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OPINION ON TWO BILLS OF THE REPUBLIC OF POLAND ON THE CONSTITUTIONAL TRIBUNAL (SEJM PRINTS NO. 253 AND 254, AS OF 24 JULY 2024)

POLAND

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Based on an unofficial English translation of the two Bills commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

As underlined in previous ODIHR opinions on judicial reform in Poland in 2017-2024, while every state has the right to reform its judicial system, such reforms should always comply with the country's constitutional requirements, adhere to the rule of law principles, be compliant with international law and human rights standards, as well as OSCE commitments. These underlying principles should guide the legislative choices to be made by the Polish legislators to execute the judgments of European courts against Poland concerning judicial independence. Therefore, with respect to the initiative to reform the Constitutional Tribunal, it is important that the chosen modalities are duly justified in light of international law and human rights standards, and that the legal drafters do not lightly invoke the existence of exceptional circumstances to resort to extraordinary measures, as this may run the risk of setting a precedent whereby a changing political majority, which did not approve the reform, would be tempted to proceed the same way.

The complexity and scale of the reform required to address the systemic deficiencies of the judicial system in Poland as identified by the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), international organizations, including ODIHR, as well as national observers, call for the elaboration of a thorough and coherent policy underpinning the entire reform process. The constitutional crisis following controversial appointments of the judges of the Constitutional Tribunal in 2015, subsequent government actions and legislative reforms undermining its independence have fundamentally impacted the Tribunal's standing and its ability to carry out its constitutional mandate. In this context, the intention to reform the Constitutional Tribunal as one of the priorities of ongoing rule of law reform efforts is positive. The existing legal framework, the composition of the Constitutional Tribunal, and modalities of electing its judges, constitute structural dysfunctions which, among others, have led to deficiencies in its functioning and the finding of the ECtHR that the Constitutional Tribunal no longer meets the requirements of an independent and impartial tribunal established by law.

In light of the above, ODIHR welcomes the introduction of the Bill on the Constitutional Tribunal and notes a number of positive features that will prove useful to address several shortcomings of the existing legal framework as amended (or interpreted) since 2016 and would contribute to restoring the Constitutional Tribunal's independence, effectiveness and legitimacy. In particular, the election of judges of the Constitutional Tribunal by a qualified majority vote of the *Sejm* contemplated by the Bill is welcome, although additional incentives for the majority and opposition to reach a compromise and staggered terms of office could also be considered. In addition, a number of provisions of the Bill contain other welcome aspects, notably the extension of the term-limits of sitting judges pending the election of their successor, the broadening of entities competent to nominate candidates for the office of judge of the Constitutional Tribunal, clarification regarding the modalities of taking the oath before the President of the Republic for newly elected judges, and new rules on the status of judges and proceedings before the Tribunal.

At the same time, the Opinion highlights several issues which deserve additional consideration and could be further enhanced, including with respect to the ineligibility for four years following the termination of political party membership, the absence of deadlock-breaking mechanism in case of failure of the *Sejm* to elect a new judge of the Tribunal, the lack of requirement for staggered terms of office for judges of the

Tribunal and the power of the President of the Republic to request initiation of disciplinary proceedings against a judge of the Tribunal.

With respect to the second Bill under review, on Introductory Provisions to the Act on the Constitutional Tribunal (Introductory Provisions Bill), several significant reservations are expressed. It is recognized that the legislator is facing a challenging task and is pursuing commendable intentions of restoring the rule of law and a mechanism of effective constitutional review. However, the means of achieving the stated aims must remain within constitutional bounds and norms of international law, as well as adhere to the same values the Bill is seeking to restore. In particular, the provisions which envision an *ex lege* invalidation of the Tribunal's judgments rendered by "persons not entitled to adjudicate" require important adjustments. In addition, further work is needed to clarify the status of incumbent judges and of "persons not entitled to adjudicate", as well as to address shortcomings in provisions introducing changes to the presidency and the chancellery of the Tribunal.

More specifically, ODIHR makes the following recommendations to improve the two Bills in line with OSCE commitments and other international standards:

A. To reconsider completely the responsibility of the Constitutional Tribunal to signal flaws and gaps in legislation or revise Article 3 of the Bill clarifying that such responsibility is only provided in the context of ongoing constitutional adjudication; [paras. 28-32]

B. Regarding the eligibility requirements to become a judge of the Constitutional Tribunal:

   1. to include an explicit prohibition in Article 17.2 on individuals who are active members of government or parliament from being candidates for the office of judges of the Constitutional Tribunal; [para. 44]

   2. to reconsider the ineligibility requirement based on recent (during the last four years) political party membership, or at a minimum, limit the ineligibility to individuals who holds or have recently held leadership positions in a political party; [para. 45]

C. Regarding the election of judges of the Constitutional Tribunal by a qualified majority vote of the *Sejm*: to consider supplementing the Bill with a tailor-made, additional deadlock breaking mechanism, which does not jeopardize the independence and impartiality of the Constitutional Tribunal, while providing for a staggered terms of office of the judges of the Constitutional Tribunal; [paras. 54-55]

D. Regarding the modalities of taking the oath, in Article 20 of the Bill:

   1. to clarify that the requirement for a newly elected judge of the Constitutional Tribunal to take an oath before the President of the Republic is not necessary for validating his or her election and that preventing a judge from taking the oath within the legally defined timeline should not become an obstacle for starting the term of office; [paras. 60-61]

   2. to include an alternative mechanism to address situations where the newly elected judge is not provided with an opportunity to take the oath in the presence of the President of the Republic within the timeline provided by the law, for instance the possibility to take the oath before another body or high-level public official; [para. 61]

E. To consider supplementing the Bill with provisions ensuring that gender and diversity considerations are taken into account throughout the selection process of

judges to the Constitutional Tribunal, though not at the expense of the basic criterion of merit; [paras. 64-67]

F. To clarify which acts or omissions constitute disciplinary offences, provide that disciplinary sanctions should be proportionate to the respective disciplinary offence, and dismissal only applied in the most serious cases and as a measure of last resort, while defining the applicable majority rules for the disciplinary court to decide on disciplinary cases and requiring a qualified majority vote for dismissal; [paras. 79-80]

G. To consider including additional safeguards to avoid frequent referral of cases to the full bench, such as requiring that a referral request be submitted only by a simple majority decision of the concerned bench and allowing the full bench to decline the request; [para. 94]

H. To remove Article 87 from the Bill or amend it to specify that proceedings initiated at the request of 50 deputies of the *Sejm* or 30 senators, if not completed by the end of their term, shall continue and the cases shall be adjudicated by the Constitutional Tribunal; [para. 96]

I. Regarding the Introductory Provisions Bill,

   1. to reconsider the *ex lege* declaration that all the judgments of the Tribunal rendered with the involvement of "persons not entitled to adjudicate" are null and void; [para. 107].

   2. to clearly and narrowly define the type of cases that could be re-opened, the conditions of admissibility and criteria for re-opening/resumption of the proceedings, as well as the entities or subjects eligible to request such resumption of proceedings, while clarifying potential legal and temporal effects of such new and initial judgements; [paras. 108-111]

   3. to ensure that cases which may be re-opened are adjudicated by the Constitutional Tribunal without the involvement of "persons not entitled to adjudicate", while specifying that such cases should be adjudicated within a specified timeline and granting to the Constitutional Tribunal the power to issue interim measures during that period if/as needed; [para. 111]

   4. to provide a procedure allowing litigants with a possibility, in circumstances of a substantial and compelling nature, and in case of violation of their rights due to the past judgements of the Constitutional Tribunal involving "persons not entitled to adjudicate", for a certain, reasonable period of time, to request re-examination or re-opening of their cases before the competent court, although the rights of bona fide third parties in civil cases and the principle of *no reformatio in peius* in criminal cases should be respected, and clarification made with respect to the legal and temporal effects of such judgments; [paras. 112-114] and

J. In the Introductory Provisions Bill, to clarify the status of the persons illegally elected as judge of the Tribunal (and their successors), and consider relevant measure to restore the lawful composition of the Constitutional Court. [para. 119]

These and additional Recommendations are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing laws to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 23 April 2024, the Chair of the Justice and Human Rights Committee of the *Sejm* (the lower house of the Parliament of Poland), sent to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) a request for a legal review of the Bill on the Constitutional Tribunal (hereinafter the "Bill") and the Bill on Introductory Provisions to the Act on the Constitutional Tribunal (hereinafter the "Introductory Provisions Bill", together referred to as the "Bills").
2. On 25 April, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of the Bills with international human rights standards and OSCE human dimension commitments. On 24 July 2024, the Bills for review were adopted in third reading by the *Sejm* with amendments,[1] and subsequently submitted to the Senate on the same day. This Opinion analyses both the initial version of the Bills and relevant amendments made in the version adopted by the *Sejm* on 24 July 2024. The Bills were then considered by the Senate on 31 July 2024 and the Senate adopted two resolutions with proposed amendments to both Bills, which were forwarded to the *Sejm* on 2 August 2024.
3. This Opinion was prepared in response to the above-mentioned request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[2]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers the Bills submitted for review, and the amendments made as reflected in the version adopted in third reading by the Sejm and submitted to the Senate on 24 July 2024. This legal review is limited as it does not constitute a full and comprehensive review of the entire legal and institutional framework regulating constitutional justice in Poland.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Bills. The absence of comments on certain provisions of the Bills should not be interpreted as an endorsement of these provisions. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to good legislative practices, ODIHR does not advocate for any specific model; any country example should be assessed with caution since it cannot necessarily be replicated in another country and

1 Bill on the Constitutional Tribunal of the Republic of Poland and Bill on Introductory Provisions to the Act on the Constitutional Tribunal, adopted in the third reading by the *Sejm* on 24 July 2024.

2 See in particular OSCE Ministerial Council Decision No. 7/08 "Further Strengthening the Rule of Law in the OSCE Area", 8 December 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 […]*".

should always be considered in light of the broader national institutional and legal framework, as well as the country's legal and social context and political culture.

6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW") and the *2004 OSCE Action Plan for the Promotion of Gender Equality* and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.[3]

7. The Opinion is based on an unofficial English translation of the Bills commissioned by ODIHR, which is attached to this document as an annex. Errors from translation may result. Should the Opinion be translated in Polish, the English version shall prevail in case of discrepancies.

8. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Poland in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. The key role of constitutional courts or comparable institutions[4] empowered with constitutional judicial review in ensuring that the principles of the rule of law, democracy and human rights are observed in all state institutions has been emphasized in the *OSCE Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008).[5] While acknowledging the particular nature and specificities of constitutional adjudication, key principles pertaining to judicial independence have to be respected also when reforming legislation regulating constitutional courts. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.[6] The principle of judicial independence is also crucial to respecting the principle of the separation of powers and upholding international human rights standards.[7] Specifically, this independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being subject to internal or external pressure when adjudicating or influenced or fearful of arbitrary disciplinary investigations and/or sanctions by the executive or legislative branches or other external sources. Judicial independence is also essential to engendering public trust and credibility in the justice system in general, in

3 See the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, General Assembly, resolution 34/180, adopted on 18 December 1979; and the OSCE Action Plan for the Promotion of Gender Equality, OSCE, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

4 It is noted that under Chapter VIII of the Constitution of the Republic of Poland, the Constitutional Tribunal is considered separately from courts, although it is considered a court within the meaning of Article 6 of the ECHR and Article 14 of the ICCPR, and other international documents, to the extent it deals with the constitutional rights of an individual and the outcome of the proceedings before the constitutional court is decisive for the determination of an individual's civil rights and obligations; see European Court of Human Rights (ECtHR), *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 187-210.

5 See particular OSCE Ministerial Council Decision No. 7/08 "Further Strengthening the Rule of Law in the OSCE Area", 8 December 2008, para. 4.

6 See Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, United Nations, Human Rights Council, A/HRC/29/L.11, 30 June 2015. As stated in the OSCE Copenhagen Document 1990, para. 2, "*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*".

7 See OSCE Ministerial Council Decision No. 12/05 on "Upholding Human Rights and the Rule of Law in Criminal Justice Systems", 6 December 2005.

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, especially constitutional courts, as being independent from political influence is vital in a democratic society that respects the rule of law.

10. The independence of constitutional courts should be assured and, as ultimate guarantors of the interpretation and observance of the constitution of a state, constitutional courts should protect the separation of powers and democracy and prevent undue restrictions of human rights. Constitutional review process is essential to guarantee the conformity of governmental action, including legislation, with the constitution, but also to ensure that constitutions, once adopted, remain relevant to people's daily life.

11. The powers and competences of constitutional courts or other mechanisms of constitutional adjudication, as well as the mode of selection and appointment of its members or judges, depends on many national factors, including *inter alia* the very function and jurisdiction exercised by such a body, but also the legal, constitutional and political culture and traditions of the given country. Therefore, there is no one single model of constitutional adjudication body and procedure, which fits all country contexts and a variety of mechanisms exists.

12. While acknowledging the political nature and specificities of constitutional adjudication, key principles pertaining to the independence and impartiality of the judiciary guaranteed by Article 14 of the *International Covenant on Civil and Political Rights*[8] (hereinafter "the ICCPR") have to be respected. The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are outlined in the *UN Basic Principles on the Independence of the Judiciary*,[9] and have been further elaborated upon in the *Bangalore Principles of Judicial Conduct*.[10] An international understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers.[11] In *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]

13. As a member of the Council of Europe (CoE), Poland is also bound by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),[13] 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*". In accordance

8 International Covenant on Civil and Political Rights, United Nations, General Assembly, resolution 2200A (XXI), adopted on 16 December 1966. The Republic of Poland ratified the ECHR on 18 March 1977.

9 Basic Principles on the Independence of the Judiciary, United Nations, General Assembly, resolution 40/32, adopted on 29 November 1985, and resolution 40/146, adopted on 13 December 1985.

10 The Bangalore Principles of Judicial Conduct were 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 resolution 2006/23 of 27 July 2006. See also Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, prepared by the Judicial Group on Strengthening Judicial Integrity, 2010.

11 See e.g., in particular, Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland, United Nations, Special Rapporteur on the Independence of Judges and Lawyers April 2018.

12 General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial, United Nations, Human Rights Committee, 23 August 2007, para. 19.

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

with the case-law of the European Court of Human Rights (ECtHR), proceedings before a constitutional court can come within the scope of Article 6(1) of the ECHR when the outcome is decisive for the determination of an applicant's civil rights and obligations, even if they deal with question being referred for a preliminary ruling or following a constitutional appeal with respect to the protection of constitutional rights and freedoms, being lodged against judicial decisions, or when it concerns an appeal lodged against a law affecting a person's rights as specified in the national legal system.[14] To determine whether a body, including the constitutional court, can be considered an "*independent tribunal*" according to Article 6(1) of the ECHR, the 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, whether appointees are free from influence or pressure when carrying out their adjudicatory role, even the *appearance of independence* may be of a certain importance.[15] Other useful reference documents of a non-binding nature issued by CoE bodies are also of relevance,[16] in particular the reports and opinions pertaining to constitutional justice of the European Commission for Democracy through Law (Venice Commission),[17] especially those related to the reform of the Constitutional Tribunal of Poland in 2015-2016.[18]

14. 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 (CJEU) 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]

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14 See European Court of Human Rights (ECtHR), *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 188-191, and ECtHR case-law referred therein.

15 See e.g., *Xero Flor w Polsce sp. z o.o. v. Poland*, ECtHR, no. 4907/18, 7 May 2021, paras. 268-269; *Campbell and Fell v. the United Kingdom*, ECtHR, nos. 7819/77, 7878/77, 28 June 1984, para. 78. See also *Olujić v. Croatia*, ECtHR, no. 22330/05, 5 May 2009, para. 38; *Oleksandr Volkov v. Ukraine*, ECtHR, no. 21722/11, 25 May 2013, para. 103; *Morice v. France*, ECtHR, no. 29369/10, 23 April 2015, para. 78; on the relation of the judiciary with other branches of power, see e.g., *Baka v. Hungary*, ECtHR, no. 20261/12, 23 June 2016, para. 165; *Ramos Nunes de Carvalho E SÁ v. Portugal*, ECtHR, nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 144; *Guðmundur Andri Ástráðsson v. Iceland* [GC], ECtHR, no. 26374/18, 1 December 2020, paras. 243-252. See also *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998, para. 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 (…)*".

16 See e.g., 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, paras. 46 and 49, 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*" and that *"[s]ecurity of tenure and irremovability are key elements of the independence of judges"*. See also the opinions of the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, 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.

17 See legal opinions on constitutional justice, Venice Commission, as well as the Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, Venice Commission, CDL-PI(2020)004. See also Report on Judicial Appointments, Venice Commission, CDL-AD(2007)028-e, 22 June 2007; Report on the Independence of the Judicial System – Part I: The Independence of Judges, Venice Commission, CDL-AD(2010)004, 16 March 2010; and Rule of Law Checklist, Venice Commission, CDL-AD(2016)007, 18 March 2016.

18 See Venice Commission, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, CDL-AD(2016)001; and *Opinion on the Act on the Constitutional Tribunal of Poland*, CDL-AD(2016)026.

19 See the consolidated versions of the Treaty on European Union, OJ C 326, 26 October 2012. 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, para. 42.

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

The CJEU also held that "*the 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 judgement of its members and to influence their decisions*".[21] Moreover, pursuant to Article 19(1) sub-paragraph 2, TEU, EU 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*".[22]

15. OSCE participating States have also committed to ensure "*the independence of judges and the impartial operation of the public judicial service*" as one of the elements of justice, "*which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*" (1990 Copenhagen Document).[23] In the 1991 Moscow Document,[24] 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*" (para. 19.1) and to "*ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice*" (para. 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the OSCE Ministerial Council also called upon OSCE participating States "*to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary*", as a key element of strengthening the rule of law in the OSCE area.[25] More detailed guidance is also provided by the *ODIHR Warsaw Recommendations on Judicial Independence and Accountability*[26] and the *ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia*.[27]

2. BACKGROUND AND DOMESTIC LEGAL FRAMEWORK

16. The Constitution of Poland delineates the jurisdiction of the Constitutional Tribunal. The Constitutional Tribunal is the sole institution competent to assess the constitutionality of statutes and international agreements (Article 188.1); the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute (Article 188.2); and the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes (Article 188.3). In addition, an individual whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a

21 See *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [GC], CJEU, C-64/16, 27 February 2018, para. 44.
22 See e.g., CJEU, *European Commission v. Republic of Poland*, C-619/18, 24 June 2019, para. 58.
23 OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 5 June-29 July 1990, paras. 5 and 5.12.
24 OSCE Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 10 September-4 October 1991.
25 OSCE Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area, Helsinki, 4-5 December 2008.
26 Warsaw Recommendations on Judicial Independence and Accountability, ODIHR, 2023.
27 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, ODIHR, 2010.

court or organ of public administration has made a final decision (Articles 79.1 and 188.5). Pursuant to Article 193 of the Constitution, "*any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court*". The Constitutional Tribunal also has the power to determine whether or not there exists an impediment to the exercise of the office by the President of the Republic (Article 131.1) and to control the constitutionality of the purposes and activities of political parties (Article 188.4). Additionally, the Constitutional Tribunal is responsible for adjudicating disputes of competence between central constitutional institutions of the state (Article 189).

17. The Constitutional Tribunal is currently governed by the Act on the Status of Judges of the Constitutional Tribunal and the Act on the Organization and Procedure before the Constitutional Tribunal, both adopted on 30 November 2016, and which repealed the Act of 22 July 2016 on the Constitutional Tribunal, which itself had repealed the Act of 25 June 2015 on the Constitutional Tribunal, as amended.

18. The Bills under review have been developed to address the crisis surrounding the Constitutional Tribunal since 2015. In October 2015, the outgoing seventh-term *Sejm* adopted resolutions on the election of five new judges of the Constitutional Tribunal, three judges whose terms of office were ending on 6 November 2015, and two judges whose terms of office were ending on 2 and 8 December 2015 respectively, after the election of the eighth-term *Sejm*. On 2 December 2015, the eighth-term *Sejm* adopted five resolutions on "the lack of legal effect" of the resolutions of the seventh-term *Sejm* on the election of five new judges of the Constitutional Tribunal and then elected five new judges of the Constitutional Tribunal. While the President did not receive the oath of the judges elected by the seventh-term *Sejm*, the ones elected by the eighth-term *Sejm* took their oath before the President immediately or shortly after their election. On 3 December 2015, the Constitutional Tribunal ruled on the application challenging the constitutionality of several provisions of the Act on the Constitutional Tribunal of 25 June 2015, and confirmed the constitutionality of the elections of three Constitutional Tribunal judges whose term of office had expired on 6 November 2015, and declared unconstitutional the elections of the two other Constitutional Tribunal judges (case no. K 34/15). The Constitutional Tribunal also held that the President's competence to receive the oath had to be interpreted as the obligation to immediately receive the oath from a judge elected to the Constitutional Tribunal by the *Sejm.*

19. In parallel, on 19 November 2015 and 22 December 2015, the eighth-term *Sejm* also adopted several amendments to the existing Act of 25 June 2015 on the Constitutional Tribunal. Some of these amendments were declared unconstitutional, including the new articles providing that taking of the oath by a judge of the Constitutional Tribunal marked the beginning of his or her term of office, clarifying that the term of office of a Constitutional Tribunal judge commenced on the day of his or her election by the *Sejm*, unless the seat to which the judge was elected remained occupied. The entire Amending Act of 22 December 2015 was held unconstitutional by the Constitutional Tribunal, owing to the defective way in which it had been enacted (case no. K 47/15). The Prime Minister refused to publish this judgment of the Constitutional Tribunal. On 22 July 2016, the *Sejm* adopted a new Act on the Constitutional Tribunal, which was supposed to enter into force in August 2016; several of its provisions were declared unconstitutional by the Constitutional Tribunal on 11 August 2016 (case no. K 39/16), although the Prime Minister again refused to publish that judgment. On 30 November 2016, the two above-mentioned Acts on the Organization and Procedure before the Constitutional Tribunal and on the Status of Judges of the Constitutional Tribunal were adopted, and entered into force on 3 January 2017, except for certain provisions that had

entered into force earlier. The Act on the Introductory Provisions to the Act on Organization and Procedure before the Constitutional Tribunal and the Act on the Status of Judges of the Constitutional Tribunal adopted on 13 December 2016 also introduced a new position of the acting President of the Constitutional Tribunal, shortly after which, the President of the Republic proceeded with the appointment, with the new acting President immediately admitting the five judges elected by the eighth-term *Sejm* to the bench.

20. In the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (2021),[28] the ECtHR assessed whether the irregularities in a given judicial appointment to the Constitutional Tribunal of Poland were of such gravity as to entail a violation of the right to a tribunal 'established by law' and of whether the balance between competing principles, including the principles of legal certainty and of irremovability of judges on the one hand, and the individual right to a fair trial by an independent and impartial tribunal established by law, had been struck fairly and proportionately by the relevant State authorities in the particular circumstances.[29] In that case, the ECtHR concluded that "*the fundamental rule applicable to the election of Constitutional Court judges was breached, particularly by the eighth-term Sejm and the President of the Republic*" and that the Constitutional Tribunal failed to constitute a *"tribunal established by law"*.[30]

21. In parallel, the Constitutional Tribunal issued a number of rulings concluding that several provisions of the Treaty on European Union (TEU) were partly unconstitutional, as was Article 6 of the ECHR.[31] On 15 February 2023, the European Commission referred Poland to the CJEU "*for violations of EU law by the Polish Constitutional Tribunal and its case law*".[32]

22. The constitutional crisis following controversial appointments of the Constitutional Tribunal's judges in 2015 and subsequent government actions and legislative reforms undermining its independence have drawn numerous expressions of concern at the European and international levels.[33] It fundamentally unduly impacted the Constitutional Tribunal's standing and its ability to carry out its constitutional mandate.

23. In its latest decision on the execution of the judgment *Xero Flor w Polsce sp. z o.o. v. Poland* adopted at its 1483rd meeting in December 2023, the Committee of Ministers exhorted Poland to, among other things, *"(i) ensure the lawful composition of the Constitutional Court, by allowing the three judges elected in October 2015 to be admitted to the bench and to serve until the end of their nine-year mandate, while also excluding from the bench judges who were irregularly elected; (ii) address the status of decisions already adopted in cases concerning constitutional complaints with the participation of*

28 *Xero Flor w Polsce sp. z o.o. v. Poland*, ECtHR, no. 4907/18, 7 May 2021, paras. 4-57.

29 *Ibid.* paras. 254-275, applying the three-part test of *Guðmundur Andri Ástráðsson v. Iceland* [GC], ECtHR, no. 26374/18, 1 December 2020, paras. 243-252.

30 *Ibid. Xero Flor w Polsce sp. z o.o. v. Poland*, para. 289.

31 See e.g., rulings of 14 July 2021 (denied the binding effect of any interim measures orders of the Court of Justice issued under Article 279 TFEU to guarantee the effective judicial review by an independent and impartial tribunal established by law) and 7 October 2021 (considering unconstitutional - and thus not having effects in the Polish legal order - the Court of Justice's interpretation of Article 19(1) TEU according to which a national court may called upon to review the legality of the procedure for appointing a judge and pronouncing itself on any irregularity in the appointment process to verify whether that judge, or the court in which the judge adjudicates, meets the requirements of Article 19(1) TEU). See also rulings of 24 November 2021 and of 10 March 2022 in cases K 6/21 and K 7/21, whereby the Constitutional Tribunal concludes that Article 6 of the ECHR is unconstitutional to the extent that it applies to the Constitutional Tribunal and empowers the ECtHR to assess the legality of the appointment of Constitutional Tribunal judges and to the extent that, among others, it empowers national courts and the ECtHR to carry out a specific assessment in the context of determining the compliance of other courts with the requirement of a 'court established by law'.

32 See: The European Commission Decides to Refer Poland to the CJEU for Violations of E.U Law by Its Constitutional Tribunal, Press Release. European Commission, 15 February 2023; and *European Commission v Republic of Poland*, case C-448/23, CJEU.

33 See, among other, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, Venice Commission, CDL-AD(2016)001, 11 March 2016, and *Opinion on the Act on the Constitutional Tribunal*, Venice Commission, CDL-AD(2016)026, 14 October 2016; statement and report on Poland, Council of Europe, Human Rights Commissioner, 8 July 2016, and Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland, United Nations, Special Rapporteur on the Independence of Judges and Lawyers April 2018. See also the *Rule of Law Reports*, European Commission.

irregularly appointed judge(s); and (iii) to propose measures that are capable of preventing external undue influence on the appointment of judges in the future".[34]

24. The Explanatory Memorandum accompanying the Bills points out to the above irregularities and specifically notes that the Constitutional Tribunal in its current composition fails to meet the required standards of independence and impartiality, while its jurisprudence reveals its subordination to political interests.[35]

25. The Bill on the Constitutional Tribunal, consisting of 128 articles, is to replace the Act on the Status of Judges of the Constitutional Tribunal and the Act on the Organization and Rules of Proceedings before the Constitutional Tribunal adopted on 30 November 2016, consolidating the relevant provisions in one legislative act. The Introductory Provisions Bill, consisting of 16 articles, contains amendments to other legislation necessitated by the Bill, as well as repealing, transitional, and adapting provisions.

3. JURISDICTION OF THE CONSTITUTIONAL TRIBUNAL

26. Article 2 of the Bill reflects the competences of the Constitutional Tribunal enumerated in Articles 188 and 189 of the Constitution. In addition, Article 3 of the Bill provides that the Constitutional Tribunal "*shall signal to the competent law-making authorities the existence of flaws and gaps in the law, the remedying of which is indispensable for ensuring the integrity of the legal system of the Republic of Poland*". The same article further provides that the President of the Constitutional Tribunal "*may request that the signalee inform the Tribunal of his/her position on the matter signaled.*"

27. It is not clear whether this additional responsibility of the Constitutional Tribunal is understood as being carried out during the process of adjudication or as a separate procedure or on an *ad hoc* basis, as part of activities envisioned in Article 12 of the Bill. If not exercised during adjudication, this new responsibility to signal flaws and gaps in legislation raises several concerns.

28. First, this new task could prejudice the position of the Constitutional Tribunal as a constitutional arbiter by commenting on legal issues that may later become subject of its review as part of constitutional adjudication. In particular, this could cast doubt on the judicial impartiality of the Constitutional Tribunal if judges involved in the implementation of such task are subsequently called upon to determine a constitutional dispute over the interpretation of the legislation or norms at issue.[36] The Bill does not seem to specify the procedure which should be followed to signal "flaws and gaps", creating a risk of politicization of the Constitutional Tribunal, should normative acts be assessed outside an adjudication and without a formal request from a competent state institution. If the intention is to allow the Constitutional Tribunal to signal certain (potential) constitutional problems, while adjudicating on a constitutional complaint and reviewing legal issues unrelated to the "signaled" constitutional problem, this competence should be made clearer. Second, the formulation of this competence as a duty could imply that the Tribunal should proactively monitor and analyse all normative acts enacted by state institutions to identify such flaws and gaps. This task could become burdensome for the Tribunal and hinder its ability to effectively and promptly fulfil its core constitutional responsibilities. Ultimately, this could affect the right to a fair trial within a reasonable time enshrined in Article 6 of the ECHR and Article 14 of the ICCPR. Article 3 may also appear to contradict Article 46.2 of the Bill, which provides that the Constitutional Tribunal is bound to operate within the scope of the challenge indicated

34 See the decision on the execution of the judgment *Xero Flor w Polsce sp. z o.o. v. Poland* adopted by the CoE Committee of Ministers at its 1483rd meeting in December 2023; see <https://hudoc.exec.coe.int/eng?i=004-58569>.
35 Explanatory Memorandum to the Bill No. 254, pp. 7-8.
36 See e.g., for the purpose of comparison, ECtHR, *McGonnell v. the United Kingdom*, no. 28488/95, 8 February 2000, para. 55.

in an application, a question of law or a constitutional complaint, unless as mentioned above, the aim of Article 3 is to entitle the Constitutional Tribunal while adjudicating to signal to the legislator the identified flaws and gaps that falls outside the scope of the challenge or complaint. If this is the objective, this should be clarified.

29. If the aim of this new responsibility is to identify legal issues resulting from legal norms enacted during the constitutional crisis (see paragraphs 19-23 above), such potential legal issues could be adjudicated as part of *ex post* constitutional review.

30. This type of responsibility is rare in comparative practice. In the OSCE region, only a very few participating States grant a somewhat similar monitoring role to their constitutional review institution. In Croatia and Montenegro, the Constitutional Court is tasked with monitoring the enforcement of constitutionality and legality and must notify the legislature of any instances of unconstitutionality and illegality it identifies.[37] In its Opinion on the 2008 draft law on the Constitutional Court of Montenegro, the Venice Commission recommended that the Constitutional Court should not have a general task of monitoring constitutionality and legality, arguing that this responsibility draws the Constitutional Court into the political arena.[38] In many countries, the responsibility to identify and signal flaws in the legal order falls under the mandate of the attorney general office or a similar institution. These institutions provide legal advice to the government and government agencies, and typically do not have adjudicative functions.

31. Furthermore, the Constitution of Poland does not foresee the possibility of granting additional competences to the Constitutional Tribunal by statute. It simply provides that the Tribunal's organization and mode of proceedings shall be specified by statute (Article 197 of the Constitution). This constitutional arrangement is an important safeguard for the principle of separation of powers, as it reduces the risk of an incumbent parliamentary majority unilaterally altering the system of checks and balances between the different branches of government. Therefore, the ordinary legislator does not appear to have the authority to assign additional responsibilities to the Constitutional Tribunal.

32. **In light of the foregoing, it is therefore recommended to revise Article 3 of the Bill clarifying that the authority to signal "the flaws and gaps in the law" is provided only in the context of constitutional adjudication, or remove such function altogether. Alternatively, the legal drafters could consider authorizing the Constitutional Tribunal to oversee the implementation of its own judgments and notifying relevant bodies of any implementation issues.**

RECOMMENDATION A.

To reconsider completely the responsibility of the Constitutional Tribunal to signal flaws and gaps in legislation or revise Article 3 of the Bill clarifying that such responsibility is only provided in the context of ongoing constitutional adjudication.

4. Reporting Duty of the President of the Constitutional Tribunal to the Legislature

33. Article 4.1 of the Bill introduces a duty on the President of the Constitutional Tribunal to annually submit information to the *Sejm* and the Senate "*on substantial issues arising from the activities and jurisprudence of the Tribunal, as well as problems related to the*

37 See Constitution of the Republic of Croatia, Article 125; Constitutional Act on the Constitutional Tribunal of the Republic of Croatia, Article 104; Constitution of Montenegro, Article 149; and Law on the Constitutional Court of Montenegro, Article 112.
38 See Opinion on the Draft Law on the Constitutional Court of Montenegro, Venice Commission, 24 October 2008, para. 80.

enforcement of the Tribunal's judicial decisions". This information cannot be subject to a vote by the legislative chambers. The President of the Tribunal must also provide this information to the President of the Republic, the Council of Ministers, the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, the National Council of the Judiciary, the Prosecutor-General and several independent regulatory and oversight institutions.

34. Establishing procedures for the exchange of information and dialogue between the constitutional review body – or the judiciary more generally – and the legislature is commendable, provided these procedures do not compromise the independence of the constitutional review body or allow it to exceed its judicial mandate.[39] Dialogue between the constitutional review body and other branches of government can be valuable for the effective functioning of the constitutional review body and the rule of law. While a constitutional review body should adjudicate independently and without interference from other branches of government or private vested interests, it necessarily interacts with other branches of government. The legislative branch provides financial resources to the constitutional review body, and the executive branch is ultimately responsible for ensuring the enforcement of judicial decisions. Dialogue between these bodies can enable the constitutional review institution to highlight impediments to its effectiveness, independence and respect for its decisions, as well as share its views on the preparation of legislation concerning its status and functioning.

35. While the proposed information procedure is commendable, it should be carefully designed to ensure it does not compromise the independence of the Constitutional Tribunal or allow it to exceed its mandate. In that regard, the prohibition in Article 4.2 of the Bill on the legislative chambers from voting on the information provided by the President of the Tribunal is a positive safeguard. However, the type of information to be submitted annually by the President of the Tribunal is unclear and overly broad. Specifically, the formulation "*information (…) on substantial issues arising from the activities and jurisprudence of the Tribunal*" should not be misused by the legislature to require justifications or explanations on the reasoning of the Tribunal in its decisions nor to scrutinize potential disagreements among its judges. Such practices would subordinate the Tribunal to the legislature and undermine its independence. Conversely, the President of the Tribunal should not misuse this information obligation to supplement the Tribunal's judicial decisions or to give its opinion on legal issues that go beyond the exercise of its constitutional mandate or on matters not referred by a competent authority.

36. In addition, since constitutional review institutions provide a public service using financial resources coming from taxpayers, they should account to the general public for how these financial resources are utilized in fulfilling their constitutional mandate. It is a common practice for such institutions to issue annual public reports that provide an overview of their activities, summaries of key decisions, and information about the court's operations and expenditures. These reports contribute to enhancing public understanding of the role of constitutional review institutions and confidence in them. These reports also serve as a transparency and accountability mechanism, allowing the public to see how their tax money is being spent. **Therefore, in light of the foregoing, it is recommended to narrow the information to be submitted annually by the President of the Tribunal to the *Sejm* and the Senate to statistics on the Tribunal's decisions and activities, its budget and spending, impediments to its independence**

39 See e.g., Opinion No. 18(2015), "The Position of the judiciary and its relation with the other powers of state in a modern democracy", Consultative Council of European Judges (CCJE), 16 October 2015, para. 11, where the CCJE explained that the principles of separation of powers and judicial independence do not preclude dialogue among the three branches of government, and asserted that "*there is a fundamental need for respectful discourse among them all that considers both the necessary separation and the necessary interdependence between the powers."*

and functioning, and other issues related to the enforcement of its judicial decisions. Alternatively, introduction of annual reports by the Constitutional Tribunal may be considered, informing relevant authorities as well as the public at large about the work of the Tribunal, as well as important aspects of the constitutional review.

5. Composition and Selection of Judges of the Constitutional Tribunal

37. Generally, in comparison with judicial appointments in ordinary courts, the executive and legislature may have a more active role to play in the process of composing constitutional courts due to the specific nature and role of constitutional adjudication. At the same time, to the extent the Constitutional Tribunal deals with the constitutional rights of an individual and the outcome of the proceedings before the Constitutional Tribunal is decisive for the determination of an individual's civil rights and obligations, it falls within the ambit of Article 6 of the ECHR and Article 14 of the ICCPR, and both the institution and its judges should be independent. In addition, with respect to the execution of the judgment *Xero Flor w Polsce sp. z o.o. v. Poland*, the Committee of Ministers called upon Poland to, among other things "*propose measures that are capable of preventing external undue influence on the appointment of judges in the future*".[40]

38. In order to establish whether the Constitutional Tribunal and its judges are considered independent, various elements need to be considered. These include the manner in which the judges are appointed and their terms of office, the existence of guarantees against outside pressure and whether the body in question appears to be independent (see paras. 11 to 14 above). There exists a variety of selection and appointment mechanisms of constitutional court judges across the OSCE region,[41] and there is no one single model which fits all country contexts.

5.1. Eligibility Requirements

39. Article 194.1 of the Constitution provides that judges of the Constitutional Tribunal must be selected "*from among persons distinguished by their knowledge of law*". Article 17.1 of the Bill lists additional eligibility requirements for becoming a Constitutional Tribunal judge. These include being a person between 40 and 70 years old who excels in legal knowledge and possesses the qualifications required to hold the office of a judge of the Supreme Court or the Supreme Administrative Court.[42]

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40 See < https://hudoc.exec.coe.int/eng?i=004-58569>.

41 Overall, there are three main systems of selection and appointment of constitutional court judges across the OSCE region: a) based on appointment, b) based on election, c) mixed systems, which combine election and appointment. Appointment-based systems do not involve any voting by representative bodies (e.g., common law systems typically involving a rubber stamp appointment mechanism of judges by the Head of State or pursuant to a binding executive nomination (Canada, Ireland, Malta); Nordic supreme courts). In most of the countries using election-based systems, the electing authority is the sole chamber of Parliament (e.g., Estonia, Hungary, Latvia, Liechtenstein, Lithuania, Slovenia, North Macedonia), the lower house of Parliament (e.g., Croatia, Poland), or both houses of the legislature (e.g., Germany), or a joint session of the two chambers (e.g., Switzerland); in such systems, there is a variety of authorities which have the opportunity to propose candidates for election, e.g., the President (Slovenia), the upper house of the legislature (Croatia), a mixture of Parliament, the executive and either the supreme court (Latvia, Lithuania) or the judicial council (North Macedonia). In mixed systems, the decision is made jointly by the executive, legislative and sometimes judicial bodies (e.g., in several countries, among them in Bulgaria, Georgia, Italy and Ukraine, the power of appointment is split three ways between the President of the country, the Parliament and a judicial authority; in Italy, the elective component requires a two-thirds majority of a joint meeting of the two houses of Parliament, thus invariably including the opposition into the appointment procedure; in Spain, the elective component is predominant in the procedure, because besides the two-two candidates appointed by the federal government and the judiciary, the two houses of the legislature, the Congress and the Senate elect four judges each, even though all the candidates are nominally appointed by the King, who has however no discretion to reject the candidates; in Portugal, which represents a unique variation of the mixed system, it involves the participation of the legislature and the Constitutional Court itself).

42 Article 30 of the Act on the Supreme Court of Poland provides the following eligibility requirements to hold the office of a judge of the Supreme Court: "*1) have only Polish nationality and enjoy full civil and public rights; 2) have not been convicted or conditionally discharged of an intentional crime prosecuted by public indictment or an intentional fiscal crime; 3) have reached the age of 40; 4) are of good character; have completed higher education in law in the Republic of Poland and obtained a Master's degree or foreign*

40. With a single nine-year mandate (Article 194.1 of the Constitution) and no mandatory retirement age set by the Bill, the maximum age for a judge of the Constitutional Tribunal could be 79 years. The minimum age requirement of 40 years is reasonable from the viewpoint of life experience and maturity, and is common in comparative practice.[43] However, the contemplated maximum age seems relatively high. Typically, 70 years is considered the upper age limit for members of Constitutional Courts.[44] When assessing the norms regulating the age limit of Constitutional judges or members, the Venice Commission recommended either to set 60 years as the maximum age for becoming a judge or to establish a mandatory retirement age of 70 years, with the latter being considered preferable. At the same time, setting the maximum age for judges through legislation (by defining a maximum age for candidates and/or a mandatory retirement age) raises concerns, as it could be modified by a simple legislative majority to remove sitting judges and capture the Constitutional Tribunal.[45] **To reduce this risk, it is recommended, in the long run, to consider setting the age requirements for candidates to the office of judge of the Constitutional Tribunal and the mandatory retirement age in the Constitution. In any case, any change in this respect should apply only to future judges of the Constitutional Tribunal, not to those serving their term at the time of adoption of such constitutional amendment.**

41. Although similar types of provisions can be found in other OSCE participating States, the requirements to "*excel in legal knowledge*" (Article 17.1 of the Bill) and "*be of good character*" (Article 30.1.4 of the Act on the Supreme Court) may imply some form of subjective assessment and potentially lead to varied understanding and interpretation. In its Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, the Venice Commission noted that such criteria "*not further explained by the draft Law might be difficult to ascertain with precision in practice, but is adequate*", noting that similar types of provisions also exist in other countries.[46] **It is recommended to provide for the development of guidelines or clarifications on these types of eligibility requirements to secure predictability, transparency and legal certainty of the selection process for judges.** Regarding the notion of "good character", legal drafters could refer to the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights which explained that "*qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of conviction for crimes (…), as well as (obviously) independence and impartiality*" have been mentioned as key components of the requirement of "high moral character".[47]

42. As per Article 17.1 of the Bill and Article 30 of the Act on the Supreme Court of Poland, candidates for the office of judge of the Constitutional Tribunal must "*have completed higher education in law in the Republic of Poland and obtained a Master's degree or*

qualification in law recognised in the Republic of Poland; 6) are distinguished by a high level of legal knowledge; 7) are fit, as regards their state of health, to perform a judge's duties; 8) have at least ten years' professional experience as a judge or prosecutor, as President, deputy president or counsel of the Prosecutor-General's Office of the Republic of Poland or have practised for at least ten years as an advocate, legal adviser or notary public; 9) have not served in, worked for or cooperated with the state security bodies referred to in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation".

43 See e.g. Constitution of Armenia, art. 165.1; Constitution of the Czech Republic, arts. 19.2 and 84.3; Act on the Federal Constitutional Court of Germany, Part 1, Section 3.1; Constitution of Mongolia, art. 65.2; Constitution of Slovakia, art. 134.3; Constitution of Ukraine, art. 14.

44 Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice, Venice Commission, CDL-PI(2022)050, October 2022, pp. 14-15.

45 See Act of 12 July 2017 amending the National Council of the Judiciary Act and certain other acts, Republic of Poland; Act of 10 May 2018 amending the Law on Organization of Common Courts, the Act on the Supreme Court and certain other Acts, Republic of Poland; see also *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017)*, ODIHR, 13 November 2017, paras. 109-112.

46 See Opinion on the draft Constitutional Law on the Constitutional Court of Armenia, Venice Commission, 19 June 2017, para. 13

47 A Short Guide on the Panel's Role and the Minimum Qualifications Required of a Candidate, Council of Europe, The Advisory Panel of Experts on Candidates for Election as Judge of the European Court of Human Rights, 2020, p. 7.

foreign qualification in law recognised in the Republic of Poland" and *"have at least ten years' professional experience as a judge or prosecutor, as President, deputy president or counsel of the Prosecutor-General's Office of the Republic of Poland or have practised for at least ten years as an advocate, legal adviser or notary public".* Most OSCE participating States with a specialized constitutional review body similarly require that members of the constitutional court have legal qualifications and experience. Some constitutional courts expressly allow for non-lawyers to become members of the court to bring diverse expertise and human experiences, but in practice these courts are predominantly composed of lawyers.[48] Although the length and type of legal experience required vary from country to country, several countries that allow both ordinary judges and individuals from the legal profession to be candidate require more years of experience in the legal profession than in the judiciary for candidates. It is also relatively common for law professors to be eligible to the office of judge of the constitutional review body, and this could be added to the list of eligible legal experience.

43. Article 17 of the Bill also introduces several circumstances which render ineligible an otherwise qualified individual from being a candidate for the office of constitutional judge. In particular, members of the *Sejm*, Senate, European Parliament and the Council of Ministers are disqualified from appointment to the Constitutional Tribunal for four years following the expiration of their political mandate (Article 17.2 of the Bill). Further, members of political parties are disqualified for four years following the termination of their party membership (Article 17.3 of the Bill).

44. The four-year disqualification period for former members of the government and parliament envisioned in Article 17.2 of the Bill aims to enhance the political neutrality of constitutional judges. While this disqualification aligns with the principles of judicial independence and impartiality,[49] the appropriate length of such a period is debatable. A four-year disqualification may appear unusually long, though it can also reduce the risk of perception of bias and lack of impartiality, and potential conflict of interest where a judge might have been involved in the development of a contested legal act in his/her previous capacity as member of the government or parliament, necessitating his/her recusal from the case. Such conflict of interest could also be remedied by recusals. However, as currently drafted, Article 17.2 does not exclude candidates who are active members of government or parliament at the time of nomination. **It is therefore recommended to also explicitly prohibit individuals who are active members of government or parliament from being candidates for the office of constitutional judge.**

45. On the other hand, disqualification of former members of political parties for four years following the termination of party membership appears excessive and unduly infringes on the right to participate in public affairs. It may also be considered to place a disproportionate restriction on the right to freedom of association guaranteed in Article 58.1 of the Constitution as well as Article 11 of the ECHR and Article 22 of the ICCPR. Faced with similar restrictions in draft legislation of Ukraine, the Venice Commission commented that "*two important principles – the protection of judicial impartiality as a judge and the value of political commitment in a democracy – must be reconciled*".[50] The Venice Commission recommended reconsidering these restrictions, expressing the view that "*political activities of citizens belong to the core of a pluralistic democracy and,*

48 See The Composition of Constitutional Courts, Venice Commission, CDL-STD(1997)020-e, 1997, p. 8.

49 See 2019 Report of the UN Special Rapporteur on the independence of judges and lawyers, United Nations, Special Rapporteur on the Independence of Judges and Lawyers, 29 April 2019, para. 110; Opinion no. 3 (2002) on Ethics and Liability of Judges, CCJE, paras. 27-36; Joint Guidelines on Political Party Regulation, ODIHR and Venice Commission, 2nd ed., 2020, para. 147.

50 See *Opinion on the Draft Law on the Constitutional Court of Ukraine*, Venice Commission, CDL-AD(2016)034, paras. 30-32. The restrictions included a two-year disqualification period for members of political parties, candidates and elected officials to government or lower government offices, and those who participated in managing or financing political campaigns or other political activities.

thus, should be promoted. This includes political activities within political parties, even for persons who may be qualified to become a constitutional judge in the future".[51] At the same time, recent leadership in a political party could potentially impact confidence in the impartiality and independence of judges of a constitutional review body, which may justify certain limitations in this respect.[52] **It is thus recommended to reconsider this ground of ineligibility based on recent political party membership, or limit the ineligibility to individuals who have recently held leadership functions within a political party.**

RECOMMENDATION B.

1. To include an explicit prohibition in Article 17.2 on individuals who are active members of government or parliament from being candidates for the office of judges of the Constitutional Tribunal.
2. To reconsider the ineligibility requirement based on recent (during the last four years) political party membership, or at a minimum, limit the ineligibility to individuals who holds or have recently held leadership positions in a political party.

5.2. Selection Procedure

46. The Constitution simply provides that the Constitutional Tribunal consists of 15 judges chosen individually by the *Sejm* (Article 194.1). The Bill regulates the selection procedure by establishing eight consecutive steps (Articles 16, 18, 19 and 20). First, the Marshall of the *Sejm* must announce the initiation of the procedure for the election of a Tribunal judge between six and five months before the expiration of the term of a current judge (Article 18.2), or immediately if the mandate of a judge is terminated before the end of his/her term (Article 18.3). Second, competent authorities can each nominate a candidate and submit the nomination to the Marshal of the *Sejm* no later than three months before the expiration of the term of a judge of the Tribunal (Articles 18.1 and 18.2). If the mandate of a judge is terminated before the end of his/her term, nominations must be submitted within 30 days from the initiation of the election procedure (Article 18.3). Third, the Marshal of the *Sejm* must then verify that the nominations have been submitted by an authorized entity and that the candidates meet the eligibility requirements (Article 18.5). Fourth, after verification, the Marshall of the *Sejm* must present the eligible candidates to the members of the *Sejm*, the National Council of the Judiciary (hereinafter NCJ) and the public (Article 19.1). Fifth, the NCJ conducts hearings of the candidates and presents its opinion on the candidate to the Marshal of the *Sejm*, who then shares it with the members of the *Sejm* (Article 19.2). The sixth step consists of a public hearing of candidates with the participation of the *Sejm* and social organizations (Article 19.3). Seventh, the *Sejm* must elect a candidate to the office of judge of the Tribunal by a three-fifths majority vote, with at least half of its members present (Article 16.1). Finally, the judge of the Tribunal elected by the *Sejm* must take an oath in the presence of the President of the Republic (Article 20).

5.2.1. Authorities Competent to Nominate a Candidate

47. The Bill significantly expands the range of entities competent to nominate a candidate for the office of judge of the Constitutional Tribunal. According to the existing modalities

51 *Ibid*, para. 31. See also *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, ECtHR, no. 35972/97, 2 August 2001.
52 See e.g., *Joint Guidelines on Political Party Regulation*, ODIHR and Venice Commission, 2nd ed., 2020, paras. 147-148.

for nominating candidates,[53] only the Presidium of the *Sejm* or a group of at least 50 deputies of the *Sejm* may propose a candidate. By contrast, the Bill grants the right to propose a candidate to the President of the Republic, the Presidium of the *Sejm*, a group of at least 50 members of the *Sejm*, a group of at least 30 members of the Senate, the General Assembly of the Judges of the Supreme Court, the General Assembly of the Judges of the Supreme Administrative Court, the National Council of Attorneys-at-law, the Supreme Bar Council and the National Council of Prosecutors (Article 18.1).

48. Given that the *Sejm* exclusively selects all judges of the Constitutional Tribunal (Article 194.1 of the Constitution), allowing other branches of government and organizations of the legal profession to nominate a candidate can be valuable. This approach introduces features of a co-operative selection mechanism while abiding with the parameters set in the Constitution. This expansion is likely to widen the pool of candidates, and can contribute to enhancing the representativeness, pluralism and diversity of the composition of the Constitutional Tribunal. By including other branches of government and the legal profession in the nomination process, this expansion could also foster more buy-in and acceptance of the Tribunal's decisions by other branches of government. Additionally, allowing nominations by judicial actors and legal professionals could provide alternative candidates and may help different parties in the *Sejm* to compromise and reach the necessary three-fifths majority rather than adopting maximalist position on their own candidate. This expansion is, therefore, welcome.

5.2.2. Verification of the Candidacies by the Marshall of the Sejm

49. Under Article 18.5 of the Bill, the Marshal of the *Sejm* verifies that the nominations have been submitted by authorized entities and that the candidates meet the eligibility requirements. The amended version of the Bill adopted by the *Sejm* on 24 July 2024 contains a new Article 18.6 which provides a duty on the Marshal of the Sejm to reject nominations of candidates made by an unauthorized entity, lodged after the deadline, which do not contain the necessary documents or who do not meet the eligibility requirement. While this amendment is commendable, **it is recommended to supplement the Bill to require that the Marshal of the *Sejm* provides a reasoned and publicly accessible explanation for any decision to reject a candidacy,** in order to further improve the transparency and fairness of the selection procedure.

5.2.3. Hearings of Candidates by the NCJ

50. Article 19.2 of the Bill, and Article 6 of the amended version of the Introductory Provisions Bill, provides that the National Council of the Judiciary must conduct hearings of the eligible candidates and present an opinion on the candidates to the Marshal of the *Sejm*, who shall present it to members of the *Sejm*. A reference is made to Article 186.1 of the Constitution, which mandates the NCJ to safeguard the independence of courts and judges.

51. Subject to the reform of the NCJ to address the existing structural dysfunctions of this body,[54] the NCJ's opinion could contribute to a more informed discussion in the *Sejm* about the candidates before the vote is held. While hearings to be conducted by members of the *Sejm* may be politicized, the NCJ should in principle be independent and impartial, and may be better capable to assess the candidates' legal knowledge and reasoning capabilities. Although this proposed mandatory step introduces elements of a co-

53 Currently, Presidium of the *Sejm* or at least 50 Deputies (see Article 2 of the Act of 30 November 2016 on the Status of Judges of the Constitutional Tribunal referring to the Rules of Procedure of the Sejm and Article 30 of the Rules of Procedure). According to Article 6.4 of the Act on the Constitutional Tribunal of 22 July 2016 (repealed), only the Presidium of the Sejm or a group of at least 50 deputies of the Sejm could propose a candidate.

54 See *ODIHR Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland* (8 April 2024).

operative selection mechanism, the NCJ's opinion is not binding, and thus does not risk causing a blockage and does not restrict the decision-making authority of the *Sejm*.

5.2.4. Election by a Qualified Majority Vote of the Sejm

52. The Constitution provides that the Constitutional Tribunal consists of 15 judges chosen individually by the *Sejm* (Article 194.1), implicitly deferring the details of the selection procedure to be determined by legislation. Under the existing election modalities, the judges of the Constitutional Tribunal are elected by an absolute majority of votes.[55] The Bill proposes increasing this majority threshold to a three-fifths majority vote in the presence of at least half of the total number of the *Sejm* deputies (Article 16.1).

53. As currently provided, the election of judges to the Constitutional Tribunal by an absolute majority vote raises concerns. Given that all 15 judges of the Tribunal are elected by the *Sejm* and neither the Constitution nor the legislation requires for their term of office to be staggered, this means that the incumbent majority party can unilaterally appoint the judges of the Tribunal whose mandates expire during the Sejm' term and thereby fundamentally influence the composition of the Tribunal. This arrangement undermines the independence and impartiality of the Constitutional Tribunal and is at odds with international good practices. When the legislature elects a great majority or all of the members of the constitutional review body, it is crucial to require a qualified majority vote to ensure that judges have the support of a broad political spectrum, and not of the parliamentary majority only. A supermajority vote seeks to ensure that a broad agreement is found in the legislature among different political forces and tends to depoliticize the process of judges' election. By requiring the majority to seek compromise with the legislative minority, it encourages moderation in the selection process and promotes the nomination of candidates who can garner support from multiple political parties. **Therefore, the proposed increase to a three-fifths majority is a welcome improvement, and is in line with good comparative practices in the OSCE region where the election of constitutional judges by parliament often requires a qualified majority.**[56]

54. While a supermajority requirement is commendable, it can be difficult to reach and may occasionally lead to deadlock, particularly in the absence of a culture of democratic compromise among political forces. Such a stalemate can affect the balanced composition of the constitutional review body. It can also result in the inability for the Constitutional Tribunal to sit and issue decisions due to lack of quorum. To avoid these situations, several countries in the OSCE region have devised default solutions and/or anti-deadlock mechanisms. The Bill foresees one default solution. It provides that a judge of the Tribunal whose term of office has ended shall continue to serve until a successor is elected (Article 16.2). This arrangement, also found in comparative practice,[57] is

55 Article 2 (2) of the Act of 30 November 2016 on the Status of Judges of the Constitutional Tribunal provides that the "*rules of election and the related deadlines for proceedings are laid down in the Sejm's Rules of Procedure*". Article 31 of the Rules of Procedure of the Sejm provides for an election by an absolute majority of votes, without specifying the attendance quorum, whereas certain other provisions of the Rules of Procedure mention the requirement of attendance by at least half of the Sejm deputies present. The Act of 25 June 2015 on the Constitutional Tribunal of Poland repealed by the Constitutional Tribunal Act of 22 July 2016 (itself repealed by the Act of 30 November 2016 on the Status of Judges of the Constitutional Tribunal), both provided for the election of Constitutional Tribunal judges by an absolute majority of votes with at least half of the Sejm deputies present.

56 In its *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, Venice Commission, CDL-AD(2016)001, the Venice Commission recommended that "*the Constitution be amended in the long run to introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism*" also proposing as an alternative, "*a system by which a third of the judges of the Constitutional Tribunal are each appointed / elected by three State powers – the President of Poland, Parliament and the Judiciary*" (paras. 140-141). See also e.g., *Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic*, Venice Commission, CDL-AD (2017)001, paras. 57-58, where it is noted that "*an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process*" although this "*can lead to a stalemate between majority and opposition but this can be overcome through specific anti-deadlock mechanisms*".

57 See *Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms In Relation to the Election by Parliament of Constitutional Court Judges, Prosecutors General, Members of Supreme Judicial and Prosecutorial Councils and the Ombudsman*, Venice Commission, 27 June 2018, pp. 4-8;

commendable as it prevents vacancies in case the *Sejm* fails to elect a new judge by the required three-fifth majority. However, it may not create sufficient incentive for the parties in the *Sejm* to reach a compromise, and thus does not constitute a deadlock-breaking mechanism as such. The amended version of the Bill adopted by the *Sejm* on 24 July 2024 introduces a new provision which foresees that if the Sejm fails to elect a new judge by the required three-fifth majority, the Marshal of the *Sejm* shall re-initiate the selection process following the same procedure (Article 19.5 of the Bill adopted with amendments by the *Sejm* on 24 July 2024). This amendment does not constitute an effective deadlock-breaking mechanism as it simply foresees to reconduct the exact same procedure**.** One deadlock breaking mechanism used in some countries involves lowering the required majority after several unsuccessful votes.[58] However, providing for different, decreasing majorities in subsequent rounds of voting has the drawback that it may not be an effective incentive for the majority to reach a compromise in the first round of vote knowing that in subsequent rounds, the voting threshold will simply decrease; in principle, an anti-deadlock mechanism should be unattractive both to the majority and the minority to encourage compromise on both sides.[59] It is therefore crucial that the lowered threshold still requires a qualified majority vote and a minimum quorum to ensure that elected judges have the support of a broad political spectrum. If such a mechanism were to be considered for the election of judges of the Constitutional Tribunal in Poland, it would require setting a two-third majority vote requirement as the rule, with a three-fifth majority vote serving as the deadlock-breaking mechanism.

55. Another potential deadlock-breaking mechanism could consist in the nomination of new candidates by a neutral body, such as the NCJ – providing it constitutes an independent and impartial body – or the Commissioner for Human Rights or the plenary of the Constitutional Tribunal itself,[60] after several unsuccessful votes. This would oblige the political forces in the *Sejm* to negotiate and vote on candidates proposed by a third party. This mechanism could also be combined with lowering the required majority. These deadlock-breaking mechanisms, however, do not necessarily eliminate the incentives to block the election. Each party will understand the implications of a deadlock for the composition of the Tribunal, and will assess whether blocking or co-operating is more likely to advance its political goals regarding that composition. As further elaborated below in para. 60, though this would require an amendment to the Constitution, which does not appear feasible in the near future, to reduce the risk of blocking the work of the Constitutional Tribunal, it is generally recommended to have different branches of power nominating candidates. **In light of the foregoing, it is thus recommended to supplement the Bill with a tailor-made, effective deadlock breaking mechanism, which does not jeopardize the independence and impartiality of the Constitutional Tribunal.**

56. Leaving the majority threshold requirement for the election of judges to the Constitutional Tribunal and anti-deadlock mechanisms to be fleshed out in primary legislation or even, as is currently the case, in the Rules of Procedure of the *Sejm*, which are not subject to adoption in accordance to the ordinary legislative process, is problematic. The Rules of Procedure of the *Sejm* may be amended by resolution of the

58 *Ibid.* In Italy, for example, for those judges of the constitutional court who are to be elected by parliament, the two-thirds majority requirement is reduced to three fifths after three unsuccessful ballots; see Legge Costituzionale 22 Novembre 1967, Republic of Italy, Article 3.

59 See e.g., *Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, Venice Commission, CDL-AD(2013)028, paras. 5-8.

60 For instance, the Act on the Federal Constitutional Court of Germany establishes a similar type of deadlock-breaking mechanism: if the Bundestag (the first chamber of the federal legislature) or the Bundesrat (the second chamber of the federal legislature) fails to elect a constitutional court judge by a two-thirds majority vote within two months of a constitutional judge's term expiry or premature departure, the plenary of the federal Constitutional Court itself shall propose candidates; see Act on the Federal Constitutional Court, Federal Republic of Germany, Part 1 § 7a.

Sejm proposed by motion of the Presidium of the Sejm, the Committee on the Rules, Deputies' Affairs and Immunities or at least 15 deputies, which is adopted in three readings unless decided otherwise; although published in the Official Gazette, they do not require a vote of the Senate nor the promulgation by the President and are not considered normative acts subject to the jurisdiction of the Constitutional Tribunal.[61] This arrangement enables the parliamentary majority to easily and unilaterally modify the modalities of election and majority requirement for the election of constitutional judges by the *Sejm*, without some of the safeguards and scrutiny provided when adopting a law. Even if such modalities are provided in primary legislation, one party having the absolute majority in the *Sejm* could still unilaterally decide to modify them and the majority requirements. This makes the Tribunal vulnerable to capture by an incumbent governing majority and poses a significant threat to its independence and impartiality. Given the Constitutional Tribunal's critical role in the system of checks and balances between the different branches of government, it is important to regulate, among others, the majority requirement for the election of constitutional judges in the Constitution to reduce the risk of change by an incumbent governing majority alone. **Therefore, it is recommended, in the long run, to introduce into the Constitution a qualified majority for the election of the Constitutional Tribunal judges by the *Sejm*, combined with effective anti-deadlock mechanisms and staggered terms of office**.

57. If a constitutional amendment procedure is initiated, other selection procedure for Constitutional Tribunal judges could also be considered to reduce the risk of politicization inherent in the involvement of the parliament. One alternative could be to introduce a system where authorities from the three branches of government – the President of the Republic, the Parliament and the National Council of the Judiciary – each select one third of the judges of the Constitutional Tribunal,[62] with staggered terms of office. In such a system, it would still be important that the judges chosen by the parliament be elected by a qualified majority vote, as recommended above. Generally, this model ensures a balanced composition and prevents any single branch or majority party from dominating the selection process. While such selection method may potentially lead to or create perception of internally fragmented Tribunal, with judges being seen as sympathetic to the institution that selected them, this risk maybe mitigated by establishing transparent, inclusive and competitive selection process of candidates.

58. Another option could be to introduce a co-operative selection procedure involving different authorities from the three branches of government at different stages. For example, the National Council of the Judiciary could nominate candidates to the President of the Republic who would then appoint them, subject to the approval of the legislature. Such approach aims to balance the composition of the constitutional review body by identifying consensus candidates who have the support of all three branches of government. A third approach could be to maintain a selection procedure by the legislature, but to assign both the *Sejm* and the Senate the responsibility to each appoint a specified number of the judges of the Constitutional Tribunal through a qualified majority vote for staggered terms. Another alternative could be to introduce a system where constitutional judges are selected by an independent selection commission. To further decouple the composition of the Constitutional Tribunal from electoral cycles and reduce the risks of capture by the political majority of the day, it is also advisable to provide for staggered terms of office for constitutional judges. This arrangement, such as replacing one-third of the judges every three years, allows for a gradual turnover and prevents wholesale political shifts in the Constitutional Tribunal.

61 See inadmissibility decision in case no. U 8/15 of 7 January 2016 (announced on 11 January 2016), Constitutional Tribunal of Poland.
62 This option was recommended by the Venice Commission in its Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, para. 141.

RECOMMENDATION C.

Regarding the election of judges of the Constitutional Tribunal by a qualified majority vote of the *Sejm*:

To consider supplementing the Bill with a tailor-made, additional deadlock breaking mechanism, which does not jeopardize the independence and impartiality of the Constitutional Tribunal, while providing for a staggered terms of office of the judges of the Constitutional Tribunal.

5.2.5. Taking of the Oath

59. The Constitution does not require judges of the Constitutional Tribunal to take an oath, contrary to some other high-level office-holders whose oath is explicitly provided in the Constitution. The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal stipulates that the term of office for a newly elected constitutional judge begins upon taking an oath before the President of the Republic (Articles 4 and 5).[63] It is noted however that in its judgment K 34/15 of 3 December 2015, the Constitutional Tribunal had clarified that in accordance with Article 194 (1) of the Constitution, a judge of the Constitutional Court acquires such status at the moment when the election procedure by the *Sejm* is completed and not upon taking the oath before the President.[64]

60. The Bill aims to prevent the recurrence of situations where the President of the Republic denied newly elected judges the opportunity to take their oath. Article 20.1 of the Bill obliges newly elected judges to take an oath in the presence of the President of the Republic of Poland, while Article 20.2 obligates the President of the Republic to enable the taking of oath by an elected judge within 14 days from his or her election by the *Sejm*. The formulation "a judge of the Tribunal" used in Article 20.2 seems to imply that a candidate elected by the *Sejm* would be considered a judge of the Tribunal before taking the oath. At the same time, taking the oath before the President holds significant symbolic value and represents a constitutional judge's commitment to the state and the constitutional order. In its 2016 Opinion, the Venice Commission explained that "*taking the oath cannot be seen as required for validating the election of constitutional judges. The acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function*".[65]

61. Additionally, while making the acceptance of the oath by the President of the Republic a duty rather than a prerogative is a welcome change, the Bill does not offer solutions in case a judge is prevented from taking the oath within the legally defined timeline. While the proposed arrangement aims to avoid the situation when lawfully elected judges of the Tribunal may be prevented from taking their oath in the presence of the President of the Republic within the time-limits established by the Bill, **it is recommended to specify in the Bill an alternative mechanism to address such a situation**. This could include, for example, requiring the General Assembly of the Constitutional Tribunal, or another constitutional body or high public official, for instance the Marshal of the *Sejm*, to accept the oath of the newly elected judge if the President of the Republic does not do so within 14 days of the election of the new constitutional judge. Furthermore, while the proposed arrangement seems to imply that a candidate elected by the *Sejm* would be considered a

63 Act of 16 November 2016 on the Status of the Judges of the Constitutional Tribunal, Republic of Poland, Articles 4 and 5.
64 See <Trybunał Konstytucyjny: Ustawa o Trybunale Konstytucyjnym>, judgment of 3 December 2015, No. K 34/15, para. 8.2.
65 See *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, Venice Commission, CDL-AD(2016)001, para. 108.

judge of the Tribunal before taking the oath, the Bill does not clearly define when the term of office for the newly elected judge begins. To foster legal certainty**, it is recommended to specify that taking the oath is not necessary for validating the election of a judge of the Constitutional Tribunal.**

RECOMMENDATION D.

In Article 20 of the Bill:

1. To clarify that the requirement for a newly elected judge of the Constitutional Tribunal to take an oath before the President of the Republic is not necessary for validating his or her election and that preventing a judge from taking the oath within the legally defined timeline should not become an obstacle for starting the term of office.
2. To include an alternative mechanism to address situations where the newly elected judge is not provided with an opportunity to take the oath in the presence of the President of the Republic within the timeline provided by the law, for instance the possibility to take the oath before another body or high-level public official.

5.3. Gender and Diversity Considerations in the Selection Process

62. The legitimacy of a Constitutional Court and society's acceptance of its decisions may depend on the extent of the court's consideration of different social values and sensibilities. This may be facilitated by ensuring diversity in its composition.[66] To this end, the rules regarding the composition and selection/appointment should be designed to prevent discrimination in the selection process and to ensure gender balance and diversity in the Constitutional Tribunal.[67] By reflecting the composition of society, a pluralistic composition can enhance a constitutional court's legitimacy for striking down legislation adopted by a parliament as the representative of the people[68] and more generally foster greater public trust in the impartiality of the court.[69]

63. An independent, impartial and gender-sensitive judiciary has also a crucial role in achieving gender equality and ensuring that gender considerations are mainstreamed in the administration of justice.[70] Therefore, states should make an effort to evaluate the structure and composition of the judiciary to ensure adequate representation of women and provide necessary conditions for the advancement of gender equality within the judiciary at all levels.[71] The OSCE Athens Ministerial Council on Women's Participation

66 See the Rule of Law Checklist, Venice Commission, CDL-AD(2016)007, 18 March 2016, para. 112; and The Composition of Constitutional Courts - Science and Technique of Democracy, Venice Commission, CDL-STD(1997)020, December 1997, p. 21.

67 See Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina, Venice Commission, 8 November 2005, para. 13; and Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Venice Commission, 11 March 2016, para. 119.

68 See e.g. Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina, Venice Commission, CDL-AD(2005)039, 14 November 2005, para. 3.

69 See e.g. Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, Venice Commission, CDL-AD(2009)014, 20 March 2009, para. 48.

70 See Convention on the Elimination of all Forms of Discrimination Against Women, United Nations, 18 December 1970, Article 1; and, Report of the Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice, United Nations, A/HRC/17/30, 29 April 2011, para. 45.

71 See also General Recommendation No. 23 (1997) on Political and Public Life, United Nations, CEDAW Committee, para. 5; Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), paras. 182 and 190, particularly Strategic Objective G.1. "*Take measures to ensure women's equal access to and full participation in power structures and decision-making*"; Appendix to Recommendation Rec (2003)3 of the Committee of

in Political and Public Life calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies.*"[72]

64. The Constitution recognizes the equality between all individuals (Article 32) and guarantees equal rights to men and women in political life and to hold offices (Article 33). However, there are no provisions in the Constitution nor in the Bill that promote the nomination and selection of women judges to the Constitutional Court. In its current composition, there are only two women judges of Constitutional Tribunal.[73] In order to promote women's representation in the Court, **it is recommended to supplement the Bill with provisions ensuring that gender considerations are taken into account throughout the selection process, though not at the expense of the basic criterion of merit**.[74]

65. The composition of the judiciary should also aim at reflecting the composition of the population as a whole, including the representation of persons with disabilities. Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD)[75] prescribes the right to work for persons with disabilities, on an equal basis with others. This includes the right to gain a living by "work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities". Persons with disabilities also have the right to participate on an equal basis in the justice system, not only as users of the system, but also as judges, prosecutors, jurors and lawyers. "Participation on an equal basis" in justice sector professions implies not only that selection and employment criteria must be non-discriminatory, but also that states are obliged to take positive measures to create an enabling environment for the realization of full and equal participation of persons with disabilities,[76] meaning that adequate conditions should be provided to facilitate the work of qualified candidates.[77] The 2020 International Principles and Guidelines on access to justice for persons with disabilities provide additional guidelines and recommendations in this respect, in particular under Principle 7.[78]

66. Finally, the Bill is also silent in terms of the relative representation of minorities within the Constitutional Tribunal. As emphasized above, ensuring diversity at all levels of the judiciary, including in the highest instances, can help address lack of confidence on the part of minorities, make justice more accessible to them, promote the integration of society through participation in State institutions and build trust in the State more generally.[79] There may exist a variety of reasons preventing access to the judicial

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Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making, Council of Europe, adopted on 12 March 2003, which refers to the goal of achieving a minimum representation of 40% of women and men in political and public life, through legislative, administrative and supportive measures.

72 See Decision No. 7/09 on Women's Participation in Political and Public Life, OSCE, Ministerial Council, para. 20.

73 See <The Constitutional Tribunal: Judges of the Tribunal (trybunal.gov.pl)>.

74 See Report of the UN Working Group on the issue of discrimination against women in law and in practice, United Nations, A/HRC/23/50, para. 39). See also Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges, ENCJ, 2012, Indicator no. I.8; See also Ministerial Council Decision 7/09 on Women's Participation in Political and Public Life, OSCE, 2 December 2009, which specifically calls on participating States to "*consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies*"; and Opinion on the Appointment of Supreme Court Judges of Georgia, OSCE/ODIHR, 2019, para. 49, regarding possible mechanisms. See also Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic, OSCE/ODIHR and Venice Commission, 16 June 2014, Sub-Section 5.1.

75 See Convention on the Rights of Persons with Disabilities, United Nations, General Assembly, A/RES/61/106, 24 January 2007. See particularly Article 13 of the Convention, which imposes a positive duty on States to provide the necessary accommodations in order to facilitate effective role of persons with disabilities as direct and indirect participants in legal proceedings.

76 See recommended standards for judicial selection and training set forth in Part II of 2010 Kyiv Recommendations.

77 See Convention on the Rights of Persons with Disabilities, United Nations, General Assembly, A/RES/61/106, 24 January 2007, art. 13.

78 See the International Principles and Guidelines on access to justice for persons with disabilities, United Nations, Special Rapporteur on the rights of persons with disabilities, August 2020. See also Warsaw Recommendations on Judicial Independence and Accountability, ODIHR, 2023, Chapter VI.

79 See e.g. The Graz Recommendations on Access to Justice and National Minorities, OSCE High Commissioner on National Minorities, 2017, Recommendation 5 and p. 23.

profession in a given country. In this respect, the OSCE High Commissioner on National Minorities Graz Recommendations on Access to Justice and National Minorities (2017) and ODIHR's publication on Gender, Diversity and Justice (2019) can serve as useful guidance tools to develop mechanisms and policies to ensure diversity within the Constitutional Tribunal.[80]

67. In order to facilitate the representation of minorities and persons with disabilities on the Constitutional Tribunal, it is recommended **to supplement the Bill with guiding principles for ensuring that the selection process is accessible, and that special efforts aim towards attracting candidates from underrepresented groups, while giving due consideration to diversity throughout the selection process, though not at the expense of the basic criterion of merit.**

> **RECOMMENDATION E.**
>
> To consider supplementing the Bill with provisions ensuring that gender and diversity considerations are taken into account throughout the selection process of judges to the Constitutional Tribunal, though not at the expense of the basic criterion of merit.

6. STATUS OF JUDGES OF THE CONSTITUTIONAL TRIBUNAL

6.1. Incompatibilities

68. Constitutional judges are usually not permitted to concurrently hold another office in the legislative or executive branches of government. In jurisdictions where constitutional review is exercised exclusively by a specialized constitutional review body, constitutional judges are also not permitted to hold another office in the judiciary branch. Often, they are also forbidden from private occupations and business activities that might undermine their impartiality. This general rule serves to protect judges from influence potentially arising from their participation in activities in addition to those of the constitutional review body. At times, an incompatibility between the office of a constitutional judge and another activity may not be apparent, even to the judge in question. Such conflicts of interests, real or perceived, can be prevented by way of strict incompatibility provisions.[81] At the same time, incompatibility provisions should not be too strict as to jeopardize the objective of ensuring a pluralist and diverse composition of the Constitutional Court.[82]

69. Article 195.3 of the Constitution prohibits judges of the Constitutional Tribunal from membership in political parties, trade unions and from performing public activities incompatible with the principles of independence of the courts and judges. Article 26.1 of the Bill reiterates these incompatibilities. Article 26.2 of the Bill forbids judges of the Constitutional Tribunal from continuing any additional employment, except for part-time position as university teacher or researcher in an institute of the Polish Academy of Sciences. Article 26.3 further prohibits judges of the Constitutional Tribunal from engaging in "*any gainful or non-gainful activity that would impede the performance of his/her duties, compromise the dignity of the office of a judge of the Tribunal, or could undermine trust in his/her impartiality or independence*".

80 *Ibid*, pp. 25-27; and Gender, Diversity and Justice: Overview and Recommendations, ODIHR, 2019.
81 See Composition of constitutional courts – Science and technique of Democracy, Venice Commission, No. 20, 1997, pp 15-16.
82 See *Ibid.* p.16 which states that "one criticism of strict incompatibility was that they tend to produce a court composition of retiring members of society (…)".

70. In principle, judges, have a right to freedom of association, including membership in a political party, even though restrictions on this right may be justified to preserve their independence and impartiality and the appearance thereof, in particular when it is deemed necessary to maintain their political neutrality or where this would conflict with their public duties.[83] In that respect, judges' political involvement and membership in political parties may pose issues regarding their independence, impartiality and separation of powers.[84] While there is no consensus at the international level on whether a judge has the right to be member of a political party,[85] judges should generally exert restraint in the exercise of public political activity to preserve the separation of powers and independence of the judiciary,[86] including the appearance of independence.[87] Accordingly, limitations pertaining to being a member of a political party may be justified to preserve their independence and impartiality and the appearance thereof.[88]

71. However, despite its presence in the constitutions of a few OSCE participating States,[89] the blanket prohibition on judges of the Constitutional Tribunal from membership in trade unions does not comply with international standards. The Bangalore Principles of Judicial Conduct provides that "*a judge may form or join associations of judges or participate in other organizations representing the interests of judges*".[90] The Commentary adds that, "*a judge may join a trade union or professional association established to advance and protect the conditions of service and salaries of judges or, together with other judges, form a trade union or association of that nature. Given the public and constitutional character of the judge's service, however, restrictions may be placed on the right to strike.*"[91] Similarly, the Warsaw Recommendations on Judicial Independence and Accountability stipulates that judges shall have the right to form or join associations to promote their interests and the principles of judicial independence and accountability.[92] **In light of the foregoing, and while this would require a constitutional amendment, it is recommended, in the long run, to reconsider the blanket prohibition on judges of the Constitutional Tribunal from membership in trade unions, to allow them to belong to trade unions or professional associations representing the interests of judges or in other associations promoting the principles of judicial independence and accountability.**

72. Article 26.2 of the Bill prohibits judges' additional employments, with the exception of being an academic teacher in a university or a researcher in an institute of the Polish Academy of Sciences. While academic teaching at every university, including at private ones can serve as a legitimate exception, it does not seem to be reasonable to allow research activity only in the institutes of the Polish Academy of Sciences, and not in other research institutions. The same comment applies to Article 41.3 of the Bill.

83 See, regarding public servants in general, *Ahmed and Others v. United Kingdom*, ECtHR, Application no. 22954/93, judgement of 2 September 1998, paras. 53 and 63. See also Warsaw Recommendations on Judicial Independence and Accountability, ODIHR, 2023, para. 30. See Joint Guidelines on Freedom of Associations, ODIHR and Venice Commission, 2014, para. 144, where 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*".

84 See Opinion no. 3 (2002) on Ethics and Liability of Judges, CCJE, para. 30.

85 See Report on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors, United National, Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29 April 2019, paras. 60, 64 and 109.

86 *Ibid.* para. 110.

87 *Ibid.* paras. 66 and 111. See also Opinion no. 3 (2002) on Ethics and Liability of Judges, CCJE, paras. 27-36.

88 See Joint Guidelines on Political Party Regulation, OSCE/ODIHR and Venice Commission, 2nd edition, 2020, para. 147.

89 See Constitution of the Slovak Republic, Article 37.4; Constitution of Ukraine, Article 127.

90 See The Bangalore Principles of Judicial Conduct, United Nations, Economic and Social Council, 2002, Article 4.13.

91 See Commentary on the Bangalore Principles of Judicial Conduct, United Nations, Office on Drugs and Crime, 2007, para. 176.

92 See Recommendations on Judicial Independence and Accountability, OSCE/ODIHR, 27 October 2023, para. 30.

6.2. Immunity

73. The Constitution provides that a judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal (Article 196). The initial version of the Bill vested the power to grant such consent in the disciplinary court of the Constitutional Tribunal (Articles 28.1 and 31.1 of the Bill). However, the amended version of the Bill adopted by the *Sejm* on 24 July 2024 vests this power in the General Assembly of the Constitutional Tribunal (Articles 7.6, 28.1 and 31.1 of the Bill adopted with amendment by the *Sejm* on 24 July 2024). The extent to which the former approach reflects the intention of the Constitution could be questioned. In addition, this initial arrangement risked blurring the disciplinary responsibility and functional immunity of judges of the Constitutional Tribunal. The Venice Commission has previously recommended for such decisions to be taken by a court plenary, with the judge concerned not sitting.[93] This is also the approach in relation to judges of the ECtHR.[94] Therefore, the amendments adopted by the *Sejm* in July 2024 **vesting the General Assembly of the Constitutional Tribunal, with the judge concerned not sitting, with the authority to lift judicial immunity are welcome.**

74. In addition, the Bill does not provide criteria for granting or refusing consent to lift a judge's criminal immunity. ODIHR and the Venice Commission have recommended that judges, including constitutional judges, should only have functional immunity.[95] They noted that "*there needs to be a balance between immunity as a means to protect the judge against pressures and abuses from state powers or individuals (e.g., abusive prosecution, frivolous, vexatious or manifestly ill-founded complaints) and the fact that the judges should not be above the law. In principle, a judge should only benefit from immunity in the exercise of lawful functions*".[96] Immunity in the exercise of lawful functions means that judges have immunity from prosecution and liability for acts performed in good faith in the exercise of their functions. However, this immunity does not cover the commission of intentional crimes, even if committed in the exercise of their functions. Accordingly, if a judge commits a criminal offence outside the exercise of his/her office, for instance causing a traffic accident due to drink driving, he/she should not be immune from criminal liability. Additionally, if a judge commits a criminal offence in the exercise of his or her office (e.g., accepting bribes, corruption, traffic of influence or other similar offenses), he or she should have no immunity from criminal liability. Article 28.1 of the Bill reflects the concept of functional immunity, but does not provide criteria for granting or refusing consent to lift a judge's criminal immunity, leaving it to the discretion of the competent body. Where there are reasonable grounds to believe a judge has committed a criminal offence, the General Assembly of the Constitutional Tribunal should lift immunity. **In light of the foregoing, it is recommended that the Bill be supplemented with a provision requiring that the Constitutional Tribunal defines in its rules of**

93 In the Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, CDL-AD(2013)014, para. 49, the Venice Commission recommended that "for judges of the Constitutional Court, immunity should be lifted by the plenary of the Court, with the exception of the judge concerned."

94 See Article 6 of the Fourth Protocol to the General Agreement on Privileges Immunities of the Council of Europe of 1961 which provides: "Privileges and immunities are accorded to judges not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions. The Court alone, sitting in plenary session, shall be competent to waive the immunity of judges […]" (emphasis added).

95 See *Urgent Opinion on the Draft Constitutional Law of the Republic of Kazakhstan on the Constitutional Court*, ODIHR, 30 September 2022, para. 56; *Recommendations on Judicial Independence and Accountability (Warsaw recommendations)*, ODIHR, 2023, para. 16; *Amicus Curiae Brief on the criminal liability of the Constitutional Court judges – Republic of Moldova*, Venice Commission, December 2019, paras. 25-27; *Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia*, Venice Commission, 19 June 2017, paras. 36-37; *Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine*, Venice Commission, 15 June 2023, paras. 19-20.

96 Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic. ODIHR and Venice Commission, 16 June 2014, paras. 37 and 41; *Urgent Opinion on the Draft Constitutional Law of the Republic of Kazakhstan on the Constitutional Court*, ODIHR, 30 September 2022, para. 56; and *Opinion on the Law on the High Judicial Council of the Republic of Uzbekistan*, ODIHR, 1 October 2018, paras. 42 and 54.

procedure criteria for granting or refusing consent to lift a judge's criminal immunity. It is recommended that the Bill provides that these criteria must ensure that judges of the Constitutional Tribunal only benefit from functional immunity in the exercise of their *lawful* functions.

75. Furthermore, according to Article 196 of the Constitution, a judge of the Tribunal can be arrested or detained only when two cumulative conditions are met: when a judge has been apprehended in the commission of an offence and his/her detention is necessary for securing the proper course of proceedings. Article 28.3 of the amended Bill adopted by the *Sejm* on 24 July 2024 seems to treat these two conditions as cumulative, in line with the Constitution, which was not clear from the initial version of the Bill. Furthermore, Article 196 of the Constitution provides that in the event of such detention, the President of the Constitutional Tribunal shall be notified and may order an immediate release of the judge. By contrast, Article 28.4 of the initial version of the Bill provided that the Marshal of the *Sejm* would be notified and could order the judge's immediate release. Allowing the Marshal of the *Sejm* to make this decision would infringe upon the principle of separation of powers and risk politicizing the lifting of immunity, as the decision to order or not order the release of a detained judge may be perceived as politically motivated. The amended version of the Bill adopted by the *Sejm* on 24 July 2024 provides that the President of the Constitutional Tribunal shall be notified and may order the judge's immediate release (Article 29.4 of the Bill adopted with amendment by the Sejm on 24 July 2024), in line with the Constitution. **These two amendments adopted in July 2024 are commendable.**

6.3. Disciplinary Responsibility

76. According to Article 34.1 of the initial version of the Bill, a request to initiate disciplinary proceedings against a judge could be submitted by the President of the Republic, the Prosecutor General, a judge of the Constitutional Tribunal, and a retired judge of the Constitutional Tribunal. Under the amended version of the Bill, adopted by the *Sejm* on 24 July 2024, only an incumbent or a retired judge of the Constitutional Tribunal can request to initiate disciplinary proceedings against a judge (Article 34.1 of the amended Bill). In its 2016 Opinion, the Venice Commission questioned the granting of a role in initiating disciplinary proceedings to external, political authorities (President of the Republic and the Minister of Justice).[97] **Therefore, the amendment adopted by the *Sejm* is welcome as it excludes political authorities including the President of the Republic and the Minister of Justice/Prosecutor General from those entitled to request the initiation of disciplinary proceedings against a judge of the Constitutional Tribunal.**

77. At the same time, as noted by the Venice Commission, criminal and disciplinary liability are not mutually exclusive, and disciplinary sanctions may still be appropriate even if criminal proceedings result in acquittal. The fact that criminal proceedings have not been initiated also does not mean that no disciplinary breach was committed by the judge concerned. A Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe concluded that "*If the misconduct of a judge is capable of undermining public confidence in the judiciary, it is in the public interest to institute disciplinary proceedings against that judge*".[98] Based on these considerations, a prosecutor who has knowledge of potential judicial misconduct

97 See Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, Venice Commission, CDL-AD(2016)001, paras. 92-93.

98 See Joint opinion on the draft laws on making amendments to the Constitutional Law in the Judicial Code and to the Constitutional Law of Armenia, Venice Commission and the CoE Directorate General of Human Rights and Rule of Law (DGI), CDL-AD(2022)002, para. 27.

could signal the matter to the authorities competent to conduct disciplinary investigations for them to initiate disciplinary proceedings.

78. In addition, ODIHR and the Venice Commission explained in a joint opinion that the right to submit a complaint against an apex court judge to the authorities competent to initiate disciplinary proceedings should be granted to persons who have been affected by the said behaviour or to those who have some form of legal interest in the matter.[99] Therefore, **it is also recommended to supplement the Bill with a provision allowing individual complainants as part of a direct petition procedure (as per Articles 79.1 and 188.5 of the Constitution) to submit a complaint to the authorities competent to conduct disciplinary investigation and initiate disciplinary proceedings.**

79. Regarding the grounds for disciplinary proceedings, Article 33.1 of the Bill provides that a judge of the Tribunal shall be liable to disciplinary action for "*violating the law in an obvious and gross manner, compromising the dignity of the office of a judge of the Tribunal or engaging in other unethical behaviour that may undermine trust in his/her impartiality and independence*". Article 33.2 of the Bill further stipulates that "*a judge of the Tribunal shall also be liable for disciplinary action for his/her conduct prior to taking office if he/she failed to fulfil the duties of the State office held at the time or proved to be unworthy of the office of a judge of the Tribunal*". International standards on disciplinary liability of judges require that acts or omissions that constitute disciplinary offences be clearly defined by law.[100] In particular, provisions in the law regarding the grounds for disciplinary proceedings should meet the condition of foreseeability, which implies that the law should be formulated with sufficient precision to enable a judge to foresee what actions may lead to disciplinary liability. In that regard, the disciplinary liability of a judge of the Tribunal for "*be[ing] unworthy of the office of a judge of the Tribunal*" prior to taking office is vague and may be open to varying interpretations, and may not comply with the condition of foreseeability. **It is thus recommended to clarify which acts or omissions constitute disciplinary offences.**

80. International standards also prescribe that disciplinary sanctions should be proportionate to the respective disciplinary offence.[101] The Bill provides a relatively wide array of disciplinary sanctions, ranging from admonition, reprimand, financial penalty to removal from office and deprivation of the status of a retired judge (Article 37). This broad range of disciplinary sanctions is commendable as it may facilitate compliance with the principle of proportionality. **However, it is recommended to supplement it with a provision specifying which types of disciplinary offence shall entail which types of disciplinary sanctions. Alternatively, legal drafters could consider adding a provision stipulating that disciplinary sanctions should be proportionate to the respective disciplinary offence.** In particular, the dismissal of a judge should only be ordered in exceptionally rare cases, as a measure of last resort. Such cases should involve serious disciplinary breaches, including conduct that is manifestly contrary to the independence, impartiality and integrity of the Constitutional Tribunal. **Therefore, it is recommended to clarify in the Bill that only the most serious disciplinary offences may entail the dismissal of a judge of the Constitutional Tribunal as a measure of last resort.**

99 Joint Opinion on the Draft Law on Disciplinary Liability of Judges of the Republic of Moldova, ODIHR and Venice Commission, CDL-AD(2014)006-e, March 2014, para.64.

100 See Opinion no.3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Council of Europe, Consultative Council of European Judges (CCJE), 19 November 2002, para. 77; Recommendations on Judicial Independence and Accountability (Warsaw recommendations), OSCE/ODIHR, 2023, para. 16; *N.F v. Italy*, ECtHR, 12 December 2001.

101 See Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Council of Europe, CCJE, 19 November 2002, para. 77; Recommendations on Judicial Independence and Accountability (Warsaw recommendations), ODIHR, 2023, para. 16

81. Article 35 of the Bill provides that disciplinary cases shall be adjudicated by a disciplinary court composed of 5 judges in first instance, and by a disciplinary court composed of 7 judges in second instance. Judges of the disciplinary court are to be selected by lot from among the incumbent and retired judges of the Constitutional Tribunal. This arrangement is commendable as it grants the Tribunal itself the competency to adjudicate disciplinary cases and provides for an appeal procedure.[102] In addition, the Bill provides certain procedural guarantees in disciplinary proceedings against accused judges, notably the right to be fully informed of the charges against them (Article 34.6 of the Bill), the right to be heard (Article 34.5 of the Bill), present a defense (Article 34.7 of the Bill), and to have decisions rendered within a reasonable time (see timeline provided in Article 76 of the Act on the Supreme Court of Poland applicable to constitutional court judges as per Article 39 of the Bill). As recommended by the Warsaw Recommendations on Judicial Independence and Accountability, **legal drafters could consider granting judges the right to be represented by a lawyer of their choice in disciplinary proceedings**.[103] **To promote accountability and transparency of the disciplinary proceedings, legal drafters could also consider providing for open disciplinary proceedings, unless otherwise decided with reasoning upon the accused judge's request.**[104]

82. Importantly, the Bill does not define the applicable majority rules for the disciplinary court to decide on disciplinary cases. **To ensure legal certainty, it is recommended that the Bill clearly define the applicable majority rules for the disciplinary court to decide on disciplinary cases. Legal drafters should also consider establishing stricter procedural requirements for the dismissal of a judge, such as a qualified majority vote by the disciplinary court of the Tribunal.**[105]

RECOMMENDATION F.

To clarify which acts or omissions constitute disciplinary offences, provide that disciplinary sanctions should be proportionate to the respective disciplinary offence, and dismissal only applied in the most serious cases and as a measure of last resort, while defining the applicable majority rules for the disciplinary court to decide on disciplinary cases and requiring a qualified majority vote for dismissal.

6.4. Termination of the Term of Office

83. The irremovability of constitutional judges constitutes an essential element of the independence of the constitutional review body. It guarantees that a judge not favourably perceived by outside forces cannot be suspended or dismissed during his/her term of office in order to effectively stop his/her work on certain cases. The Constitution provides that judges of the Constitutional Tribunal are elected for a single 9-year term of office (Article 194.1). The Bill does not define a mandatory retirement age, so judges of the

102 International standards regarding procedural aspects of disciplinary proceedings require that the law should allow an appeal of the disciplinary decision taken by the first instance disciplinary body to a competent body or court that presents all the guarantees of Article 6(1) of the ECHR. See *Eminağaoğlu v. Turkey,* ECtHR, 2021, para. 101; Opinion no. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Council of Europe, CCJE, 19 November 2002, para. 72; Basic Principles on the Independence of the Judiciary, United Nations, 6 September 1985, para. 20.

103 See Warsaw Recommendations on Judicial Independence and Accountability, OSCE/ODIHR, 2023, paras. 19 ad 20.

104 *Ibid*, para. 20.

105 See for example Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, Venice Commission, CDL-AD(2012)009, para. 54.2 which provides "*In order to balance the vagueness of the term of "unworthiness" in Section 16 ACC, allowing the exclusion of a member from the Court, procedural safeguards should be introduced, for example to provide for the decision on exclusion to be taken by at least a two-thirds majority or even the unanimity of other judges*.", Similarly the Rules of the ECtHR require a two-third majority vote of the judges to dismiss a judge, Rules of Court, European Court of Human Rights, 28 March 2024 Rule 7

Tribunal hold their office until the end of their term. Article 21.1 of the Bill provides a list of circumstances leading to termination of a judge's mandate before the end of the term of office. These circumstances include death (subparagraph 1), resignation (subparagraph 2), permanent medical incapacity (subparagraph 3), conviction by a final court judgement for an intentional crime prosecuted by public indictment or an intentional fiscal crime (subparagraph 4) as well as final disciplinary decision on the removal of a judge from office (subparagraph 5). Article 21.3 of the initial version of the Bill further provides that the General Assembly of the Constitutional Tribunal shall adopt a resolution on the expiration of the judge's mandate "*after conducting an appropriate investigation and, in particular, after examining the files of criminal or disciplinary proceedings and hearing the person concerned, unless no such possibility exists".* However, under Article 21.3 of the amended version of the Bill, adopted by the *Sejm* on 24 July 2024, the investigation by the General Assembly of the Constitutional Tribunal is mandatory only upon the request of the judge concerned. If the judge concerned does not request such an investigation, the General Assembly of the Constitutional Tribunal has the discretion to decide whether or not to conduct one before adopting a resolution on the expiration of the judge's mandate.

84. Bearing in mind that judges of the Constitutional Tribunal may only be held criminally responsible with prior consent of the Constitutional Tribunal (Article 196 of the Constitution), the purpose of additional investigation envisioned in Article 21.3 of the Bill is not clear. Considering the importance placed on security of tenure of judges by international standards, it is important to ensure that grounds and procedure for the termination of office of a constitutional judge be set out in a very detailed and precise manner.[106] **If the aim of Article 21.3 of the Bill is to leave open the possibility that the General Assembly of the Constitutional Tribunal may decline to terminate a judge's mandate despite a criminal conviction or a disciplinary decision, it would be advisable to clarify the grounds for such course of action by the General Assembly. Conversely, if the intention is for the General Assembly to be bound by the criminal conviction and the disciplinary decision regarding the removal of a judge, it is recommended to omit the requirement of additional investigation.**

85. Similar considerations apply to the termination of a judge's mandate due to the determination by a medical panel of permanent incapacity to perform the duties of a judge of the Tribunal due to illness, infirmity or frailty (Article 21.1 subparagraph 3 of the Bill). Article 21.3 of the initial version of the Bill authorizes the General Assembly to "*seek an opinion of the relevant health care provider on the state of health of the judge of the Tribunal*". If Article 21.3 implies a second opinion which may differ from the determination by a medical panel in Article 21.1(3), **it is recommended to clarify whether the General Assembly may decline to terminate a judge's mandate based on this differing second opinion.** These provisions should also be aligned with Article 42 of the Bill. The General Assembly should be obliged to issue a resolution on the expiration of mandate of a judge of the Tribunal when the concerned judge submits a declaration of permanent incapacity from an occupational medical examiner from the Social Insurance Institution. In cases where a concerned judge cannot submit a declaration personally, the General Assembly should have the competency to request a medical opinion about the judge from an occupational medical examiner from the Social Insurance Institution and be bound by it. **In this regard, the amendments to Articles 21.3 and 42 of the Bill adopted by the *Sejm* on 24 July 2024 are welcome as they foresee that a medical examination from the Social Insurance Institution can be requested by a concerned judge on its own initiative or by the General Assembly**

106 See Opinion on the Draft Law on the Constitutional Court of Montenegro, Venice Commission, 13 October 2014, para. 21.

and that the General Assembly is bound by the medical declaration of permanent incapacity.

7. Organization and Procedures of the Tribunal

7.1. Benches of the Tribunal and Decision-Making

86. The effectiveness of a constitutional court requires a sufficient number of judges, that the procedures are not overly complex and that the court has the right to reject individual complaints that do not raise an issue of constitutionality.[107]

87. Article 71.1 of the Bill provides that an application, a question of law or a constitutional complaint shall be subject to preliminary examination by a judge of the Tribunal designated by alphabetical order. When an application, a question of law or a constitutional complaint is manifestly unfounded or when deficiencies on these documents have not been remedied upon the Tribunal's request, the Tribunal shall issue an order on refusal to proceed (Article 71.3). This order must provide the reasons for the rejection (Article 111.1). The applicant or the complainant has the right to appeal to the Tribunal within 7 days from the date of service of the order on refusal to proceed (Article 71.4 of the Bill). The Tribunal's authority to reject unfounded petitions following a preliminary review is commendable and constitutes good practice as it contributes enhancing the Tribunal's effectiveness. The requirement for the Tribunal to provide detailed reasons for rejecting petitions is also welcome. This arrangement contributes to reducing the risk of arbitrariness during preliminary reviews and improving public understanding of the Tribunal's decisions.

88. Article 52 of the Bill establishes three types of benches and defines which bench will adjudicate specific types of cases. Given that the constitutional complaint mechanism can be initiated by individuals, the Constitutional Tribunal may have to deal with a large number of such complaints. Hence, the provision for adjudication by benches of five or three judges is welcome. The appointment of judges, including the presiding judge and reporting judge, of the bench by alphabetical order, and the allocation of cases based on the order in which they are received (Article 53.1 of the Bill) is also commendable. This approach should prevent any discretion on the side of the General Assembly of the Tribunal regarding case allocation.

89. Articles 49.1, 61.1, 76.2 and 105 of the Bill aim to balance the effectiveness and transparency of the Tribunal. Article 61.1 provides that proceedings before the Constitutional Tribunal are conducted in writing, unless otherwise provided in statute. Given the specificities of constitutional adjudication, written proceedings allow parties to present detailed legal arguments and enable judges to carefully examine these arguments and assess the constitutionality of the contested act. Written procedures also contribute to a better allocation of judges' time and to more timely decisions. While most of the proceedings are conducted in writing, deliberation by the concerned bench of the Tribunal is necessary, where judge members of the bench deliberate based on the draft decision prepared by the judge rapporteur. Article 105 of the Bill provides that deliberation by the judges of the bench are held in camera, which is common in comparative practice. Article 49.1 of the Bill ensures transparency by holding open hearings , except for cases involving state security and non-public information classified as secret, or other cases provided by statute. Article 76.2 allows the Tribunal to consider a case *in camera* "*if it indisputably follows from the positions presented by the participants in the proceedings in writing that the challenged normative act does not*

107 See e.g., The Composition of Constitutional Courts – Science and Technology of Democracy, Venice Commission, 1997, para. 22.

conform to the Constitution", except for hearing by the Tribunal as a full bench. From the perspective of human rights protection, public proceedings are preferable at least in cases involving individual rights.[108] The Bill appears to be in line with this principle.

90. Articles 190.5 of the Constitution and 106.1 of the Bill provide that judicial decisions of the Tribunal shall be made by a majority vote, as currently provided by Article 106 of the Act of 30 November 2016 on the Organization and Procedure before the Constitutional Tribunal. Compared to Article 37.2 of the Act of 30 November 2016, the Bill lowers the attendance quorum for hearings by the full bench of the Tribunal from 11 to 9 out of 15 judges. While this quorum is slightly below the two-thirds attendance quorum found in most European countries, it is in line with common good practices that the necessary quorum for decisions of the constitutional court exceeds the simple majority of judges.[109]

91. Article 196.3 of the Bill allows a judge of a bench who disagrees with the majority of voters to file a dissenting opinion. A note of the dissenting opinion shall be made in the judicial decision. It further provides that the dissenting opinion may also concern the reasoning only. In comparative practice, opinions in which a judge agrees with the content of the majority decision but with a different reasoning are often referred to as concurring opinions. Generally, dissenting and concurring opinions are not considered to weaken a constitutional court but rather have several benefits.[110] They enable public, especially scientific, discussion of the judgments, strengthen the independence of the judges and ensure their effective participation in the review of the case in this respect. Separate opinions also improve the quality of judgments, because those delivering a dissenting or concurring opinion must explain why they do not agree with the majority. Therefore, this provision is positive. However, it is unclear whether the requirement that a note of the dissenting opinion be made in the judicial decision means that these separate opinions must be attached to the judicial decision or simply mentioned therein. **The legal drafters could consider explicitly requiring the publication of dissenting and concurring opinions alongside the judicial decision.**

7.2. Referral of Cases to the Full Bench

92. Article 52.1.1 of the Bill provides that the Tribunal shall decide in full bench cases regarding conflicts of competence between central state authorities, on the existence of impediments to the exercise of the office of the President of the Republic, on the constitutionality of the purposes or activities of political parties, on *ex ante* control of bills, on international agreement before their ratification, on particularly complex cases, and on the applicant's appeal against the order of the President of the Tribunal refusing to initiate disciplinary proceedings. A case of particular complexity is defined as "*a case of paramount importance to the functioning of the State and society, or a case in which the bench intends to depart from a legal view expressed in a judicial decision delivered by a full bench*" (Article 52.3). According to Article 52.4 of the Bill, each judge of the Constitutional Tribunal may submit a request for a case of particular complexity to be heard by a full bench.

93. In its Opinion on the Act on the Constitutional Tribunal of 22 July 2016, the Venice Commission noted that if referral to the full bench is applied frequently, it can become quite burdensome to the functioning of the Tribunal.[111] Article 26.1.1.g of Act on the Constitutional Tribunal of 22 July 2016 – now repealed – enabled three judges of the

108 See e.g. Study on Individual Access to Constitutional Justice, Venice Commission, 2010, paras. 132 and 133.
109 See e.g. Opinion on Amendments to the Act of 25 June 2015 of the Constitutional Tribunal of Poland, Venice Commission, 11 March 2016, paras. 69-71; Opinion on the Act of the Constitutional Tribunal, Venice Commission, 14 October 2016, para. 32
110 See Urgent Opinion on the Draft Constitutional Law of the Republic of Kazakhstan on the Constitutional Court, ODIHR, 30 September 2022, paras. 82 and 83.
111 See Opinion on the Act on the Constitutional Tribunal of Poland, Venice Commission, CDL-AD(2016)026, paras. 33-36.

Tribunal to refer a case to the full bench. On this aspect, the Venice Commission warned that "*in the absence of a possibility for the other judges to reject a transfer request, there is a danger of politicisation and obstruction to the effective functioning of the Tribunal*".[112] To address this issue, it recommended additional safeguards, such as allowing the plenary to decline the referral or deciding cases in fast track or summary proceedings.[113]

94. The Bill seeks to limit requests for full bench referrals to particularly complex cases. However, the Bill introduces the possibility for individual judges to submit referral requests. Furthermore, the Bill does not specify whether and how the full bench can reject such requests. Therefore, the concerns raised by the Venice Commission remain relevant. In order to avoid frequent referral of cases to the full bench, **it is recommended to include additional safeguards, such as requiring that a referral request be submitted only by a simple majority decision of the concerned bench and allowing the full bench to decline the request through a simple majority vote.**

> **RECOMMENDATION G.**
>
> To consider including additional safeguards to avoid frequent referral of cases to the full bench, such as requiring that a referral request be submitted only by a simple majority decision of the concerned bench and allowing the full bench to decline the request.

7.3. Discontinuance of Proceedings

95. Article 86.1 of the Bill provides that the Tribunal will discontinue the proceedings if the delivery of a judicial decision would be "superfluous or inadmissible". Unless these terms are well-defined and settled in the Tribunal's caselaw, **in the interests of legal certainty, it would be advisable to clarify, in the rules of procedures of the Constitutional Tribunal, which situations would fall under the notions of superfluous or inadmissible delivery of a judicial decision.**

96. Article 87 of the Bill stipulates that proceedings initiated at the request of 50 deputies of the *Sejm* or 30 senators, if not completed by the end of their term, shall be suspended by the Tribunal. The suspended proceedings shall resume only if, within six months of suspension, the request is supported by 50 deputies of the *Sejm* or 30 Senators of the next legislature. This proposed arrangement is problematic as it denies the realization of MPs constitutional right to submit a request to the Constitutional Tribunal, as enshrined in Article 191.1.1 of the Constitution. If a request is submitted while the MPs are still in office, the case should be adjudicated even if in the meantime their term of office has ended. The potential delay in adjudication should not affect the MPs right to submit a case to the Tribunal. Proceedings should continue regardless of the conclusion of the MPs' term. Besides affecting the constitutional rights of MPs, the proposed arrangement also raises concern as it could potentially prevent the Tribunal from adjudicating a case which might be in the public interest. Requiring support from the next legislature for resumption of proceedings may foster political bargaining and undermines the principle of legal certainty. To ensure legal certainty and uphold MPs' constitutional rights, cases should be adjudicated as long as they are lodged while the MPs are in office. **Therefore, it is recommended to remove Article 87 from the Bill or amend it to specify that proceedings initiated at the request of 50 deputies of the *Sejm* or 30 senators, if not**

112 *Ibid.* para. 36.
113 *Ibid.* para. 34.

completed by the end of their term, shall continue and the cases be adjudicated by the Constitutional Tribunal.

RECOMMENDATION H.

To remove Article 87 from the Bill or amend it to specify that proceedings initiated at the request of 50 deputies of the *Sejm* or 30 senators, if not completed by the end of their term, shall continue and the cases shall be adjudicated by the Constitutional Tribunal.

7.4. Presence of the Prosecutor General

97. Article 59.6 of the Bill requires the participation of the Prosecutor General in all cases before the full bench, and a prosecutor from the Prosecutor General's Office in cases before other benches of the Tribunal. Article 80.5 of the Bill allows the Tribunal to proceed even if the Prosecutor General or a prosecutor is absent.

98. The introduction of a procedure that allows the Tribunal to proceed without a prosecutor's presence constitutes a positive change for the independence and effectiveness of the Tribunal. Indeed, under Article 43 of the Act of 30 November 2016 on the Organization and Procedure before the Constitutional Tribunal, the Prosecutor General or his/her deputies shall participate in the full bench of the Tribunal. Given that the Minister of Justice currently serves as the Prosecutor General, this arrangement enables a member of the Government to prevent the Tribunal from taking a decision by not attending, thereby interfering with its work. The new provision contemplated in the Bill mitigates this risk.

7.5. Anonymization of Judgments

99. According to Article 114 of the Bill, the President of the Tribunal will anonymise the judgments to the necessary extent, removing the data that permit identification of the applicant, complainant or referring court. Having in mind the undisputed public features of the constitutionally authorized bodies that are entitled to initiate the proceedings before the Constitutional Tribunal, with the exception of the constitutional complaints submitted by individuals, **it is recommended to review anonymization of data since only individuals as complainants fall under the scope of the Regulation (EU) 2016/679 (General Data Protection Regulation). This provision should be aligned with Article 88.3 of the Bill, which appears to presume the publicity of data of the constitutional complainants.**

8. Introductory Provisions Bill

100. The Introductory Provisions Bill contains a number of far-reaching proposals. According to the Explanatory Memorandum accompanying the draft, these proposals are devised to restore the Tribunal's ability to carry out the constitutional function of guardian of the supremacy of the Constitution, the principles of the democratic state of law, and upholding the protection of individual rights and freedoms, also in light of the ECtHR case of *Xero Flor w Polsce sp. z o.o. v. Poland* (2021). To this end, the Introductory Provisions Bill envisages, among other changes, the invalidation of the judgments and orders that were delivered with the participation of "persons not entitled to adjudicate"/[*osoba nieuprawniona do orzekania*], the possibility for incumbent judges of the Tribunal to retire before the end of their term of office, transitional provisions related to the presidency of the Tribunal, and abolition of the Tribunal's Chancellery and the Office of the Legal Service.

101. It must be recognized that the aims pursued by the Introductory Provisions Bill are of paramount importance. As discussed above (see Sub-Section III.2 on Background), restoring constitutionalism and the rule of law is critical for Poland's domestic legal order and its international standing, and ensuring compliance with the caselaw of the ECtHR and the CJEU. However, the means of doing so should be consistent with the principles they intend to protect; otherwise, the supremacy of the Constitution and the rule of law may be jeopardized further.

8.1. Status of Judgments Rendered by Benches which Included "Persons Not Entitled to Adjudicate"

102. Article 9 (1) of the amended Introductory Provisions Bill provides that all judgments rendered by benches which included "persons not entitled to adjudicate"[114] shall be invalid and shall have no legal effects specified in Articles 190.1 and 190.3 of the Constitution. Orders issued by such benches are declared invalid and without any legal effects (Article 9 (2) of the amended Introductory Provisions Bill). All procedural acts before the Tribunal that ended with the issuance of the invalidated decisions are to be repeated. At the same time, final judicial and administrative decisions rendered in individual cases in reliance on the invalidated judgments shall remain in force (Article 9 (4) of the amended Introductory Provisions Bill).

103. The legal effects of the Constitutional Tribunal's decisions are defined by Article 190.1 of the Constitution, which clearly states that "*judgments of the Constitutional Tribunal shall be of universally binding application and shall be final*", thus encompassing the effects of *res judicata* (finality), *erga omnes* (universally binding application), and the force of law. In normal situations - that is when the Constitutional Tribunal fulfils the criteria to constitute an "independent and impartial tribunal established by law" in the sense of Article 6 of the ECHR, the Parliament cannot alter the constitutional effects of the Tribunal's judgments by an ordinary statute. Accepting a position to the contrary would be inconsistent with the supremacy of the Constitution, independence of the judiciary, and ultimately the rule of law.[115] It would also open the door for parliamentary majorities of the day to treat the Constitutional Tribunal's decisions as they see fit, which would severely undermine the role of the Tribunal in the system of constitutional checks and balances.

104. However, the Introductory Provisions Bill seeks to declare null and void judgments of the Tribunal rendered by benches which included "persons not entitled to adjudicate", meaning situations where the Tribunal failed to constitute a tribunal 'established by law'. In the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (2021), the ECtHR held that there was a violation of the right to a tribunal 'established by law' "*on account of the participation in the proceedings before the Constitutional Court of Judge M.M., whose election was vitiated by grave irregularities that impaired the very essence of the right at issue*".[116] With respect to the execution of this case, the Committee of Ministers exhorted Poland to, among other things, "*address the status of decisions already adopted*

114 i.e., a person elected as a judge of the Tribunal in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws of 2016, item 293 and of 2018, item. 1077) and the judgments of the Court of 3 December 2015, ref. K 34/15 (Journal of Laws, item 2129) and of 9 December 2015, ref. K 35/15 (Journal of Laws, item 2147), as well as the person elected in his/her place (Article 9(1) of the amended Introductory Provisions Bill).

115 See also Opinion on the Act on the Constitutional Tribunal, Venice Commission, CDL-AD(2016)026, para. 98, concerning the Constitutional Tribunal at a time when it was allegedly fulfilling the requirements of a tribunal 'established by law': "*Declaring judgments of a Constitutional Court "illegal" through legislation contradicts Article 190.2 of the Constitution. Moreover, through this provision the legislature openly questions the position and authority of the Constitutional Tribunal as the final arbiter in constitutional issues. Like the purported exercise of such authority by the executive, rejecting the authority of a court in such a way flouts the principle of independence of the judiciary and constitutes another flagrant violation of the rule of law*".

116 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021, paras. 289-291.

in cases concerning constitutional complaints with the participation of irregularly appointed judge(s)".[117]

105. It is primarily for the states concerned to choose the means to be used in their domestic legal order to execute the judgments of the ECtHR and they are afforded a certain margin of appreciation to address the consequences of the violation of Article 6 of the ECHR.[118] A balancing test should be carried out between the individual right to a tribunal established by law and the public interests in legal certainty, including of the stability of judgments and respect for the principle of *res judicata* as well as good administration of justice. Considering the significance of judgments rendered by an apex constitutional review body, it is fundamental to ensure the legitimacy of the constitutional adjudication system and the validity of judgments of the Tribunal. In particular when the ECtHR specifically referred to certain of these judgments as perpetuating the state of continued non-compliance with the ECHR[119] or as being in violation of the ECHR,[120] it is essential that the public authorities consider introducing a mechanism or measures effectively remedying such violations. It is noted that there is a moderate number of judgments rendered by benches which included "persons not entitled to adjudicate" (between 2017 and 2022, it is reported that 85 judgments were rendered by such benches of the Tribunal),[121] although depending on the nature of the decisions, they may have had far-reaching consequences and potentially have impacted not only an individual applicant but a wider range of individuals.

106. The question arises as to whether the determination of the status of the above judgments should be done *ex lege* or through existing mechanisms, if they are available, or an *ad hoc* procedure that would be provided in the law, falls within the margin of appreciation of the state. In any case, the solution should comply with the Constitution and rule of law principles, while ensuring respect for the rights of individuals. The main guiding principles from the *ODIHR Note on the Effects of Decisions of Judges Appointed in a Deficient Manner* (12 August 2024)[122] may serve as a useful reference to decide on best legislative option in this respect, though acknowledging the specificities of constitutional adjudication and its potentially far-reaching consequences. While a state may enjoy a certain margin of appreciation in the way it decides to cure the violations of the right to a fair trial in cases when decisions are made by a tribunal not considered to be 'established by law', declaring *ex lege* – through a law adopted with simple majority – the decisions of the Tribunal null and void raises serious concerns.

107. Certain decisions of the Constitutional Tribunal on the constitutionality of normative acts may have determined the scope of application of these challenged acts, thus having wider legal implications, affecting the work of the public institutions and/or potentially the rights of an undefined number of individuals. Other decisions may have been made in favour of an individual applicant upholding his/her rights against the state, and/or could have led to a similar judgment being adopted with a lawful composition of the Tribunal and/or at times, a long time may have passed after the rendering of such decisions.

117 See <https://hudoc.exec.coe.int/eng?i=004-58569>.

118 See e.g., ECtHR, *Assanidze v. Georgia* [GC], no. 71503/01, 08 April 2004, para. 202; and *Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 243. In *Wałęsa*, the ECtHR held that it is not up to the Court "…*to elaborate further on what would be the most appropriate way to put an end to the systemic situation […]; under Article 46 the State remains free to choose the means by which it will discharge its obligations arising from the execution of the court's judgments*", see ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 329 and 332.

119 See e.g., ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 325-326, referring in particular to those judgments of 24 November 2021 (case no. K 6/21) and 10 March 2022 (case no. K 7/21), consistently attempting to undermine and prevent the execution of the Court's judgments relating to the independence of the judiciary and the defective procedure for judicial appointments; those contesting the primacy of EU law and the binding effect of the CJEU judgments (such as judgments of 14 July 2021 (case no. P 7/20) and of 7 October 2021 (case no. K 3/21)); the judgment of 22 March 2022 (no. K 7/21) to justify non-execution of ECtHR judgments.

120 See e.g., the case no. K 1/20 referred to in ECtHR, *M.L. v. Poland*, no. 40119/21, 14 December 2023.

121 See Judgments Delivered by Irregular Judicial Formations of the Polish Constitutional Court, Helsinki Foundation for Human Rights, July 2023, p. 11.

122 Available at <Poland | LEGISLATIONLINE>.

Providing *ex lege* that all such decisions by "persons not entitled to adjudicate" are null and void, including those leading to recognition or acquisition of individual rights, fails to provide specific consideration of these factors. Such an option may also create even greater uncertainty as to the status and legitimacy of certain court decisions adopted on the basis of the Constitutional Tribunal's judgments and negatively impact constitutional rights of individuals. For all these reasons, **declaring *ex lege* all the judgments of the Tribunal rendered with the involvement of "persons not entitled to adjudicate" null and void should be reconsidered.**

108. A procedure of resumption of proceedings with the re-examination of the cases could instead be envisaged, with a view to have new judgments in these cases rendered by the Constitutional Tribunal in a composition not involving defectively elected/appointed judges. This should in particular be the case when there is a pressing need necessitated by circumstances of a substantial and compelling nature, such as in case of miscarriage or denial of justice or serious violations of international human rights standards.[123] When certain of these judgments have been specifically assessed by the European courts as perpetuating the state of continued non-compliance with the ECHR[124] or violating the ECHR,[125] public authorities have wider discretion to decide how to remedy the violation; the re-opening may not always be necessary and other measures could be envisaged. The Introductory Provisions Bill should clearly define the conditions of admissibility and the criteria for reopening or resumption of the cases, while specifying the procedure for doing so. In particular, one criteria that may be considered to decide not to reopen a given case and thereby confirm the validity of the judgment, is the situation where the judgments have led to the recognition or acquisition of individual rights.

109. In terms of procedure, given the significance of the decisions to reopen or resume the proceedings or not, as well as the need to ensure legitimacy of the process, it would be advisable for such decisions to be taken by the plenary of the Constitutional Tribunal, without the participation of the "persons not entitled to adjudicate". The Introductory Provisions Bill should also clearly define the entities or subjects that may request the resumption of the constitutional proceedings. **For cases where the contents of judgments of the Constitutional Tribunal have been specifically considered by the European courts or international tribunals as being in violation of international law and human rights standards, the legal drafters could consider introducing in the Bill on the Constitutional Tribunal or the Introductory Provisions Bill, or other legislative initiatives or measures, a specific provisions to ensure effective implementation of the decisions.** The Bill should also clearly specify the potential effects of judgments made with respect to the re-opened cases, including temporal impact of such judgements, which may potentially vary from pronouncing initial judgments

123 ECtHR, *Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, paras. 238 and 240; and *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 224 and 250. See also ECtHR, *Moreira Ferreira v. Portugal (no. 2) [GC]*, no. 19867/12, 11 July 2017, para. 97, referring to "the result of a manifest factual or legal error leading to a 'denial of justice'." See e.g., CJEU, *Skoma-Lux sro v. Celní ředitelství Olomouc* [GC], case no. C-161/06, 11 December 2007, paras. 71-72. See also Council of Europe, Committee of Ministers, *Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights*, adopted on 19 January 2000, Explanatory Memorandum, which provides a number of examples of the kind of violations in which re-examination of the case or re-opening will be of particular importance, including "*criminal convictions violating Article 10 [of the ECHR] because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms.*"

124 See e.g., ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, paras. 325-326, referring in particular to in particular to those judgments of 24 November 2021 (case no. K 6/21) and 10 March 2022 (case no. K 7/21), consistently attempting to undermine and prevent the execution of the Court's judgments relating to the independence of the judiciary and the defective procedure for judicial appointments; those contesting the primacy of EU law and the binding effect of the CJEU judgments (such as judgments of 14 July 2021 (case no. P 7/20) and of 7 October 2021 (case no. K 3/21)); the judgment of 22 March 2022 (no. K 7/21) to justify non-execution of ECtHR judgments.

125 See e.g., the case no. K 1/20 referred to in ECtHR, *M.L. v. Poland*, no. 40119/21, 14 December 2023.

delivered with participation of "persons not entitled to adjudicate" either null and void, or unlawful (without effect) or confirmed with full effect.

110. Regarding the Constitutional Tribunal's orders refusing or partially refusing to proceed with a constitutional complaint or request submitted by an entity having special standing or interlocutory complaints against the Constitutional Tribunal's refusal (224 orders involving a defectively elected/appointed judge in 2017-2022),[126] or orders to discontinue proceedings (except when they are purely formal), which do not have far-reaching legal effects, could be re-opened or resumed on the request of the initial applicant whose complaint was refused.

111. In light of the above, **the Introductory Provisions Bill should clearly and narrowly define the type of cases that could be re-opened, the conditions of admissibility and criteria for re-opening/resumption of the proceedings, as well as the entities or subjects eligible to request a resumption. Given the significance of the decision to reopen or resume proceedings and the need to ensure the legitimacy of the process, it is advisable that the plenary of the Constitutional Tribunal not involving the 'persons not entitled to adjudicate', rules on such cases. The Introductory Provisions Bill should also clarify the potential legal and temporal effects of the judgements rendered as well as require that such cases that have been re-opened or resumed are adjudicated within a specified timeline. The Constitutional Tribunal should also be granted a power to issue interim measures during that period if/as needed.**

112. At the same time, the judgments delivered on the basis of legal norms assessed in the judgments of the Constitutional Tribunal rendered with the involvement of "persons not entitled to adjudicate" should also be considered. In this respect, Article 9 (4) of the revised Introductory Provisions Bill provides that "*Judicial rulings and final administrative decisions, final on the date of entry into force of this Act, issued in individual cases on the basis of the legal status formed by the judgments [that are invalid and with no effect due to the participation of 'persons not entitled to adjudicate'], shall remain in force*". This provision, which seeks to preserve the final judicial and administrative decisions rendered in individual cases in reliance on the invalidated judgments of the Constitutional Tribunal, raises concerns.

113. Such provisions show that the legislator makes the principles of legal certainty and *res judicata* prevail in all cases, without further consideration or balancing with the individual rights that may be unduly impacted. This arrangement disregards the rights of those negatively affected by the invalidated judgments rendered by benches of the Constitutional Tribunal which included "persons not entitled to adjudicate". As noted above, there are circumstances of a substantial and compelling nature justifying a departure from the legal certainty and *res judicata* principles, for instance to correct abuse of process, miscarriage or denial of justice or serious violations of international human rights standards.

114. Hence, at least in the above circumstances, **in cases of a substantial and compelling nature, the legal drafters should provide a possibility for litigants, whose constitutional rights have been negatively affected by past judgements of the Constitutional Tribunal involving "persons not entitled to adjudicate" to have their individual judicial rulings or administrative decisions being reconsidered. Several modalities for doing so could be considered. If feasible, such rulings or decisions could be declared null and void by the Constitutional Tribunal if this would be the**

126 See Judgments Delivered by Irregular Judicial Formations of the Polish Constitutional Court, Helsinki Foundation for Human Rights, July 2023, pp. 22-23.

logical consequence of the new judgment. Alternatively, for a certain, reasonable, period of time, the individuals could be offered the possibility to have their individual case re-examined or re-opened before the competent court which had applied the Tribunal's judgment. Another option could be to provide them the possibility to appeal the final judicial and administrative decisions before the competent apex court. In case of ongoing criminal proceedings for legitimate activities or exercise of fundamental freedoms based on criminal law provisions that the Constitutional Tribunal composed of "persons not entitled to adjudicate" held to be constitutional, the said proceedings should be discontinued. Certain limitations to *re-examination* could however be applied, for instance to respect the rights of *bona fide* third parties in civil cases and the principle of *no reformatio in peius* in criminal cases.[127] **The Introductory Provisions Bill should also clarify the legal and temporal effects of the said judgements or decisions**.

RECOMMENDATION I.

1. To reconsider the *ex lege* declaration that all the judgments of the Tribunal rendered with the involvement of "persons not entitled to adjudicate" are null and void.
2. To clearly and narrowly define the type of cases that could be re-opened, the conditions of admissibility and criteria for re-opening/resumption of the proceedings, as well as the entities or subjects eligible to request such resumption of proceedings, while clarifying potential legal and temporal effects of such new and initial judgements.
3. To ensure that cases which may be re-opened are adjudicated by the Constitutional Tribunal without the involvement of "persons not entitled to adjudicate", while specifying that such cases should be adjudicated within a specified timeline and granting to the Constitutional Tribunal the power to issue interim measures during that period if/as needed.
4. To provide a procedure allowing litigants with a possibility, in circumstances of a substantial and compelling nature, and in case of violation of their rights due to the past judgements of the Constitutional Tribunal involving "persons not entitled to adjudicate", for a certain, reasonable period of time, to request re-examination or re-opening of their cases before the competent court, although the rights of *bona fide* third parties in civil cases and the principle of *no reformatio in peius* in criminal cases should be respected, and clarification made with respect to the legal and temporal effects of such judgments.

8.2. Restoring the Lawful Composition of the Constitutional Tribunal

115. Article 14 of the amended Introductory Provisions Bill offers the possibility to incumbent judges of the Tribunal to voluntarily retire before the end of their term of office due to the introduction of new rules for the performance of the duties of a judge of the Tribunal during their tenure. This transitional arrangement applies only to incumbent judges elected before the entry into force of the Bill. To do so, a judge may submit a statement of intent to retire to the President of the Tribunal within one month from the entry into force of the Bill on the Constitutional Tribunal. Retirement would take effect on the first

127 i.e., that a person should not be placed in a worse position as a result of the appeal or re-opening.

day of the month following the submission of the intent to retire (Article 14 (3) of the amended Introductory Provisions Bill). Retired judges are entitled to compensation specified in Article 43 of the Bill on the Constitutional Tribunal, which includes a one-time payment equal to six months salary and an emolument equal to 75 percent their salary. Article 14 (2) of the Introductory Provisions Bill explicitly excludes "persons not entitled to adjudicate" from obtaining retirement status.

116. This transitional arrangement differs from the standard retirement provisions contemplated in the Bill on the Constitutional Tribunal. As per Articles 21 and 42 of the Bill, a judge may only prematurely terminate his/her term of office and obtain retirement status with associated benefits, in cases of permanent incapacity to perform duties due to health reasons.

117. In essence, Article 14 provides a financial incentive for legally elected incumbent judges to terminate their term of office prematurely. It must be underlined that the security of tenure of constitutional court judges is an essential guarantee of their independence and their irremovability is designed to shield the constitutional court judges from influence form the political majority of the day.[128] A new government should not be able to replace sitting judges with newly elected ones of their choice, or this would undermine the independence and integrity of the Constitutional Tribunal and public confidence in the institution. Such an exceptional early retirement scheme may be problematic if they are mandatory or when they would affect a large number of judges.[129] Regarding a similar early retirement scheme in Armenia, the Venice Commission considered that such a scheme may be acceptable "*where the early retirement scheme remains truly voluntary, i.e. excludes any undue (political or personal) pressure on the judges concerned, or when it is not designed to influence the outcome of pending cases*", although noting the risk that the "*potential simultaneous retirement of several and even as many as seven out of nine justices might hamper the effective functioning of the Court.*"[130] It is noted however that with respect to judges who may not demonstrate the highest degree of integrity and professionalism, disciplinary or accountability mechanisms – if they exist and are functional and effective – should in principle be considered.

118. Furthermore, the Introductory Provisions Bill does not explicitly address the status of persons illegally elected and appointed as a judge of the Tribunal, referred to as "persons not entitled to adjudicate". As noted above with respect to the execution of the judgment *Xero Flor w Polsce sp. z o.o. v. Poland*, the Committee of Ministers called upon Poland to *"ensure the lawful composition of the Constitutional Court, by allowing the three judges elected in October 2015 to be admitted to the bench and to serve until the end of their nine-year mandate, while also excluding from the bench judges who were irregularly elected"*.[131] While the Bill considers the judgments of the Constitutional Tribunal rendered by a bench that included "a person not entitled to adjudicate" to be null and void, thereby implying that they are not considered judges, the Bill does not explicitly address nor clarify their status or provide mechanisms for restoring the lawful composition of the Constitutional Court.

119. Irrespective of the qualification of the status of "persons not entitled to adjudicate" under the national legislation, it must be underlined that the requirement of security of tenure can only apply when the relevant appointment, nomination or election was made in

128 See e.g., *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI, on the amendments to the Judicial Code and some other Laws of Armenia*, CDL-AD(2019)024-e, para. 58.

129 *Ibid.* para. 60. See also *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, Venice Commission, CDL-AD(2017)031, paras. 44-52 and 130.

130 *Ibid.* para. 60.

131 See <https://hudoc.exec.coe.int/eng?i=004-58569>.

compliance with the Constitution and with international standards; moreover, there are exceptions to the principle of irremovability of judges when there is a pressing need – of a substantial and compelling character, for instance in cases where judicial reform are needed to ensure compliance with international human rights standards and the execution of the judgments of international/regional courts.[132] In any case, the ruling of the Constitutional Tribunal declaring unconstitutional the elections of two Constitutional Tribunal judges (case no. K 34/15) and the need to execute the judgments of the ECtHR, as outlined above, establish an obligation for Poland to rapidly restore the lawful composition of the Constitutional Court. **The Introductory Provisions Bill should be supplemented to that effect, clarifying their status and ensuring that they are no longer involved in constitutional adjudication.**

RECOMMENDATION J.

To clarify the status of the persons illegally elected as judge of the Tribunal (and their successors), and consider relevant measure to restore the lawful composition of the Constitutional Court.

8.3. Interim President of the Constitutional Tribunal

120. Article 11 of the Introductory Provisions Bill stipulates that after its entry into force, the duties of the President of the Constitutional Tribunal shall be performed by the longest-serving judge of the Tribunal, and within six months, the General Assembly of the Constitutional Tribunal shall present to the President of the Republic candidates to the positions of President and Vice-President of the Tribunal. The constitutional basis for the *ex lege* termination of the existing mandate of the President of the Constitutional Tribunal, even on an interim basis, is not evident. Article 194.1 of the Constitution provides that the General Assembly of the Tribunal proposes candidates to the President of the Republic, who appoints the President and the Vice-President, while the legislator is tasked with devising the appropriate procedures (see also Article 197 of the Constitution). In its caselaw, the ECtHR has considered it problematic for judicial independence that the president of a court was removed from office before the expiry of the term, even though remaining a judge of that court.[133] At the same time, as mentioned above, there are exceptions to the principle of irremovability if legitimate and compelling reasons can be established, although the termination of a mandate as court president must nonetheless respect the principles of legal certainty (legitimate expectations) and proportionality.[134] However, the removal of the chairperson of a constitutional court should be approached with much caution and it is also generally advisable to envisage a transitional period instead of immediately terminating the mandate of the current chairperson.[135]

121. The question arises as to whether there are, in the specific circumstances of Poland, such legitimate and compelling reasons that would justify the early, *ex lege* removal from office of the incumbent President of the Constitutional Tribunal. The election/appointment of the incumbent President of the Constitutional Tribunal as a judge

132 *Guðmundur Andri Ástráðsson v. Iceland* [GC], ECtHR, no. 26374/18, 1 December 2020, para. 240. See also *Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland*, Venice Commission, CDL-AD(2024)018-e, 8 May 2024, paras. 57-60.
133 *Baka v. Hungary*, ECtHR, no. 20261/12, 23 June 2016.
134 See e.g., Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court or Armenia, Venice Commission, CDL-AD(2020)016, para. 57.
135 *Ibid.* para. 59.

of the Constitutional Tribunal was held to be constitutional, although issues have been raised by various bodies, including the European Commission,[136] regarding some irregularities with respect to her appointment as President of the Tribunal. At the same time, the legitimacy of the Tribunal as a whole has been called into question in certain judgments of the ECtHR, which specifically referred to certain of the Tribunal's judgments as perpetuating the state of continued non-compliance with the ECHR and contesting the primacy of EU law and the binding effect of the CJEU judgments.[137] Such circumstances could potentially be considered legitimate and compelling reasons to justify departing from the principle of irremovability of the President of the Constitutional Tribunal and thereby to justify the early termination of the mandate of the President of the Constitutional Court in the particular circumstances of the Polish case. However, even if justified, her status of judge of the Constitutional Tribunal should not be affected as her initial appointment as a judge of the Constitutional Tribunal was made in accordance with applicable legislation and held constitutional by the Constitutional Tribunal (case no. K 34/15 mentioned above).

122. If *ex lege* removal is pursued, the question may be raised as to whether there should be an effective judicial remedy available, and whether the Tribunal's President should be able to bring the case before an independent and impartial tribunal 'established by law'. This also means determining whether the removed President of the Constitutional Tribunal would have an arguable claim of a right to remain in office, in light of the alleged irregularities in the modalities of appointment. In any case, the exclusion of access to a court could potentially be considered as justified in the particular circumstances since the contemplated reform pursues the legitimate aim of restoring the lawful composition of the Constitutional Tribunal.[138] As the ECtHR underlined in the case of *Gyulumyan and others v. Armenia*, "*the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary and that the power of a government to undertake reforms of the judiciary cannot be called into question, on condition that any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies*."[139] At the same time, if the principle of *ex lege* removal is retained, to prevent any risk of finding a violation of Article 6 (1) of the ECHR by the ECtHR, **it is recommended to provide an effective remedy, possibly before the lawfully composed Constitutional Tribunal, without involving "persons not entitled to adjudicate", dealing with the appeal, and providing that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality withdraws**.[140]

8.4. Chancellery of the Tribunal

123. According to Articles 13.1 and 14.2 of the Introductory Provisions Bill, the Chancellery of the Tribunal and the Office of the Legal Service shall be abolished 18 months after the Bill enters into force, and its employees will be dismissed. A new Chancellery of the Tribunal would be established (Article 13.3 of the Introductory Provisions Bill), whose new Head would seemingly have full discretion to offer employment to employees of the

136 See CJEU, pending infringement proceedings in case C-448/23.
137 See e.g., *Wałęsa v. Poland*, ECtHR, no. 50849/21, 23 November 2023, paras. 325-326, referring in particular to in particular to those judgments of 24 November 2021 (case no. K 6/21) and 10 March 2022 (case no. K 7/21), consistently attempting to undermine and prevent the execution of the Court's judgments relating to the independence of the judiciary and the defective procedure for judicial appointments; those contesting the primacy of EU law and the binding effect of the CJEU judgments (such as judgments of 14 July 2021 (case no. P 7/20) and of 7 October 2021 (case no. K 3/21)); the judgment of 22 March 2022 (no. K 7/21) to justify non-execution of ECtHR judgments.
138 See e.g., *Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland*, ODIHR, 8 April 2024, paras. 69-72. See also *Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland*, Venice Commission, CDL-AD(2024)018-e, 8 May 2024, paras. 65-71.
139 *Gyulumyan and others v. Armenia*, ECtHR, no. 25240/20, 21 November 2023.
140 See e.g., *Micallef v. Malta* [GC], ECtHR, no. 17056/06, para. 98.

current Chancellery and Office of the Legal Service (Article 14.2 of the Introductory Provisions Bill).

124. The proposed provisions in Article 14 of the Introductory Provisions Bill raise questions in light of Poland's obligations under Article 25(c) of the ICCPR, which deals with the right of equal access to public service. In order to ensure access to public service on general terms of equality, the criteria and processes for appointment, promotion, as well as suspension and dismissal must be transparent, objective and reasonable.[141] In order to avoid arbitrary and/or discriminatory treatment of employees of the current Chancellery and Office of the Legal Service, **it is recommended that the Introductory Provisions Bill is revised to incorporate transparent, objective and reasonable criteria for their employment in any new chancellery of the Constitutional Tribunal**.

9. Recommendations Related to the Process of Preparing and Adopting the Bills and Other Rule of Law Legislative Initiatives

125. The scale of the needed reform to address the systemic deficiencies of the judicial system in Poland is immense and requires a thorough and coherent policy underpinning the reform process to prevent a piecemeal and fragmented approach to legislative changes that may be detrimental to reform efforts. At the same time, given the urgency to address certain systemic dysfunctions in order not to further aggravate the situation, a sequenced approach to legislative reform could be justifiable in the circumstances, providing that it is accompanied by an in-depth reflection on a comprehensive reform of the judicial system that is prepared in a participatory and inclusive manner, including with active and meaningful involvement of representatives of the judiciary, civil society and the public, ensuring that the contemplated policy and legislative options are debated at length.[142]

126. Indeed, 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, para. 5.8).[143] Moreover, key commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, para. 18.1).[144]

127. As done in previous opinions,[145] ODIHR would like to reiterate that it is a good practice when initiating fundamental reforms of the judicial system, for the judiciary and civil society to be consulted and play an active part in the process. 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*".[146] 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

141 See M. Nowak; CCPR Commentary, 2nd ed., N.P. Engel Publishers, 2005, p. 585. See also *Rubén D. Stalla Colsta v. Uruguay*, CCPR Communication No. 198/1985, U.N. Doc. CCPR/C/OP/2 at 221 (1990), para. 10.
142 See Guidelines on Democratic Lawmaking for Better Laws, ODIHR, 2024, Principle 8.
143 See OSCE Copenhagen Document, 1990
144 See OSCE Moscow Document, 1991.
145 See e.g., Urgent Interim Opinion on the Bill Amending the Act on the National Council of the Judiciary of Poland, ODIHR, 8 April 2024.
146 See Opinion no. 18, Council of Europe, CCJE, 2015, para. 31, 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*".

issues affecting their work, to ensure that judges are not left out of the decision-making process in these fields.[147]

128. 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.[148] 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.[149] To guarantee effective participation, consultation mechanisms should allow for input at an early stage, from the initial policymaking phase and throughout the process,[150] meaning not only when the draft is being prepared but also when it is discussed before Parliament, be it during public hearings or during the meetings of the parliamentary committees. Given the sensitivity and importance of reforming the Constitutional Tribunal, it is fundamental that all voices are heard, even those that may be critical of the proposed initiatives with a view to address the issues being raised and achieve broad political consensus and public support within the country about such a reform. Ultimately, this tends to improve the implementation of laws once adopted, and enhance public trust in public institutions in general.

129. It will be useful to initiate a more in-depth reflection of the necessary changes to avoid multiple amendments to legislation with appropriate transitional period allowing for a gradual change to prevent that it is used or perceived to be used by the political majority to reform the system to its advantage.[151] This is notwithstanding potential imminent changes that may be required exceptionally. However, in all cases, respect for the principle of judicial independence should be upheld and an open, transparent, inclusive and participatory process throughout the development of policy and legislative options should be ensured, whilst these changes should be implemented in line the constitutional provisions and norms of international law.

130. It is understood that the Bills have been subject to public consultations and a number of submissions/opinions have been made by various institutional and other stakeholders, which is welcome. At the parliamentary stage, the Bills were submitted to the *Sejm* on 19 March 2024 and adopted in first reading on 26 April 2024. It is welcome that a public hearing was organized on 24 May 2024, in which 33 persons, including representatives of judicial associations, bar council and civil society organizations, were registered to participate.[152] The Bills were then approved by the *Sejm* in second and third reading on 23 and 24 July 2024, respectively, and subsequently submitted to the Senate on the same day.[153] The two Bills were immediately sent to the Legislative Committee and the Committee on Human Rights and the Rule of Law of the Senate and were considered by these committees on 30 July, before being considered by the Senate on 31 July, which adopted two resolutions with proposed amendments submitted to the *Sejm* on 2 August

147 European Charter on the Statute for Judges, European Association of Judges, Strasbourg, 8-10 July 1998, para. 1.8. See also Magna Carta of Judges, CCJE, 2010 para. 9, 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 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate, ENCJ, 2011, Recommendation 5, which states that *"[j]udiciaries and judges should be involved in the necessary reforms*".

148 See Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

149 See Guidelines on Democratic Lawmaking for Better Laws, OSCE/ODIHR, 2024, Principle 7.

150 *Ibid.* Principle 7.

151 See e.g., Opinion on three legal questions in the context of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court or Armenia, Venice Commission, CDL-AD(2020)016, para. 38.

152 See, List of persons proposed to participate in the public hearing in the Sejm - Sejm of the Republic of Poland.

153 See <Paper no. 253 - Sejm of the Republic of Poland> and <Paper no. 254 - Sejm of the Republic of Poland>.

2024.[154] The review and discussion of the Bills at the Senate therefore appears to have been rather summary, not offering opportunities for meaningful and inclusive discussion and consultation.

131. **The reform process relating to the Constitutional Tribunal and the judiciary, especially of this scope and magnitude, should be open, transparent, inclusive, and involve effective and extensive consultations, including with representatives of the judiciary, professional community of judges and of lawyers, the academia, civil society organizations and the public, allowing sufficient and adequate time for meaningful discussions at all stages of the legislative process, including before both chambers of the Parliament, and should involve a full impact assessment including of compatibility with relevant international human rights and rule of law standards, according to the principles stated above.** It would be advisable for relevant stakeholders to follow such principles in future rule of law 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]

154 See <Senate of the Republic of Poland / Work / Legislative process in the Senate / Acts passed by the Sejm / Acts passed by the Sejm> and <Senate of the Republic of Poland / Work / Legislative process in the Senate / Acts passed by the Sejm / Acts passed by the Sejm>.