiality in line with states’ obligation to preserve the independence and impartiality of the judiciary. However, these legitimate aims cannot be used as a pretext to control judges or to restrict their ability to exercise their fundamental rights. This effect would go beyond the legitimate aims pursued. In any case, information about judges’ membership in associations should not be misused by the authorities, for instance to discredit a judge or by impugning the judge’s motives for speaking out in favour of judicial independence. The fact of making the information publicly available as contemplated in the Bill would make information about judges’ affiliation in any type of non-profit organizations public, which may have a chilling effect on them and other judges wishing to join judges’ associations or other

¹¹⁶ New draft Article 88a(1)(3) of the Act on the Organization of Common Courts, as inserted by Article 1(29) of the Bill.

¹¹⁷ New draft Article 88b of the Act on the Organization of Common Courts, as inserted by Article 1(29) of the Bill.

¹¹⁸ See e.g., regarding public servants in general, ECtHR, [Ahmed and Others v. United Kingdom](#) (Application no. 22954/93, judgment of 2 September 1998), pars 53 and 63.

¹¹⁹ See e.g., ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014), par 144.

¹²⁰ See Principle 4.13 of the [Bangalore Principles of Judicial Conduct](#); and *op. cit.* footnote 10, par 176 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)). See also *op. cit.* footnote 26, par 108 (2019 [Report of the UN Special Rapporteur on the independence of judges and lawyers](#)). See also ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014), par 146, concerning state officials more generally.

¹²¹ *Op. cit.* footnote 10, par 176 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)).

¹²² *ibid.* par 167 (2007 UN [Commentary on the Bangalore Principles of Judicial Conduct](#)).

¹²³ *Op. cit.* footnote 26, par 60 (2019 [Report of the UN Special Rapporteur on the independence of judges and lawyers](#)).

¹²⁴ ODIHR-Venice Commission, [Joint Guidelines on Freedom of Association](#) (2014), par 231.

types of associations, thus running the risk of unduly limiting their right to freedom of association,¹²⁵ and potentially their right to respect for private life protected by Article 8 of the ECHR.

66. In light of the foregoing, **it follows that the mandatory disclosure requirement of judges' membership in associations as defined by the Bill and the fact that this information is made public are disproportionate and thus contrary to international standards and should be repealed. In any case, the right of judges and prosecutors to form and join professional organizations to protect their interests must not be curtailed.**

6. Change of the Rules on Judicial Discipline

67. While disciplinary mechanisms are a legitimate and necessary element of modern judicial frameworks, they pose risks for the independence of the judiciary. The ultimate sanction of removing a judge is particularly sensitive as it represents a limitation on the principle of judicial security of tenure, but lesser sanctions also have an impact insofar as they may undermine the authority of the sanctioned judge in the eyes of the public. International standards have accordingly addressed both the substantive grounds of judicial discipline, as well as the processes by which it is enforced, both of which aspects are addressed below.

6.1. Changes to Disciplinary Grounds and Sanctions

68. The Polish Constitution enshrines the principle that "*[j]udges shall not be removable*", which is qualified by a proviso that removal (or suspension or enforced transfer to another judicial post) "*may only occur by virtue of a court judgment and only in those instances prescribed in statute*".¹²⁶ The existing Act on the Organization of Common Courts states that "*[a] judge is liable to disciplinary actions for misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office (disciplinary misconduct)*" (Article 107(1)).
69. The Bill seeks to amend the statutory grounds for discipline for each of the courts it covers. The same wording is introduced in each case, with minor variations. Overall, the Bill's new grounds for disciplining judges are the following: "*1) an obvious and gross contempt against the provisions of the law; 2) acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary; 3) actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland; 4) public activities that are incompatible with the principles of judicial independence and the impartiality of judges; and 5) an infringement of the dignity of the office*".¹²⁷ Items (2) to (4) are more specific than existing legislation. It is clear from item (3) in particular that the Bill seeks to introduce as a disciplinary offence judicial criticism of the validity of judicial appointments, including any judgments or rulings on that subject (see Sub-Section 4.2 *supra*). The wording of the other grounds for judicial discipline remain overly

¹²⁵ See e.g., the comments made by ODIHR and the Venice Commission concerning the publication of certain information on associations/NGOs, in *Joint Opinion on Draft Law No. 140/2017 of Romania on Amending Governmental Ordinance No. 26/2000 on Associations and Foundations* (16 March 2018), par 68.

¹²⁶ Article 180(1)-(2) of the Constitution of the Republic of Poland.

¹²⁷ Draft Article 107(1) of the Act on the Organization of Common Courts, as amended by Article 1(32) of the Bill; draft Article 72 par 1 of the Act on the Supreme Court, as amended by Article 2(8) of the Bill; and draft Article 37 par 2 of the Act on the Organization of Military Courts, as amended by Article 3(3) of the Bill.

vague and broad. The Bill also provides for the most serious disciplinary sanctions for judges who are found to have engaged in conduct falling within items (2)-(4), with the default penalties being removal from judicial office, or enforced transfer to another judicial post.¹²⁸ Even in less serious cases, more lenient sanctions such as a warning or reprimand provided in the existing provisions are not available. As a consequence, the judge in question would be subject to financial penalties or dismissal from a function which he or she currently exercises.

70. Generally, vague, imprecise and broadly-worded provisions that define judges' liability may have a chilling effect on their independent and impartial interpretation of the law, assessment of facts and weighing of evidence, and may also be abused to exert undue pressure on judges when deciding cases and thus undermine their independence and impartiality.¹²⁹
71. First, the wording of the new disciplinary grounds, for instance the reference to an "*obvious and gross contempt against the provisions of the law*" (without indicating violation of which legal provisions would result in a disciplinary sanction), to "*public activities that are incompatible with the principles of judicial independence and the impartiality of judges*" (see Sub-Section 5.1. *supra* in that respect) or "*an infringement of the dignity of the office*", are vague and overly broad. This would likely fail to fulfil the requirement of foreseeability developed by the ECtHR, whereby the conduct giving rise to disciplinary action should be defined with sufficient clarity, so as to enable the concerned person to foresee the consequences of his or her actions and thereupon regulate his or her conduct accordingly.¹³⁰ More specific and detailed description of grounds for disciplinary proceedings would also help limit discretion and subjectivity in their application.¹³¹ In general, enumerating an exhaustive list of specific disciplinary offences, rather than giving a general definition, which may prove too vague, is a good practice/approach acknowledged at the international level.¹³²
72. Moreover, such broad wording could encompass the content of their ruling, including the interpretation of the law, assessment of facts or weighing of evidence by judges, which are covered by judges' functional immunity and should not lead to disciplinary, civil or criminal liability, except in cases of malice or gross negligence.¹³³ Disciplinary proceedings shall deal with gross misconduct that brings the judiciary into disrepute, and not the content of rulings of verdicts or criticism of courts.¹³⁴ The risk arises particularly from the Bill's reference in item (3) of the disciplinary grounds to "actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland". As discussed above, other provisions of the Bill impose a related restriction on courts and it

¹²⁸ See existing Article 109 par 1 item 4 or 5 of the Act on the Organization of Common Courts; Article 75 par 1 item 5 of the Act on the Supreme Court; and Article 39 par 1a of the Act on the Organization of Military Courts.

¹²⁹ See e.g., Venice Commission, [Amicus Curiae Brief for the Constitutional Court on the Criminal Liability of Judges](#), CDL-AD(2017)002, par 48. See also, regarding Poland specifically, *op. cit.* footnote 2 (2020 PACE Monitoring Committee's [Report on the Functioning of Democratic Institutions in Poland](#)) referring to the chilling effect of the abuse of disciplinary proceedings against judges and prosecutors in Poland.

¹³⁰ See e.g. ECtHR, [N.F. v. Italy](#) (Application no. 37119/97, judgment of 2 August 2001), pars 29-30; and [Volkov v. Ukraine](#) (Application no. 21722/11, judgment of 1 January 2013), par 173ff. See also *op. cit.* footnote 11, par 19 (2007 UNHRC [General Comment no. 32](#)), which states: "*States should take specific measures guaranteeing the independence of the judiciary [...] through the constitution or adoption of laws establishing clear procedures and objective criteria for the [...] dismissal of the members of the judiciary and disciplinary sanctions taken against them*"; and ODIHR-Venice Commission, [Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova](#), CDL-AD(2014)006, par 16.

¹³¹ *Op. cit.* footnote 56, par 24 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)).

¹³² See ODIHR-Venice Commission, [Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova](#), CDL-AD(2014)006, par 15; and CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 63-65.

¹³³ See *op. cit.* footnote 16, pars 66-68 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)). See also ODIHR-Venice Commission, [Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova](#), CDL-AD(2014)006, pars 20-23; and *op. cit.* footnote 25, par 25 (2010 ODIHR [Kyiv Recommendations](#)).

¹³⁴ *Op. cit.* footnote 25, par 25 (2010 ODIHR [Kyiv Recommendations](#)).

seems clear that this is intended to apply to judgments challenging the validity of judicial appointments, and also a much wider category of judgments that consider whether state bodies acted within the scope of their legal powers.

73. The reference to the “*infringement of the dignity of the office*” seems to refer to the violation of ethical rules, which by their very nature should not be regarded as disciplinary misconduct and should not be a ground for disciplinary liability. Indeed, the purpose of ethical rules is to provide general rules, recommendations or standards of good behaviour that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities.¹³⁵ Given their nature, they should not be directly applied as a ground for disciplinary sanctions,¹³⁶ also given the fact that they are often drafted in general and vague terms,¹³⁷ which do not fulfil the requirement of foreseeability.¹³⁸ Breaches of the ethical norms should usually result in moral rather than in disciplinary liability.¹³⁹ Similarly, and in addition to what is stated under Sub-Section 5.1. *supra*, the Bill's reference in item (4) of the disciplinary grounds to “*public activities that are incompatible with the principles of judicial independence and the impartiality of judges*” risks turning every breach of judicial ethics or professional standards into a disciplinary matter, with a disproportionate sanction (see above).
74. Also, the Bill's list of disciplinary grounds, some of which are couched in wide and open-ended language, creates a risk that judges might face disciplinary proceedings in situations that do not meet the threshold requirement of *serious misconduct*, which is enshrined in international standards.¹⁴⁰
75. As already mentioned in Sub-Section 5.1 *supra*, disciplinary measures must be in proportion to the gravity of the infraction committed¹⁴¹ and the Bill's provision requiring aggravated penalties for items (2)-(4) would appear to be in conflict with such a principle.
76. In light of the above, **the introduction of the new substantive disciplinary grounds, which the Bill introduced, poses a series of risks to judicial independence and should therefore not be pursued.**
77. Finally, it is worth noting that the Bill also introduces new financial penalties for judges amounting to one month's basic salary plus allowances (Article 1(34), Article 2(9) and Article 3(4) of the Bill). Existing provisions already provide for severe financial penalties, including the reduction in wages from 5% to 50% for six months to two years (see e.g., Article 109 par 1 items 2a of the Act on the Organization of Common Courts and Article 75 par 1 item 3 of the Act on the Supreme Court). While the provision of a wide range of possible sanctions is generally welcome in order to ensure the proportionality of the disciplinary measure, it is important that financial sanctions or fines

¹³⁵ *Op. cit.* footnote 56, par 26 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)).

¹³⁶ See CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 44 and 46-47. See also *ibid.* par 25 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)).

¹³⁷ See e.g., Venice Commission, [Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan](#), CDL-AD(2013)035, 10 December 2013, par 31.

¹³⁸ *Op. cit.* footnote 56, pars 25-28 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)). See also CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), pars 60 and 48 (i); and *op. cit.* footnote 16, pars 72-73 (2010 CoE [Recommendation CM/Rec\(2010\)12](#)).

¹³⁹ *ibid.* par 27 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)). See also *op. cit.* footnote 20, par 36 (Opinion of the Venice Commission on the Draft Code on Judicial Ethics of the Republic of Tajikistan).

¹⁴⁰ See e.g., CCJE, [Opinion no. 3 \(2002\) on Ethics and Liability of Judges](#), par 60. See also [Bangalore Implementation Measures](#), par 15.1, which states that: “Disciplinary proceedings against a judge may be commenced only for serious misconduct. The law applicable to judges may define, as far as possible in specific terms, conduct that may give rise to disciplinary sanctions as well as the procedures to be followed”; and *op. cit.* footnote 25, par 25 (2010 ODIHR [Kyiv Recommendations](#)), which states that “[d]isciplinary proceedings against judges shall deal with alleged instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute”.

¹⁴¹ See e.g., *op. cit.* footnote 56, par 66 (2014 ODIHR-Venice Commission [Opinion on Disciplinary Liability of Judges in the Kyrgyz Republic](#)); and [Bangalore Implementation Measures](#), par 15.8.

are not so drastic as to potentially have an adverse impact on judges. Apart from the “chilling effect” that the fear of severe sanctions may have (see pars 60-61 *supra*), it is also key to reiterate the importance of adequate remuneration to protect judges from undue outside interference.¹⁴² Accordingly, **the Parliament should reconsider the severity of the range of sanctions, including financial penalties, imposed in the above cases.**

6.2. Procedural Changes to the Disciplinary Process and Procedure relating to the Lifting of Judicial Immunity

78. The Bill makes changes to the procedure by which the judicial disciplinary process is initiated and conducted against common court judges (see Article 1(35) to (37) of the Bill).
79. It is worth emphasizing that the changes to disciplinary proceedings introduced by the 2017 amendments to various acts on the judiciary, whereby the Ministry of Justice appoints disciplinary officers, were heavily criticized by ODIHR and other international organizations.¹⁴³ The November 2017 ODIHR Opinion noted in particular the potential influence of the executive over disciplinary proceedings against common court and other judges, which ODIHR considered as seriously undermining judicial independence and the principle of separation of powers.¹⁴⁴ ODIHR specifically **recommended to reconsider all provisions pertaining to the Disciplinary Officers of the Minister of Justice/General Public Prosecutor and their special role in disciplinary proceedings against military and common court judges, in light of their negative effects on judicial independence.**¹⁴⁵
80. In relation to the disciplinary process for judges of the common courts, the Bill would authorized the Disciplinary Prosecutor for Common Courts, an official who is directly appointed by the Minister of Justice for a four-year term of office, to carry out investigations or institute disciplinary proceedings in any case concerning a judge.¹⁴⁶ Second, the Bill will abolish the shortlisting system for deputy disciplinary officers currently carried out by general assembly of judges,¹⁴⁷ and provide instead that the Disciplinary Officer for Common Courts has full discretion to select the deputy disciplinary officer from among the judges of the court concerned, or from the district courts within the same area of jurisdiction.¹⁴⁸ The Bill also brings changes to the process for lifting common court judges’ immunity from detention and criminal prosecution. The Bill provides that these decisions are to be made by the Disciplinary Chamber of the Supreme Court.¹⁴⁹ With regard to judges of the military courts, the Bill makes a similar provision entrusting the Disciplinary Chamber of the Supreme Court with the responsibility of deciding whether to lift military judges’ immunity from detention and criminal prosecution.¹⁵⁰ The Bill also provides for changes to the disciplinary process for judges of the administrative courts. It would enable the President of the Republic of Poland to appoint an Extraordinary Disciplinary Prosecutor to investigate and initiate

¹⁴² See e.g., *op. cit.* footnote 18, pars 46 and 51 (2010 Venice Commission’s [Report on the Independence of the Judicial System – Part I: The Independence of Judges](#)).

¹⁴³ *Op. cit.* footnote 1, Sub-Section 5.1 (November 2017 ODIHR Opinion).

¹⁴⁴ *ibid.* Sub-Section 5 (November 2017 ODIHR Opinion); and par 50 (August 2017 ODIHR Opinion).

¹⁴⁵ *ibid.* par 124 (November 2017 ODIHR Opinion).

¹⁴⁶ Article 1(36) of the Bill, inserting Article 112(2a) into the Act on the Organization of Common Courts. The authorization extends to the two Deputy Disciplinary Prosecutors for the Common Courts, who are also appointed by the Minister of Justice.

¹⁴⁷ Article 112(6) of the Act on the Organization of Common Courts.

¹⁴⁸ Article 1(36) of the Bill, amending Article 112(6)-(7) of the Act on the Organization of Common Courts.

¹⁴⁹ Article 1(35) of the Bill, amending Article 110(2a) of the Act on the Organization of Common Courts.

¹⁵⁰ Article 3(5) of the Bill, inserting Article 39(2a) into the Act on the Organization of Military Courts.

proceedings in respect of a specific disciplinary case.¹⁵¹ Such an appointment displaces the role of the ordinary Disciplinary Prosecutor of the Supreme Administrative Court, who is elected by the college of the court.¹⁵² The Presidential appointment of an Extraordinary Disciplinary Prosecutor is also tantamount to an instruction to launch a disciplinary investigation.¹⁵³

81. Accordingly, **the proposed amendments exacerbate even more the concerns identified by ODIHR in its 2017 opinions.**¹⁵⁴ As mentioned above, international standards require that judges are not subjected to undue interference by the executive branch and are protected against improper pressure which is capable of influencing the way in which they exercise their independent judgment in the cases they decide, including in the context of disciplinary proceedings.¹⁵⁵ It is clear that this principle applies not only to disciplinary courts as the final decision-maker but also disciplinary officers as they are at the centre of the initial stage of the disciplinary process. The draft amendments would risk increasing the indirect influence of the executive, via the Disciplinary Prosecutor for the Common Courts, whom the Minister of Justice appoints.
82. The Bill also introduces a direct executive influence in the disciplinary process for administrative court judges, in the form of the President's right to appoint an Extraordinary Disciplinary Prosecutor. A similar modality concerning the direct appointment by the President of disciplinary officer for disciplinary proceedings against Supreme Court judges was also heavily criticized in the November 2017 Opinion.¹⁵⁶ As recommended therein, **in light of the new rules on disciplinary proceedings' adverse effects on judicial independence, all provisions pertaining to the Disciplinary Officers of the President of the Republic and their special role in disciplinary proceedings against judges should be removed.**
83. In light of the foregoing, more generally, **the Bill's above-mentioned measures with regard to the disciplinary process are harmful to judicial independence, and should be abandoned.**
84. The Bill's move to entrust responsibility for lifting immunity of judges to the Supreme Court Disciplinary Chamber is problematic in light of the considerable concerns with regard to its lack of independence within the meaning of EU and Polish law (see par 24 *supra*). As emphasized by the CJEU, *“where it appears that a provision of national law reserves jurisdiction to hear cases [...] to a court which does not meet the requirements of independence or impartiality under EU law, in particular, those of Article 47 of the Charter, another court before which such a case is brought has the obligation, in order to ensure effective judicial protection, within the meaning of Article 47, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, to disapply that provision of national law, so that that case may be determined by a court which meets those requirements and which, were it not for that provision, would have jurisdiction in the relevant field, namely, in general, the court which had jurisdiction, in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements”*.¹⁵⁷ **The**

¹⁵¹ Article 4(10) of the Bill, amending Art 48 of the Act on Administrative Courts.

¹⁵² Article 48(4) of the Act on administrative courts.

¹⁵³ Article 4(10) of the Bill, amending Art 48 of the Act on Administrative Courts.

¹⁵⁴ *Op. cit.* footnote 1, Sub-Section 5 (November 2017 ODIHR Opinion); and Sub-Section 4 (August 2017 ODIHR Opinion).

¹⁵⁵ See e.g., CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, pars 69, 71 and 77; and *op. cit.* footnote 16, par 69 (2010 CoE *Recommendation CM/Rec(2010)12*). See also *op. cit.* footnote 26, par 9 (2010 OSCE/ODIHR Kyiv Recommendations on Judicial Independence), which states that “[b]odies deciding on cases of judicial discipline must not be controlled by the executive branch nor shall there be any political influence pertaining to discipline [and that] [a]ny kind of control by the executive branch over [...] bodies entrusted with discipline is to be avoided”.

¹⁵⁶ *Op. cit.* footnote 1, Sub-Section 5.1 (November 2017 ODIHR Opinion).

¹⁵⁷ See CJEU [GC], *A. K. and Others v. Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, par 166.

provisions concerning the jurisdiction of the Disciplinary Chamber should therefore be removed.

85. More generally, it is worth emphasizing that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions¹⁵⁸ or offer possibilities for abuse. The CJEU has elaborated on the required guarantees, stating that “*rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary*”.¹⁵⁹
86. Finally, changes are also brought to the disciplinary proceedings against prosecutors (Article 6(5) to (9) of the Bill). ODIHR had also raised some concerns concerning the new disciplinary procedure against prosecutors in its November 2017 Opinion, particularly concerning the involvement of the executive as potentially jeopardizing the autonomy of the prosecution service.¹⁶⁰ Certain of the provisions that are introduced by the Bill may also be problematic. According to recommendations made at the international and regional levels, disciplinary proceedings against prosecutors shall be impartial and transparent, and guarantee an objective evaluation and decision.¹⁶¹ The right to a fair hearing and to access to an independent judge also applies to disciplinary proceedings against prosecutors.¹⁶² In that respect, the fact that **Article 6(7) of the Bill** provides that the disciplinary court shall conduct proceedings despite the *justified* absence of the charged person or his/her defense counsel would appear to go against such standards and **should be reconsidered, as should the involvement of the Minister of Justice in disciplinary proceedings against prosecutors as recommended in ODIHR November 2017 Opinion.**

7. Restrictions on Public Expression and Debate by Judicial Self-Governing Bodies of the Common Courts

87. The Bill includes an amendment inserting a new provision into the Act on the Organization of Common Courts that would restrict the subject matter, which the college and judicial self-government bodies in the judiciary may deliberate upon, which cannot include “*political matters*” (Article 1(3) of the Bill). It is worth noting that the existing functions of the college of the Court of Appeal include providing opinions to the NCJ on candidates for appointment to the court, “*expressing opinions on personnel matters related to judges*” and draft financial plans for the court, as well as discussing the results of court inspections and expressing opinions on other matters raised by the President of the Court of Appeal.¹⁶³ The functions of the college of the regional court are similar.¹⁶⁴

¹⁵⁸ CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, par 77.

¹⁵⁹ CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, par 77.

¹⁶⁰ *Op. cit.* footnote 1 pars 125-127 (November 2017 ODIHR Opinion), and references contained therein regarding the principle of autonomy of the prosecution service and disciplinary proceedings against prosecutors.

¹⁶¹ See e.g., *UN Guidelines on the Role of Prosecutors*, 1990, par 22; and CoE Consultative Council of European Prosecutors (CCPE), *Opinion no.9 on European Norms and Principles concerning Prosecutors* (2014), Principle XII.

¹⁶² *ibid.* par 21 (1990 UN Guidelines on the Role of Prosecutors). See also e.g., Venice Commission, *Opinion on the Draft Organic Law of the Public Prosecutor’s Office of Bolivia*, CDL-AD(2011)007, 30 March 2011, par 53.

¹⁶³ Article 29(1) of the Act on the Organization of Common Courts, as amended by the Bill, Article 1(9).

¹⁶⁴ Article 31(1) of the Act on the Organization of Common Courts, as amended by the Bill, Article 1(11).

88. The definition of “judicial self-government”, as amended by the Bill, refers to the general assemblies of judges of the Court of Appeal, regional courts and district courts.¹⁶⁵ According to the draft amendments, the Act on the Organization of Common Courts would not confer very wide functions on the general assemblies of judges, apart from electing delegates to participate in the judicial selection function of their respective court college and receiving information about the situation in the court from the court president.¹⁶⁶ Nevertheless, it is clear that both colleges and general assemblies are judicial bodies, which are well placed to deliberate on matters concerning the judiciary, and the Act on the Organization of Common Courts currently provides mechanisms for both types of bodies to pass resolutions without imposing any restriction on the subject matter of the deliberations or resolutions. This restriction on colleges and general assemblies of judges deliberating on “political matters” arguably overlaps with the restriction on questioning the powers of state bodies discussed above. After all, the provision imposing that restriction refers not only to courts but also to “organs of courts”, a term which could reasonably be applied to the colleges and general assemblies of judges in the common courts system.
89. First, the term “political matters” which the Bill uses to restrict debate in the court colleges and general assemblies of the common court system is both broad and vague. It unavoidably curtails discussion on a wide range of topics on which it has been internationally recognized as valuable for judges to be able to express their views. For example, the CCJE recommends that “*judges should be allowed to participate in certain debates concerning national judicial policy [and] [t]hey should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system*”.¹⁶⁷ According to the UN Special Rapporteur on the independence of judges and lawyers, as a general principle, there are a number of situations in which a judge may properly speak out about matters that are politically sensitive, for instance, when commenting on legislation and policies that “*directly affect the operation of the courts, the independence of the judiciary, or fundamental aspects of the administration of justice*”.¹⁶⁸ This view has also been echoed by ECtHR jurisprudence¹⁶⁹ (see also Sub-Section 5.1. on the freedom of expression of judges and references made therein).
90. A multitude of topics constitute legitimate subjects for judicial discussion even though they may be qualified as “political” issues. Examples include the funding of the justice system, fair trial rights of defendants, protection of witnesses or vulnerable litigants, or mechanisms of alternative dispute resolution. Measures to achieve gender equality amongst justice system actors, as well as gender-sensitive justice systems, may equally be labelled as “political matter”, however constitutes a legitimate subject of judicial deliberation and debate.
91. In view of the clear conflict with international recommendations and recognized good practices, **it is recommended that the content-based restrictions imposed on the deliberation of judicial self-governing bodies provided in Article 1(2) of the Bill be removed.**

¹⁶⁵ Article 1(1) of the Bill, amending Article 2 of the Act on the Organization of Common Courts.

¹⁶⁶ Articles 34(1), 36(1), 36a(6) of the Act on the Organization of Common Courts, as amended by the Bill in Article 1(14)-(15).

¹⁶⁷ CCJE, *Opinion no. 3 (2002) on Ethics and Liability of Judges*, par 34.

¹⁶⁸ *Op. cit.* footnote 26, par 4 (*2019 Report of the UN Special Rapporteur on the independence of judges and lawyers*).

¹⁶⁹ See e.g., ECtHR, *Wille v. Lichtenstein* [GC] (Application no. 28396/95, judgment of 28 October 1999), pars 67-70; and ECtHR, *Baka v. Hungary* [GC] (Application no. 20261/12, judgement of 23 June 2016), pars 151-152 and 171.

8. Additional Comments

8.1. *Excessive Role of the Executive in the Administration of Justice*

92. The Bill seems to increase the executive's role in the administration of justice, a tendency that has already been criticized by ODIHR in its November 2017 Opinion.¹⁷⁰ In particular, according to amendments to Article 37h.2 of the Act on the Organization of Common Courts (as per Article 1(17) of the Bill), the Minister of Justice will evaluate annual information on the activity of courts submitted to him/ her by the Presidents of the Courts of Appeal, and will have the power to accept or refuse this information. Pursuant to paragraph 6 of the same article the refusal of the Minister of Justice to accept the annual information constitute a failure of the President of the Court of Appeal to fulfil his/her official duties within the meaning of Article 27(1)(1) of the Act. Even though the Minister's refusal needs to be justified, this justification is not subject to judicial review. Moreover, this provision is specifically problematic in light of the Article 27(1), which states that the president and the vice president of a court may be dismissed by the Minister of Justice in the course of the term of office for such a gross violation. Another example is the increased involvement of the President of the Republic in disciplinary proceedings against judges of administrative courts, as mentioned in pars 82-83 *supra*. In principle, the executive should not be in a position to interfere in matters of judicial administration, in order not to undermine judicial independence.¹⁷¹ Accordingly, **the amendments to the Article 37h (6) of the Act on the Organization of Common Courts, and more generally, all provisions of the Bill conferring excessive influence of the executive over judicial administration should be removed.**
93. The Bill introduced amendments to judicial colleges of regional courts, especially their composition. Article 1(10) of the Bill provides that such colleges are in future to be composed exclusively of the President of the regional court and the presidents of district courts within the area of jurisdiction of the regional court, as opposed to a college of eight members nominated by the general assembly of the circuit judges. However, such presidents are direct appointees of the Minister of Justice (Articles 24 and 25 of the Act on the Organization of Common Courts), which ultimately confer to direct government appointees an increased influence when giving opinions on candidates for judgeship, among others. Recommendations elaborated at the regional level emphasize that an undue influence of political interests in the appointment process should be avoided by ensuring that the authorities in charge of the selection and career of judges are independent of the executive and legislative powers.¹⁷² **Hence, such amendments run counter to this principle and should therefore be reconsidered in their entirety.**
94. Other provisions of the Bill similarly seek to decrease the institutional independence of courts by transferring certain prerogatives from courts to the government. For instance, Article 4(7) of the Bill would permit the President of the Republic to determine the rules of the Supreme Administrative Court. ODIHR has strongly criticised similar provisions conferring to the President the powers to determine the Rules of the Procedure of the

¹⁷⁰ *Op. cit.* footnote 1, pars 86-89, among others (November 2017 ODIHR Opinion); and Sub-Section 3 (August 2017 ODIHR Opinion).

¹⁷¹ *Op. cit.* footnote 37, pars 26 (c) (2007 UNODC's [Commentary on the Bangalore Principles of Judicial Conduct](#)). See also *op. cit.* footnote 1, par 40 (August 2017 ODIHR Opinion).

¹⁷² See e.g., *op. cit.* footnote 16, par 46 (2010 CoE Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities); *op. cit.* footnote 30, par 8 (2010 ODIHR Kyiv Recommendations on Judicial Independence); *op. cit.* footnote 26, par 1.3 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 47, par 48 (2007 CCJE Opinion no. 10 on the Council for the Judiciary at the Service of Society); and *op. cit.* footnote 22, pars 25 and 32 (2007 Venice Commission's [Report on Judicial Appointments](#)).

Supreme Court in its November 2017 Opinion.¹⁷³ Indeed, enabling a member of the executive to regulate such a wide range of matters may deprive litigants of their right to “an independent and impartial tribunal established by law” under Article 6 of the ECHR.¹⁷⁴ Namely, placing excessive regulatory powers in the hands of the executive may enable it to “interfere in matters that are directly and immediately relevant to the adjudicative function”, which the *UNODC Commentary on the Bangalore Principles* describes as breaching a minimum condition for the institutional independence of the judiciary.¹⁷⁵ Moreover, since in the administrative courts, an organ of the Executive is usually the defendant, this provision would also enable one side of administrative disputes to influence the procedures that are used. **It is thus recommended to remove Article 4(7) of the Bill in its entirety.**

8.2. Change of the Rules on Appointment of the First President of the Supreme Court

95. Concerning modification of the rules on appointment of the First President of the Supreme Court, the most important change introduced by Article 2(1) of the Bill is that all judges of the Supreme Court have the right to propose one candidate. Further, detailed rules are provided to avoid situations where the absence of a quorum/sufficient majority would preclude the nomination of the five candidates. The nomination is left to the General Assembly of Supreme Court Judges.
96. First, an alternative would have been to allow Supreme Court judges to not only propose one candidate but rather to rank several candidates by order of preferences. Such a system would be more likely to ensure wider support, even if only as a matter of 2nd or lower preference, for the person who is appointed as First President, which is generally recommended.¹⁷⁶
97. The mere fact that the President of the highest court in a country is appointed by the executive does not in itself undermine her/his independence provided that, once appointed, s/he is not subject to any pressure, does not receive any instructions and performs his/her duties with complete independence.¹⁷⁷ At the same time, it is worth noting that the contemplated modalities would give considerable choice to the President of the Republic. In that respect, ODIHR has previously considered that “[r]aising the number of potential candidates for the position of First President proposed by the General Assembly of Supreme Court judges to the President of the Republic from two to five de facto dilutes the role of the General Assembly and confers on the President of the Republic more influence, especially since he/she is not bound in his or her choice by the number of votes received by each of the candidates. Moreover, the fact that the President of the Republic of Poland has the final say in the appointment and re-appointment decisions cannot exclude that political or other considerations may prevail over the merit.”¹⁷⁸ Moreover, the President should not be able to pick a candidate supported by only a small minority of the Supreme Court judges.¹⁷⁹
98. Accordingly, **the Parliament should reconsider the provisions that give Supreme Court judges only one vote to cast and instead specify that they should rank several preferred candidates, while providing for a mechanism to ensure that the President**

¹⁷³ *Op. cit.* footnote 1, Sub-Section 3 (November 2017 Opinion).

¹⁷⁴ *Op. cit.* footnote 1, par 36 (August 2017 Opinion).

¹⁷⁵ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007), par 26.

¹⁷⁶ See e.g., Venice Commission, *Opinion on the Bill amending the Act on the National Council of the Judiciary; on the Bill amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, CDL-AD(2017)031, par 75.

¹⁷⁷ See e.g., ECtHR, *Zolotas v. Greece* (Application no. 38240/02, judgment of 2 June 2005), par 24.

¹⁷⁸ *Op. cit.* footnote 1, par 104 (November 2017 Opinion).

¹⁷⁹ See e.g., *op. cit.* footnote 176, par 75 (2017 Venice Commission’s Opinion on Poland).

cannot pick a candidate supported by only a small minority of the Supreme Court judges.

9. Final Comments on the Process of Preparing and Adopting the Bill

99. The initial legislative process which the Amendments underwent may be deemed inapt on a number of fronts. At first, very little time was provided to stakeholders to formulate their opinions on the Bill, even though many did so in the short time frame.¹⁸⁰ Secondly, the Bill was adopted in the first reading on 19 December, after which it was submitted to the Justice and Human Rights Committee of the *Sejm*, were debated well into the night¹⁸¹ and adopted in the second and third reading by the *Sejm* the following day (20 December)¹⁸² and then sent to the Senate on 23 December 2019.¹⁸³
100. 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).¹⁸⁴ Moreover, key OSCE 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).¹⁸⁵
101. ODIHR would like to reiterate what it said in its 2017 Opinions¹⁸⁶ that is a good practice when initiating fundamental reforms of the judicial system, the judiciary and civil society are consulted and should play an active part in the process. As such, public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.¹⁸⁷ 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,¹⁸⁸ unless exigency of the matter justifies urgent action. To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,¹⁸⁹ meaning not only when the draft is being prepared but also when it is discussed before Parliament. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in the institutions in general. In that respect, the brevity of the discussions and lack consultations in absence of any information justifying urgent action when developing the Bill are at odds with these principles and good practices.

¹⁸⁰ See <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=69>; and <https://www.senat.gov.pl/prace/komisje-senackie/posiedzenia.184.1.8489.komisja-ustawodawcza.html>.

¹⁸¹ While no formal provisions prevent them, the Inter-Parliamentary Union in its *Report on “Gender Sensitive Parliaments”* of 2011 has called for parliamentary working hours which are more family-friendly in order to ensure equal representation, including through a limitation on debates going well into the night (see page 90).

¹⁸² See <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=84CF468EEA95B97EC12584CE006F4282>.

¹⁸³ See <https://www.senat.gov.pl/prace/senat/proces-legislacyjny-w-senacie/ustawy-uchwalone-przez-sejm/ustawy-uchwalone-przez-sejm/ustawa.934.html>.

¹⁸⁴ Available at <http://www.osce.org/fr/odihr/elections/14304><http://www.osce.org/fr/odihr/elections/14304>.

¹⁸⁵ Available at <http://www.osce.org/fr/odihr/elections/14310><http://www.osce.org/fr/odihr/elections/14310>.

¹⁸⁶ *Op. cit.* footnote 1, par 16 and Sub-Section 8 (November 2017 Opinion); and Sub-Section 8 (August 2017 Opinion).

¹⁸⁷ *ibid.*

¹⁸⁸ 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 ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

¹⁸⁹ See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), pars 33-34. See also e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs.

102. 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*".¹⁹⁰ The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or other issues impacting their work, to ensure that judges are not left out of the decision-making process in these fields.¹⁹¹
103. An Explanatory Statement to the Bill, which lists a number of reasons justifying the contemplated reform, has been prepared¹⁹² but does not mention the research and impact assessment on which these findings are based. In particular, little evidence is presented to demonstrate that the existing problems within the Polish judiciary require the draft legislative reform. The Explanatory Statement also does not outline whether and to what extent the benefits of the measures chosen by the authors of the Bill outweigh their costs, including their negative impact on judicial independence. Given the potential impact of the Bill on the independence of the judiciary and the rule of law, it is essential that such legislation be preceded by an in-depth regulatory impact assessment, complete with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option (including the "no regulation" option),¹⁹³ also in line with the requirements concerning explanatory statements listed in Article 34 par 2 of the Rules of the *Sejm*, applicable to all bills.¹⁹⁴
104. Moreover, the Bill seeks to amend numerous provisions of other pieces of legislation, which were only recently adopted or amended.¹⁹⁵ As noted in ODIHR 2017 Opinions, this raises doubts as to whether these continuous legal changes are part of any coherent policy involving a thorough problem analysis and outline of the comparative costs and benefits of all available policy solutions. As specifically noted by the CCJE, too many changes within a short period of time should be avoided if possible, especially in the area of administration of justice.¹⁹⁶ A comprehensive approach, involving a proper policy discussion with all relevant stakeholders and impact assessment at the outset, should underpin the reform process.
105. Furthermore, Article 17 of the Bill provides that the Act will enter into force 7 days after its publication. The Bill should provide for adequate *vacatio legis* to allow for orderly implementation of the changes in law.
106. In light of the above, the initial process by which the Bill was adopted fails to conform to the aforesaid principles of democratic law-making. ODIHR welcomes the fact that the Senate allowed for a broad and open debate around the bill and consulted, as appropriate, with national and international stakeholders and experts. Any legitimate reform process relating to the judiciary, especially of this scope and magnitude, **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the judiciary, judges' and lawyers' associations, the academia, civil society organizations and should involve a full impact assessment including of**

¹⁹⁰ *Op. cit.* footnote 17, par 31 ([CCJE Opinion no. 18 \(2015\)](#)), which states 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*".

¹⁹¹ *Op. cit.* footnote 26, par 1.8. (1998 [European Charter](#)). See also *op. cit.* footnote 26, 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 ENCJ, [2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate](#), Recommendation 5, which states that "[j]udiciaries and judges should be involved in the necessary reforms".

¹⁹² See <<https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=69>>.

¹⁹³ See e.g., ODIHR, [Report on the Assessment of the Legislative Process in the Republic of Armenia](#) (October 2014), pars 47-48.

¹⁹⁴ See Article 34 par 2 of the 1992 Rules of the *Sejm*, as last amended in 2017.

¹⁹⁵ See the list of amendments to various acts mentioned in *op. cit.* footnote 41.

¹⁹⁶ *Op. cit.* footnote 17, par 45 ([CCJE Opinion no. 18 \(2015\)](#)).

compatibility with relevant international human rights standards, according to the principles stated above. Adequate time should also be allowed for all stages of the ensuing law-making process and for *vacatio legis*. It would be advisable for relevant stakeholders to follow such principles in future legal reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]