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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
OF THE COUNCIL OF EUROPE
(VENICE COMMISSION)

POLAND

URGENT JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE ON THE DRAFT LAW CONCERNING THE STATUS OF JUDGES APPOINTED OR PROMOTED BETWEEN 2018 AND 2025 AND OTHER RELATED MATTERS

Issued on 27 February 2026 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure

On the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Mr Martin KUIJER (Member, Netherlands)
Ms Angelika NUSSBERGER (Member, Germany)
Mr Kaarlo TUORI (Honorary President of the Venice Commission)
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I. Introduction

1. By letter of 6 March 2025, Ms Zanda Kalniņa-Lukaševica, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission of the Council of Europe on the draft Law on "Restoring the right to an independent and impartial tribunal established by law by regulating the effects of resolutions of the National Council of the Judiciary adopted in the years 2018-2025" (hereinafter "the draft Law", CDL-REF(2026)003). Since the submission of the request for this Opinion, the draft Law was subject to several revisions within the Ministry of Justice until October 2025, when the Ministry presented the final version of the draft Law. In line with its earlier practice, the Commission decided to prepare the present Opinion jointly with the Directorate General of Human Rights and Rule of Law of the Council of Europe ("DGI"). The Commission also decided to prepare this Opinion through the urgent procedure, pursuant to Article 14a of the Commission's Revised Rules of Procedure.

2. Mr Barrett, Mr Kuijer, Ms Nussberger, and Mr Tuori acted as rapporteurs on behalf of the Venice Commission. Mr Reissner acted as a rapporteur on behalf of DGI.

3. On 8-9 January 2026, a delegation of the Commission and DGI composed of Ms Nussberger, Mr Tuori, and Mr Reissner, accompanied by Mr Pashuk from the Secretariat, travelled to Warsaw and had meetings with the Minister of Justice, the First President and judges of the Supreme Court, members of the Sejm and Senate, the Human Rights Commissioner, representatives from the President's Chancellery as well as civil society organisations and judicial associations. The Commission is grateful to Ministry of Justice for the excellent organisation of this visit.

4. This urgent Opinion was prepared in reliance on the English translation of the draft Law. The translation may not accurately reflect the original version on all points.

5. This urgent opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings held on 8-9 January 2026. In line with paragraph 10 of the Venice Commission's Protocol on the Preparation of Urgent Opinions (CDL-AD(2018)019), the draft Urgent Opinion was transmitted to the authorities of Poland on 16 February 2026 for comments. The Urgent Opinion was then issued on 27 February 2026, pursuant to the Venice Commission's Protocol on the preparation of urgent opinions. It will be submitted to the Commission for endorsement at its 146th Plenary Session (Venice, 6-7 March 2026).

II. Background

6. In 1989, the National Council of the Judiciary ("NCJ") was introduced into the Polish judicial system. According to Article 186 (1) of the Polish Constitution,[1] the function of the NCJ is to "safeguard the independence of courts and judges".

7. Following parliamentary elections in Poland in October 2015, which were won by the Law and Justice (PiS) party, a far-reaching judicial reform was initiated. These reforms also affected the NCJ, transferring the right to elect the judicial members of the NCJ from the judicial community to the Parliament. In assessing these reforms in 2017, the Venice Commission reached the conclusion that the reforms "enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law".[2]

[1] Text of the Constitution may be consulted on the official website of the Sejm: sejm.gov.pl/prawo/konst/angielski/kon1.htm

[2] Venice Commission, CDL-AD(2017)031, Poland - 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, para. 129.
See also: Venice Commission, CDL-AD(2020)017, Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, para. 61.

8. In subsequent case-law of the Court of Justice of the European Union ("CJEU")[3] and the European Court of Human Rights ("ECtHR")[4], the NCJ was deemed not to be an independent and impartial body as a result of the 2017 reforms and this had led to systemic defects in the procedure for appointment of judges.[5]

9. In view of the systemic problems leading to the violations of the European Convention on Human Rights ("ECHR"), the ECtHR and the Committee of Ministers indicated to the Polish authorities the necessity to take "rapid measures" to restore the independence of the NCJ through the introduction of legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ and "address the status of all judges appointed in the deficient procedure" and the status of "decisions adopted with their participation".[6]

A. The October 2024 Opinion

10. In 2024, the Polish Minister of Justice asked the Venice Commission to formulate the parameters with which any arrangements chosen by the Polish authorities to address the status of the Polish judges appointed in a deficient procedure would need to comply. In its Joint Opinion of 14 October 2024 ("the October 2024 Opinion"), the Venice Commission and DGI stated that any arrangement would need to fall within the following parameters:

(a) it needs to address the status of "all" judges appointed in the deficient procedure;
(b) an assessment of the effects of the deficient procedure in respect of the office holder concerned should not be conducted by a government-controlled body (and if it is not conducted by a judicial body, some form of judicial review should be available);
(c) the assessment needs to be conducted on the basis of pre-established criteria and procedures (including the elements of fair trial);
(d) the assessment and the consequences following that assessment should always be strictly in line with the principle of proportionality requiring some form of individual assessment. The Venice Commission and DGI consider that some form of assessment by reference to cohorts of appointments including, where necessary, individual circumstances of appointment or promotion, would be needed; and
(e) the mechanism needs to be suitable for a fairly rapid settlement of the issue.[7]

11. As to the possibility to challenge the validity of judicial decisions taken by judicial panels with the involvement of one or more judges appointed in the deficient procedure, the Venice Commission and DGI called for restraint in light of the principle of *res judicata* which is a central rule-of-law-principle. They recommended making it conditional in the legislation for parties to the proceedings to seek the invalidation of a judicial decision as follows:

(a) only in respect of judicial decisions against which no ordinary appeal can be lodged anymore;

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[3] CJEU, Judgment of 19 November 2019 in the case A.K. (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18, C-625/18); Grand Chamber judgment of 15 July 2021 in the case of Commission v. Poland (Disciplinary regime for judges) (C-791/19); and Grand Chamber judgment of 5 June 2023 (C-204/21).

[4] See *inter alia*:
- ECtHR, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021 (concerning appointments to the Disciplinary Chamber of the Supreme Court);
- ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021 (concerning appointments to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court);
- ECtHR, *Advance Pharma sp. z o.o v. Poland,* no. 1469/20, 3 February 2022 (concerning appointments to the Civil Chamber of the Supreme Court); and
- ECtHR, *Grzęda v. Poland,* no. 43572/18, 15 March 2022 (in which the ECtHR held that the judiciary as a result of successive judicial reforms has been exposed to interference by the executive and legislature and its independence has been substantially weakened).

[5] For more details on the assessment of these reforms by the Venice Commission, the ECtHR, the CJEU and domestic courts, see CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, paras. 11-24.

[6] ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 329.

[7] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law on European standards regulating the status of judges, para. 18.

(b) time-limits, i.e. parties have to invoke the invalidity within a given timeframe (also in view of the demands of legal certainty);
(c) only when the invalidation request is accompanied by a claim of an impact on the concrete procedure;
(d) possibly only in respect of proceedings in which the parties at the time complained about the participation of a judge who was appointed in a procedure endangering judicial independence, at least as from the ECtHR judgment in the case *Reczkowicz v. Poland*.[8]

B. Draft Law

12. In October 2025, the Ministry of Justice introduced the draft Law to the Council of Ministers. In December 2025, the Council of Ministers approved the draft Law and submitted it to the Sejm for further examination.[9] The key elements of the draft Law are as follows.

13. The draft Law provides, as a general rule, that resolutions of the NCJ concerning judicial appointments, including promotions to higher judicial positions, adopted during the relevant period are to be deprived of legal force (Article 2(1)). At the same time, this rule is subject to important exceptions. In that context, the draft Law divides the judges concerned into three groups, and determines different legal consequences to each category.

14. The first group of about 1,200 persons (referred to as "green group") consists of novice judges who applied for judicial appointments in the deficient NCJ procedure as court assessors, court clerks, assistants to judges, as well as persons exercising their right to return to the judicial office if they had been appointed before 2018. For this group, the appointment to the position of judge will be confirmed *ex lege* on the date of entry into force of the draft Law (Article 2(2)).

15. The second group of about 1,100 persons (referred to as "yellow group") includes judges transferred or promoted in the deficient NCJ procedure, but who had been appointed as judges before March 2018. These persons will return to their previous positions to which they had been correctly appointed (Article 3). However, before returning, for two years they will continue to adjudicate in their current courts on a temporary basis by way of *ex lege* secondment (Article 4). The NCJ may terminate the secondment if "it is required in order to maintain the perception of the court as an impartial and independent body" (Article 27(1)). The early termination of secondment may be appealed to the Supreme Court; the appeal does not have suspensive effect (Article 27(2)).

16. The third group (referred to as "red group") consists of judges who were appointed for the first time in the deficient NCJ procedure and had not previously held any judicial position. The group amounts to about 350 people in common courts and 80 people in the Supreme Court and Supreme Administrative Court. They will be removed from judicial office by virtue of law (Article 5). These individuals (except for persons appointed to the Supreme Court and the Supreme Administrative Court) will be able to become court clerks (Article 6). Former prosecutors can request to return to prosecutorial roles, former barristers, legal advisers, or notaries may seek reinstatement to their professions, and ex-officials in public institutions may seek reemployment in prior posts (Articles 7-9).

17. Upon entry into force of the draft Law, the Minister of Justice shall prepare the list of judges in each category and publish the register. Affected judges or court presidents can appeal the register records in the Supreme Court, which reviews correctness and resolves errors in the register. The appeal does not have suspensive effect (Articles 14 and 15).

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[8] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law on European standards regulating the status of judges, para. 45.
[9] The progress of the draft law may be consulted on the official website of the Sejm: https://legislacja.rcl.gov.pl/projekt/12403303/katalog/13164651

18. As a consequence of the transfer or removal of judges in the yellow and red groups, the positions concerned will become vacant and repeated competitions will be held to fill them. The judges affected by the draft law will become participants in these competitions by virtue of law and must compete under the same conditions as all other candidates. Prior service in the judicial posts taken on the basis of deficient NCJ resolutions will not count toward professional experience or qualifications assessment (Articles 29-31).

19. The draft Law establishes a procedure for reviewing court judgments issued by judges appointed via deficient NCJ resolutions. Parties to proceedings can request the reopening and annulment of affected judgments, provided that objections regarding the appointment were raised during the proceedings or if the matter is pending before the ECtHR. The mechanisms apply across civil, criminal, administrative, and disciplinary cases, specifying the grounds, deadlines, and procedures for such requests (Articles 33-39).

20. The draft Law provides for the abolition of the Extraordinary Review and Public Affairs Chamber in the Supreme Court (Article 51).

III. Analysis

21. In its analysis of the draft Law, the Venice Commission and DGI will focus on the most pertinent issues, notably as arising from discussions with the stakeholders. The absence of comments on certain draft provisions should not be interpreted as their tacit approval.

A. Legislative approach to the revision of judicial appointments

22. The present reform has two aims that are closely interrelated – the restoration of the rule of law, and the implementation of the judgments of the ECtHR, i.e. the fulfilment of an international obligation of Poland based on Article 46 ECHR as well as the judgments of the CJEU. The Explanatory Report expressly provides that the draft Law is intended to implement the general measures indicated in the ECtHR's pilot judgment in the case of *Wałęsa v. Poland*.[10] This international obligation includes the requirement of "rapidity" in view of the systemic and massive nature of the problem in the judiciary. In the recent decision on suspension of cases under *Wałęsa* group, the ECtHR provided a term of one year to address the systemic issues underlying the violations of the ECHR.[11] It is a general understanding that a long-lasting complicated process addressing the status of judges appointed in the deficient NCJ procedure will be detrimental to the justice system in Poland. As the Venice Commission stated in its updated Rule of Law Checklist, for the restoration of the rule of law to be effective, it is essential that the relevant issues be resolved without delay.[12]

23. In this context, the authorities have introduced the present draft Law, setting forth a statutory framework that classifies the affected judges into specific categories, each subject to differentiated legal consequences. The draft Law proceeds on the premise that the proposed legislative scheme ensures a sufficient degree of individualisation and provides proportionate responses to the structural defects identified in the legal system.

24. The Explanatory Report argues that statutory individualisation through the proposed grouping of judges is appropriate given the urgency of reform, emphasising that comprehensive individual assessment on a case-by-case basis would significantly delay the process, potentially taking ten to twelve years when judicial review of results is included. During that prolonged time, domestic courts would be staffed by judges whose status remains contested, resulting in ongoing violations of the principle of a "tribunal established by law". However, advocates for individual verification models suggested a more optimistic timeframe of approximately three years and argued that such assessments would be less intrusive than the automatic statutory measures proposed in the draft Law. While it will undoubtedly depend

[10] ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023.
[11] Press Release of the Registrar of the Court, 17 November 2025, ECHR 269 (2025).
[12] Venice Commission, The Updated Rule of Law Checklist, CDL-AD(2025)002, para. 160.

on the concrete design of the case-by-case verifications, the Venice Commission and DGI accept that the fear of long delays in restoring the rule of law are well-founded.

25. The Venice Commission and DGI observe that the ECtHR has accorded the Polish authorities a margin of appreciation in determining how best to "address" the status of judges concerned. Moreover, according to the ECtHR case law, individualisation, although generally deemed to be required, is not always indispensable at the level of each individual case and in certain instances may be done at the legislative level.[13] However, cogent reasons have to be provided for the choice of such an approach and the legislative scheme must be sufficiently narrowly tailored to address the pressing social need in a proportionate manner.[14]

26. In this regard, the October 2024 Opinion stressed that when treating this systemic problem in Poland, it is necessary to take account of the high number of judges incorrectly appointed in proportion to the overall number of judges; whatever reform is implemented, it must not jeopardise the functioning of the judicial system as such. Therefore, "some form of individual assessment" based on a grouping of similar cases may be acceptable.[15] It may likewise be acceptable for such grouping to be predetermined by the statute.

27. Therefore, the Venice Commission and DGI are of the view that the authorities' intention to address the matter with expediency through a legislative scheme is understandable and supported by cogent considerations, including: first, the structural nature of the deficiency, which affected all appointments made during the relevant period in a comparable manner; and, second, the imperative to rapidly restore the authority of the judiciary and the rule of law. In this respect, the legislative choice to organise the response through a statutory grouping of the affected judges is acceptable, and the criteria used for this grouping appear to be justified.

28. Nevertheless, certain issues concerning the specific arrangements and modalities proposed in the draft Law will be discussed below.

1. Removal and transfer by virtue of law: general considerations

29. The approach in the draft Law is based on the findings of the European courts that, where judges appointed upon a proposal of a deficient NCJ participate in the proceedings, the tribunal concerned is not "established by law". The Venice Commission and DGI noted in the October 2024 Opinion that the judgments of the ECtHR and the CJEU neither could nor did invalidate the appointments of the judges concerned.[16] But while the findings of the European Courts primarily concern the compatibility of the composition of the adjudicating body with human rights standards, they also have implications for the legal status of the judges themselves, which led the ECtHR and the Committee of Ministers to stress the need to "address" the status of those judges.

30. The most radical position would be to consider that all the appointments of judges by the President which were based on resolutions of the deficient NCJ are null and void *ab initio*, i.e. to consider those sitting on the bench as "non-judges". However, the October 2024 Opinion refuted this radical option. Such assessment is also consistent with the view of the CJEU Advocate General that the involvement of a body lacking a guarantee of independence in a procedure for the appointment of a judge does not, in itself, justify the exclusion of that judge of the ordinary courts.[17] This approach also corresponds to the reasoning in the case of

[13] ECtHR, *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, para. 125.
[14] ECtHR, *Polyakh and others v. Ukraine*, no. 58812/15 et al, 17 October 2019, paras. 292-293.
[15] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion on European standards regulating the status of judges, para. 29.
[16] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion on European standards regulating the status of judges, paras. 24, 25, 28.
[17] Advocate General's Opinion in Case C-521/21 | Rzecznik Praw Obywatelskich (Exclusion of a judge of the ordinary courts), 29 April 2025.

Manowska and others v. Poland where the ECtHR did not consider the relevant Supreme Court appointments as non-existent.[18]

31. It is therefore welcome that the Polish legislator abandons the idea of *ex tunc* effect of invalidity. The draft Law provides that the relevant NCJ resolutions "shall be deprived of legal force" (Article 2(1)) and the Explanatory Reports states that this provision is intended to have *ex nunc* effect.

32. However, the question remains whether the removal or transfer of judges on the basis of an act of Parliament is in compliance with the principle of the separation of powers and the principle of judicial irremovability as laid down not only in the Polish Constitution,[19] but also in international and European standards. In the October 2024 Opinion, the Venice Commission and DGI, when examining this issue in the context of an *ex tunc* approach, stated that declaring through a law that all the relevant appointments made by the NCJ in the particular timeframe are null and void, would represent an undue interference with the competence of the judiciary.[20]

33. In this regard, the Explanatory Report asserts that constitutional principles and safeguards do not apply to the concerned judges on the grounds that, due to the deficient NCJ, they were not appointed in compliance with the Constitution and should therefore not benefit from constitutional protections.

34. In the view of Venice Commission and DGI, it may be accepted that constitutional safeguards do not fully apply to office-holders appointed through a substantively deficient procedure. For example, this observation has been made with regard to the appointment of members of the NCJ in circumstances conflicting with constitutional principles and European standards.[21] At the same time, it should be acknowledged that the comparison between members of the NCJ and judges is not entirely equivalent, since the requirements of independence and institutional guarantees are more stringent in respect of judges. However, in cases involving the appointment of a high number of judges within a specific period, the absolute application of constitutional principles would make it impossible to repair a judicial system that has been changed in a way undermining the rule of law. In such circumstances, the relevant constitutional guarantees may need to be limited,[22] provided that appropriate procedural safeguards are ensured.

35. The Venice Commission and DGI therefore consider that in case of conflicting legal principles and values, a careful balancing is required to assess whether a pressing need of a substantial and compelling nature exists to justify a departure from the principle of irremovability of judges.[23]

36. In this regard, it should be borne in mind that the purpose of the principle of irremovability is not to confer personal entitlements or privileges on office holders, but to operate as an institutional guarantee serving to protect the underlying principle of judicial independence and the right of parties to a fair trial. What is therefore required is a balancing between two closely related considerations, both rooted in the protection of judicial independence: on the one hand, the individual guarantee of irremovability and, on the other hand, the need to restore and safeguard the independence of the judicial system as a whole. In this context, irremovability is an instrumental and, in that sense, subordinate guarantee, which may be subject to

[18] ECtHR, *Manowska and Others v. Poland,* no 51455/21 et al, 1 April 2025, para. 106.
[19] These principles are enshrined in Articles 10 and 180 of the Polish Constitution. In particular, Article 180(2) provides that removal or transfer may occur only on the basis of a relevant court decision.
[20] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion on European standards regulating the status of judges, para. 22.
[21] Venice Commission, CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, paras. 57-63.
[22] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion on European standards regulating the status of judges, para. 30.
[23] See also ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 240.

limitations where a pressing and compelling need exists to re-establish judicial independence and public confidence in the judiciary.

37. In its updated Rule of Law Checklist, the Venice Commission has stressed that when deciding on measures to restore the rule of law, it is necessary to consider the severity of flaws in the system, how long the system has been in place, and the extent to which public confidence has been undermined.[24] Taking radical measures will require particularly careful scrutiny and safeguards, such as the possibility of judicial review of any decisions affecting individual judges. Otherwise, such measures can erode legal certainty and, in this way, undermine the very objectives they seek to serve. The guiding principle applicable to all restorative measures should be to restore confidence, in the mind of a reasonable and objective observer, as to the independent functioning of the system.[25]

38. Moreover, the ECtHR has stressed that "with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out."[26] In other words, the passage of a certain period of time after an allegedly irregular judicial appointment process may in principle tip the balance in favour of "legal certainty".[27] It can also be argued that an impeccable administration of justice may gradually have the effect of validating the irregularities in the appointment procedures.[28]

39. The Venice Commission and the DGI will rely on these considerations when assessing the arrangements proposed in the draft Law in respect of the different groups of judges.

2. Green group of judges

40. The draft Law identifies certain cohorts of appointments in relation to which the effects of the draft Law in practice will be minimal. Although Article 2(1) of the draft Law states that all NCJ resolutions in respect of judicial appointments will be deprived of legal force as from the entry into force of the law, paragraph 2 then identifies significant cohorts of judges which will not be affected by this provision (i.e. court assessors, court clerks and assistants to judges, and persons exercising their right to return to the profession of judge). These exceptions will primarily concern district courts and provincial administrative courts (entry level judges) and will cover some 1,200 people (more than one third of all dossiers).

41. The reasons for the proposed treatment of this group are set out in the Explanatory Report and are essentially based on the considerations that these young professionals demonstrated a high level of substantive preparation upon admission and had no alternative means of entering the judicial profession other than accepting appointment by the deficient NCJ. The Explanatory Report acknowledges therefore that their position as judges "will be confirmed *ex lege* (…) with the effect of preventing any future challenge to their status as duly appointed judges". This approach represents a proportionate response to this large category of judges and is welcome.

3. Yellow group of judges

42. The draft Law identifies another significant cohort, comprising judges who were already in judicial office but were subsequently promoted through the deficient NCJ procedure. This group includes approximately 1,100 individuals, representing more than one third of the total.

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[24] Venice Commission, The Updated Rule of Law Checklist, CDL-AD(2025)002, para. 158.
[25] Venice Commission, The Updated Rule of Law Checklist, CDL-AD(2025)002, para. 159.
[26] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 252.
[27] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 284.
[28] Polish Commissioner of Human Rights, Opinion on the draft law on restoring the right to an independent and impartial court established by law by regulating the effects of resolutions of the National Council of the Judiciary adopted in 2018-2025 (No. UPRO2), 31 October 2025, section 1.4 (*in fine*).

43. The Explanatory Report rightly states that these office-holders were originally correctly appointed and therefore enjoy protection under Article 180 of the Polish Constitution. In respect of these judges, Article 3 of the draft Law provides for their reinstatement to the positions entrusted to them before their defective promotion (i.e. the rule of return). The immediate secondment provided for in Article 4 of the draft Law, by virtue of law, to their current posts (taken as a result of deficient NCJ procedures) for a period of two years seeks primarily to ensure the continued functioning of the courts. As a secondary effect, however, this automatic secondment also mitigates, in practice, the immediate impact of the rule of return. In addition, Article 29 of the draft Law provides that these office-holders will be admitted to the repeated competition for filling the posts which become vacant as a result of the application of the rule of return.

44. In assessing the departure from the principle of irremovability for this group of judges, it could be argued that this measure (a *de facto* suspended transfer to the previous judicial post) tries to ensure adequate response to solving a situation which in itself violates European human rights standards, Rule of Law standards and EU law. In support of this conclusion the following factors are relevant: (a) the status of the office-holder as judge is as such not affected, (b) the office-holder concerned had a choice as to whether or not to participate in the deficient procedure in order to be promoted, (c) those judges are automatically included in the repeated competition where they can legally regain the position they had acquired in a deficient procedure, (d) the continued functioning of the Polish courts should be secured during the application of the measures under the draft Law and (e) there are specific provisions concerning salaries and social security benefits and entitlements (Article 3(3) and Articles 17-23). Given the unprecedented nature of the situation and the systemic defects which the Polish authorities are required to address in order to restore the rule of law, the proposed scheme does not appear, as such, to be unacceptable.

45. However, the Venice Commission and DGI also have certain concerns about the particular arrangements in the proposed model. A first issue concerns whether the automatic transfers and secondments affecting a large number of judges are compatible with the principle of separation of powers. It appears problematic that these measures will operate directly by virtue of statute. As stressed in the 2024 Opinion, decisions on the transfer or removal of judges should not fall within the competence of Parliament.[29] This concern is particularly relevant in the Polish context, where the Constitution (Article 180(2)) expressly provides that the removal or involuntary transfer of a judge may only occur by virtue of a court judgment. The conclusiveness of measures involving the invalidation of NCJ resolutions on judicial appointments should also be assessed in light of the fact that the final decision regarding judicial appointment is taken by the President, as set out in Article 179 of the Constitution. Any statutory scheme should fall within the competences of the relevant bodies determined by the Constitution. The Commission and DGI therefore stress that disregarding the principle of separation of powers entails systemic risks, since, in a changing political context, a similar legislative approach could be used in the future by a different parliamentary majority to interfere with judicial offices, including through the simple repeal of such a legislative scheme.

46. The Commission and DGI also note that the transfers within this large group will take place without any further differentiation among the judges concerned. A number of interlocutors observed that such an undifferentiated approach does not adequately distinguish between promotions that were politically influenced and promotions that were, in substance, based on merit, notwithstanding the deficiencies of the procedure. Moreover, with the passage of time, some of the judges concerned may have demonstrated, through the years of irreproachable professional service and the successful compliance with impartiality tests applied to them in domestic proceedings, that their integrity and professional merits dispel any doubts arising from the defective appointment procedure.

[29] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion on European standards regulating the status of judges, paras.22 and 49.

47. It is true that these judges will have an opportunity to demonstrate their merits again in a repeated competition under the proposed arrangement; however, by that time, the interference will already have taken place and their professional status will already have been adversely affected.

48. In that context, it is relevant that the proposed arrangement creates broad discretion for the early termination of such automatic secondments. Under Article 27(1): the NCJ „shall" dismiss such an office-holder „if this is required in order to maintain the perception of the court as an impartial and independent body". This appears excessively vague and undermines the independent functioning of such an office-holder during the secondment. It remains unclear why ordinary mechanisms of judicial discipline would not suffice. Moreover, it is unclear how the arrangements will operate if the rule of return is obstructed by a lack of available vacancies in the receiving courts.[30]

49. The Venice Commission and DGI consider that the concerns outlined above would be largely addressed by allowing the affected judges to remain in their current positions for the duration of the competition procedure which should be concluded within a reasonably short period of time. Such an approach would better respect the principle of separation of powers and would ensure that the decisive stage of the process is based on an individualised assessment during the competition and is subject to effective judicial review (without suspensive effect). With this arrangement, the legislative approach set out in Article 2(1) of the draft Law, which provides for the invalidation of the relevant NCJ resolutions, would need to be revised accordingly.

50. The fact that these judges should remain in their positions may pose a risk of further ECHR violations during that interim period. However, first, this arrangement should be implemented within a short period of time, given the requirement of promptness in this context. Secondly, the effective domestic mechanisms such as recusals and self-recusals, if applied to well-founded cases, must be made available in order to prevent such consequences. The possibility for parties to raise such complaints at the domestic level enables national courts to address the issue at an early stage, reducing the need for international litigation. In this context, recourse to the extraordinary remedy for reopening of cases, as provided by the draft Law, should be subject to adequate conditions discussed below.

51. In the new competitions, the judges concerned would compete with other candidates, including those who may have previously declined to participate in the selections by the deficient NCJ. The existence of qualified candidates who, at the time, deliberately refused to participate in the defective competitions, thereby foregoing promotion in order to remain faithful to their professional principles and the rule of law, cannot be disregarded. These individuals have well-founded expectations that any restorative measures will take their principled position into account.

52. The new competitions would require a renewed assessment for promotion, ensuring that the post is awarded to the most qualified candidate, while clearly incorporating criteria relating to compliance with standards of judicial independence and political neutrality. These criteria would need to play a special role and should allow, where necessary, for negative conclusions to be drawn from the circumstances surrounding a candidate's earlier appointment in the deficient procedure.

53. In this context, requiring a judge in the yellow group to participate in a new competition as a condition for *retaining* their current position would constitute a permissible limitation on the scope of the principle of irremovability. Where the affected judges succeed in the new competition, the defects in their initial promotion would be remedied. Where they are unsuccessful, they would revert to their prior positions. Any decision on the outcome of the competition should be subject to review and approval by a court, which would assess the fairness of the process. The refusal by a judge to participate in the competition would lead to

[30] Compare ECtHR, *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021, paras. 20-22, 100.

a return to the previously held position. Given that technical difficulties may arise in announcing competitions for posts that are not yet actually vacant, the legislator must provide rules governing the announcement of the relevant judicial posts and the replacement of the current office-holder by the successful candidate upon completion of the competition. In conclusion, under these arrangements, any transfer of the judges concerned would not occur solely by operation of law but would be based on the outcome of the competitions.

4. Red group of judges

54. This cohort concerns persons who entered the judiciary in the deficient procedure coming from other legal professions (i.e. prosecutors, barristers, legal advisers, notaries or academics). Here the proposed consequences are more severe. Article 5 of the draft Law provides for the termination of their employment as judges. This group consists of approximately 350 persons in common courts and 80 persons in the Supreme Administrative Court and the Supreme Court, including its Chamber of Extraordinary Review and Public Affairs. The exception to the irremovability and security of tenure is based on the fact that these judges were not only promoted, but accorded the status of judges in the deficient NCJ procedure. The draft Law tries to mitigate the consequences to those judged by providing that they may apply to become court clerks, except for judges of the Supreme Court and the Supreme Administrative Court (Article 6); moreover, they may seek reinstatement as prosecutors, or request to resume their previous roles as barristers, legal advisers, notaries, or in administrative positions (Articles 7-9). However, submitting such applications does not guarantee a positive decision on their admission to those professions.

55. The Venice Commission and DGI accept that the differentiation between the yellow and the red group is based on objective grounds. Nevertheless, they consider that, in the light of the above discussion relating to the separation of powers, legal certainty, and proportionality, the approach could be adjusted in a manner broadly analogous to that proposed above for the yellow group. In particular, as regards the moment of removal from office, the judges concerned could remain in office pending the outcome of a new competition conducted in a reasonably short time. Requiring the judges concerned to participate in such a competition would constitute, in the view of the Commission and DGI, a permissible limitation on the scope of the principle of irremovability.

56. The competition would be open to other qualified candidates, including those who previously declined to participate on principled grounds, and would entail a renewed merit-based assessment. As noted above, the assessment should incorporate criteria relating to judicial independence and political neutrality allowing, where necessary, for negative conclusions to be drawn from the circumstances surrounding a candidate's earlier appointment in the deficient procedure. The outcome of the competition would determine whether the judge concerned retains the position or is to be removed from the judiciary, subject to judicial review and approval (without suspensive effect). Where a judge refuses to participate in the competition, this refusal would lead to the removal from the judiciary. In all instances therefore, any removal would not occur solely by operation of law but would be based on the outcome of the competitions. The draft Law would need to be adjusted accordingly.

57. The difference with the yellow group would lie in giving priority to the organisation of new competitions for the red group. However, as a matter of urgency, the first competitions would need to target the Supreme Court positions held by judges concerned, in view of the central role of that court in the domestic judiciary. Assigning the highest priority to the Supreme Court would be consistent with the ECtHR's findings that the effects of the reform should vary depending on the type of court and its position within the judiciary. The ECtHR has stressed that the defects at issue most adversely affect the appointments to the Supreme Court, as the "stringent standard" of independence of the Supreme Court from political authorities is a

necessary condition for its functioning in accordance with the Constitution and for exercising properly its powers.[31]

58. One further differentiation within the red group would be possible, in the opinion of the Venice Commission and DGI. The ECtHR has stressed that the most serious systemic issues in the Polish legal system had been caused by the creation and operation of the Extraordinary Review and Public Affairs Chamber of the Supreme Court: (i) it is not an independent or lawful tribunal under the Convention, but it decides on motions to exclude judges for lack of independence, even when these motions concern its own members, violating the *nemo judex in causa sua principle*; (ii) the extraordinary-appeal procedure in Poland – which is exclusive competence of this Chamber – fails fair-trial and legal certainty standards due to vague legal provisions, potential for disguised ordinary appeals, retrospective time-limits, and lack of safeguards against abuse, especially given the powers of the Prosecutor General.[32]

59. The Venice Commission and the DGI therefore are of the opinion that a different approach could be taken in respect of the judges who served or continue to serve in the Extraordinary Review and Public Affairs Chamber. As the abolition of this Chamber is an important requirement for the restoration of the rule of law, and this abolition is included in the draft law, no vacancies on this Chamber will be open and no competitions can be organised to fill in the posts which will no longer exist. In this context, the solution proposed by the draft law that mandates of judges in the red group be terminated by statute on a date set out in the statute, seems to be a proportionate measure in relation to the current and former judges of that Chamber as it will respond to the exceptional gravity of the violations of the independence of the judiciary. It is also notable that the draft law recognises the right of these judges to participate in repeated competitions for other positions that will need to be filled in the reorganised Supreme Court (Article 30(3)).

60. Moreover, it is for the Polish authorities to determine whether the above considerations concerning the Extraordinary Review and Public Affairs Chamber should also apply to judges appointed during the relevant period to the former Disciplinary Chamber of the Supreme Court given the special role of that Chamber and the actual impact it had on the independence of the judiciary in Poland in the relevant period.

61. The Venice Commission and DGI acknowledge that the above arrangements for the new competitions could be implemented once a new NCJ is elected in Spring 2026 in accordance with European standards. In this context, it is important that the draft law restoring the right of the judicial community to elect judicial members of the NCJ be adopted and that its text be consistent with the earlier recommendations of the Venice Commission and DGI.[33] The delegation of the Venice Commission and DGI was also informed that, even if the draft law on NCJ reform does not enter into force, the domestic judiciary may nevertheless be prepared to conduct the election of new NCJ members in compliance with the Constitution and European standards, ensuring that judicial members are elected by their peers with broad representation of different courts and categories of judges. These candidates would then be submitted to Parliament for formal election, as parliamentary approval remains a statutory requirement.

62. For the Venice Commission and DGI, the optimal solution would be to reach a political agreement on legislative initiatives that strengthen judicial independence and the rule of law, in order to resolve the ongoing crisis in the Polish judiciary without any further delay. Nevertheless, the described scenario of *de facto* election of judicial members by their peers could represent a step in the right direction.[34] Fair elections within the judicial community would provide a factual basis for distinguishing the status of the new NCJ from that of the current one.

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[31] ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324(a).
[32] See the characteristics of the Supreme Court's Chamber of Extraordinary Review and Public Affairs in *Wałęsa v. Poland*, no. 50849/21, paras. 239, 324 (b), (c), and (d).
[33] Venice Commission, CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland.
[34] Ibid., paras. 80 and 81.

5. Effective remedy against removal or transfer

63. In the October 2024 Opinion, the Venice Commission and DGI observed that the appointees should be given the right to seek judicial review against the invalidation of their nomination or promotion if the decision of invalidation is not taken by a judicial body. The need to quickly (re-)establish a fully functioning judiciary may justify some modifications in the application of procedural standards but not, for instance, the complete lack of some form of judicial review.[35]

64. Under the draft Law, appeals against entries in the register of affected individuals may be lodged with the Supreme Court, allowing for review of the correctness of the intended changes in the status of judges (Article 15 of the draft Law). The draft Law stipulates that the appeals to the Supreme Court should be lodged within two weeks of the announcement made by the Minister, and that lodging an appeal will not suspend the effects of the Act. In the view of the Venice Commission and DGI, the strict time-limit of two weeks is short, but such time-limit may be required in order to settle the issue fairly rapidly. The non-suspensive effect (Article 15 (5) is an acceptable solution given the circumstances.[36]

65. As regards the scope of judicial review, it does not appear that it would allow any (even limited) form of individual assessment on the necessity of the removal or transfer. The draft Law rather suggests that the review would be narrowed to the correctness of categorisation of a judge within a particular group by the Minister.

66. In the view of the Venice Commission and DGI, given the seriousness of the measures, such a remedy might be insufficient to comply with the European standards on access to a court. However, modifying the legislative arrangements in the manner outlined above – notably by shifting the moment of transfer or removal of affected judges to the outcome of the new competitions – would ensure that the decisive stage of the process, namely the decision within the selection procedure on each judge, is subject to sufficient judicial review. The modified approach would thus provide an effective remedy for the judges concerned, ensuring both the protection of their rights and the integrity of the process. If the judges of the Extraordinary Review and Public Affairs Chamber and the former Disciplinary Chamber of the Supreme Court were to be removed by operation of law, as discussed above, it would be appropriate to ensure that they are also granted access to an effective remedy (without suspensive effect) in respect of that measure. The remedy at issue should enable the affected judges to obtain an examination of their arguments against their early removal. As regards redress, compensatory relief may be sufficient in these specific circumstances, in particular since prompt access to judicial review should also be available in relation to their participation in the new competition.

B. Addressing the status of judgments

67. Chapter 4 of the draft Law deals with the possibility to challenge the validity of judicial decisions taken by judicial panels with the involvement of one or more judges appointed in the deficient procedure. The draft Law stipulates that “a party or participant in the proceedings” may request to set aside a judicial decision on the merits in a case which was “finally concluded” if (a) objections as to the correctness of the composition of the judicial panel were raised at the time, or (b) an application is pending before the ECtHR on the matter.

68. In general, the approach appears acceptable. It is a proportionate departure from the principle of *res judicata* and it takes into account the parameters formulated by the Commission and DGI in October 2024 Opinion. The possibility of review exists only in respect of judicial decisions against which no ordinary appeal can be lodged. Parties must invoke the alleged invalidity within a specified timeframe (i.e., one month, see Article 33(4)) and must

[35] Venice Commission, CDL-AD(2024)029, Poland – Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law on European standards regulating the status of judges, para. 36.
[36] See, *mutatis mutandis*, Venice Commission, CDL-AD(2024)018, Poland - Urgent Joint Opinion on the draft law amending the Law on the National Council of the Judiciary of Poland, para. 71.

have previously raised concerns regarding the participation of a judge appointed in a procedure that undermined judicial independence.

69. Given the proposed shift of the moment of removal or transfer of the affected judges to the outcome of the new competitions, the extraordinary remedy should become available from the moment when the relevant judge is removed or transferred from the office, and information on the termination of the mandate should be made public. Any subsequent judicial review of the competition results should not affect the triggering of the extraordinary remedy, since – as specified above – such review should not have suspensive effect. The fact that the extraordinary remedy may become available at different moments does not, in itself, raise concerns, in particular in view of the requirement that the competitions must be conducted promptly.

70. In addition, the draft Law does not include the requirement for a party to demonstrate that the specific proceedings were substantively affected by the involvement of one of these office-holders. This criterion would ensure that the reopening of finally determined cases is based on facts demonstrating that the underlying general and structural deficiency had a concrete and significant impact in the specific case, that is, in the terminology of the ECHR, that the party suffered a "significant disadvantage". It would also promote the efficiency of the mechanism by preventing unnecessary or unsubstantiated reopenings, encouraging a prudent approach in intervening in the domestic proceedings that have been concluded by a final decision. It is recommended that this criterion be incorporated into the proposed framework.

71. As an additional consideration, it may be necessary to clarify why, in criminal cases, the application of Article 435 of the Code of Criminal Procedure is excluded (Article 34 of the draft Law). This provision ensures that a successful appeal by one defendant benefits co-defendants in similar circumstances, and its exclusion in these review proceedings may result in conflicting judgments for co-defendants whose cases were originally examined by a panel including a deficiently appointed judge.[37]

72. Another point requiring further clarification is that the draft Law allows the public authorities to challenge final administrative court rulings on the same footing as citizens, even though public authorities are not holders of human rights. In so far as this arrangement may enable authorities to contest decisions favourable to individuals, it may impose an undue burden on citizens for errors not attributable to them. Reopening proceedings under such circumstances may therefore be unjustified.[38] These considerations do, however, not apply to litigation between two public authorities.

C. Changes to the structure of the Supreme Court

73. The draft Law implements significant restructuring of the Supreme Court, principally by abolishing the Extraordinary Review and Public Affairs Chamber (Article 51), which has been found by the ECtHR to lack the independence and impartiality required of a lawful tribunal under Article 6 of the Convention. It is welcome that the draft Law addresses the concerns about this Chamber whose extensive powers and extraordinary appeals were conflicting with the constitutional value of finality in judicial decisions and with international standards.[39]

74. As to the Supreme Court judges included in that Chamber, they will be affected by the grouping measures, notably all of them will fall in the red group; the draft Law expressly provides for the inclusion of those judges in the repeated competition to the Supreme Court,

[37] See in this regard, Polish Commissioner of Human Rights, Opinion on the draft law on restoring the right to an independent and impartial court established by law by regulating the effects of resolutions of the National Council of the Judiciary adopted in 2018-2025 (No. UPRO2), 31 October 2025, Section 2.2.
[38] See also Polish Commissioner of Human Rights, Opinion on the draft law on restoring the right to an independent and impartial court established by law by regulating the effects of resolutions of the National Council of the Judiciary adopted in 2018-2025 (No. UPRO2), 31 October 2025, Section 2.3.
[39] ECtHR, *Wałęsa v. Poland*, no. 50849/21, 23 November 2023, para. 324 (a)-(d).

even though this particular Chamber will be abolished (Article 30(3)). The proportionality of this measure for “red group” judges has been discussed above.

IV. Conclusion

75. At the request of the Parliamentary Assembly of the Council of Europe, the Venice Commission, jointly with the Directorate General of Human Rights and Rule of Law of the Council of Europe (DGI), assessed the draft Law on “Restoring the right to an independent and impartial tribunal established by law by regulating the effects of resolutions of the National Council of the Judiciary adopted in the years 2018-2025”.

76. The draft Law pursues two closely interrelated objectives. First, it seeks to restore the rule of law by addressing the status of judges deficiently appointed by the National Council of the Judiciary (NCJ) under the 2017 reforms. Second, the draft Law aims to implement the judgments of the European Court of Human Rights which emphasise the need to address rapidly both the status of these judges and the decisions adopted by them. In this complex context, the authorities have introduced the present draft Law, establishing a statutory framework that classifies the affected judges into specific categories, each subject to differentiated legal consequences. The authorities have also introduced in the draft Law a procedure for reopening cases in which affected judges have adjudicated.

77. The intention to resolve the matter expeditiously through a legislative scheme is understandable and supported by cogent considerations, including the structural nature of the deficiency and the imperative to restore promptly the authority of the judiciary and the rule of law. Given the unprecedented nature of the situation and the scale of the defects which the Polish authorities are required to address in order to restore the rule of law, the Venice Commission and DGI consider the proposed grouping and the overall legislative scheme as an adequate framework.

78. It is welcome that, in developing the present draft Law, the authorities have addressed a number of previous recommendations of the Venice Commission and DGI. In particular, the draft Law: (i) abandons the approach of *ex tunc* invalidation of judicial appointments; (ii) includes arrangements to ensure a proportionate approach in addressing different categories of judges; (iii) endorses the appointments of entry-level judges who had no other options of entering the judiciary but through the deficient NCJ; (iv) provides a certain, albeit limited, form of judicial review in the context of applying measures under the draft Law; and (v) establishes a procedure for reopening cases within the parameters defined by the Venice Commission and DGI.

79. Nevertheless, certain arrangements and modalities in the draft Law, as discussed in this Opinion, would need adjustments in the light of the principles of irremovability of judges, legal certainty and proportionality in order to better implement the earlier recommendations. In this regard, the Venice Commission and DGI make the following key recommendations:

(a) As to the judges subject to transfer or removal (yellow and red groups):

(i) judges in yellow and red groups, with possible exceptions for the judges of the Extraordinary Review and Public Affairs Chamber and the former Disciplinary Chamber of the Supreme Court, should remain in their current positions until the outcome of the relevant new competitions;

(ii) new competitions should clearly incorporate criteria assessing compliance of the competitors with the standards of judicial independence and political neutrality;

(iii) decisions related to the outcome of the competitions should be subject to review and approval by a court;

(iv) priority in the organisation of new competitions should be accorded to the red group, and particular urgency should be given to the positions in the Supreme Court.

(b) As to the procedure for reopening cases:

(i) parties should be required to demonstrate that the specific proceedings were materially affected by the involvement of a deficiently appointed judge;

(ii) further consideration should be given to whether it is justified to exclude the rule that a successful appeal of one defendant benefits the other co-defendants in the same criminal case;

(iii) further consideration should be given to whether public authorities should be allowed to challenge final administrative court rulings on the same footing as citizens.

80. The Venice Commission and DGI remain at the disposal of the Polish authorities and the Parliamentary Assembly for further assistance in this matter.