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Provisional

Committee on Legal Affairs and Human Rights

Judges in Poland and the Republic of Moldova must remain independent

Report*

Rapporteur: Mr Andrea ORLANDO, Italy, Socialists, Democrats and Greens Group

A. Draft resolution

1. The Parliamentary Assembly refers to its previous resolutions on upholding the rule of law and the situation with regard to the judiciary in the member states of the Council of Europe, in particular Resolution 1685 (2009) on "Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states", Resolution 2098 (2016) and Recommendation 2087 (2016) "Judicial corruption: urgent need to implement the Assembly's proposals" and Resolution 2188 (2017) on "New threats to the rule of law in Council of Europe member States: selected examples".

2. The Assembly reiterates that respect for the rule of law is one of the core values of the Council of Europe, is closely interlinked with democracy and respect for human rights and can only be achieved in a conducive environment. Corruption and conflicts of interest are always detrimental to its full realisation.

3. With regard to the Republic of Moldova, the Assembly is concerned about the proximity of part of the judiciary to the political authorities, which raises questions about the effectiveness of efforts to combat abuse of power and corruption.

4. As regards Poland, the Assembly notes that many judges have been subjected to various forms of harassment in recent months. In particular, disciplinary or pre-disciplinary proceedings have been brought against judges who have spoken in public about the independence of the judiciary, criticised ongoing reforms, taken part in activities to bring public attention to issues concerning the rule of law or submitted preliminary questions to the Court of Justice of the European Union (CJEU). Others have been threatened or effectively demoted. The Assembly condemns the campaign of intimidation waged by the political authorities against certain critical judges and against the justice system in general as well as the lack of protective measures for judges subject to that campaign. Such conduct is unworthy of a democracy and a law-governed State.

5. Access to justice before independent and impartial courts is one of the main indicators for assessing respect for the rule of law in a given country, as pointed out in the "Rule of Law Checklist" produced by the European Commission for Democracy through Law (Venice Commission), and which was endorsed by the Assembly in Resolution 2187 (2017). This essential right is safeguarded by Article 6§1 of the European Convention on Human Rights ("the Convention").[1] In its case law, the European Court of Human Rights ("the Court") has repeatedly emphasised that for a body to be considered as "independent" – notably of the executive and of the parties to the case – regard must be had to the manner of appointment of its members, the duration

* Draft resolution adopted by the committee on 8 December 2020.

[1] ETS No. 5.

of their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.

6. The Assembly also refers to Recommendation CM/Rec(2010)12 of the Committee of Ministers, which states that the independence of judges is an "inherent element of the rule of law, and indispensable to judges' impartiality and to the functioning of the judicial system" and that it is "a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system". Where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy. "Councils for the judiciary" seek to safeguard the independence of the judiciary and of individual judges; not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

7. The Assembly points out that these principles have been reaffirmed in the documents of specialised Council of Europe bodies such as the Venice Commission, the Group of States against Corruption (GRECO), the European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE).

8. The Assembly notes that its Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) also examines the issue of the independence of judges in Council of Europe member states in the course of its work. It refers to its most recent resolutions adopted on the basis of Monitoring Committee reports, in particular Resolution 2308 (2019) on the functioning of democratic institutions in the Republic of Moldova, and Resolution 2316 (2020) on the functioning of democratic institutions in Poland.

9. Having regard to the findings of Resolution 2308 (2019), concerning the Republic of Moldova, which is also the subject of an Assembly monitoring procedure, the Assembly is concerned that several attempts to reform the judiciary have not been successful and that corruption, including within the judiciary, remains a widespread phenomenon in this country. It takes note of the latest political changes and the political will on the part of the government to prioritise reform of the justice system, and welcomes the high-level consultations between the authorities and representatives of the Council of Europe.

10. The Assembly accordingly calls on the authorities of the Republic of Moldova to:

10.1. continue the reform of the judiciary, the Superior Council of Magistracy and the prosecution service in line with the recommendations of Council of Europe organs and bodies and in particular to finalise the adoption of the amendments to Article 122 of the Constitution;

10.2. take the necessary steps to implement the new strategy for reform of the judiciary, taking into account the Council of Europe experts' assessment; to this end, the Moldovan authorities should prioritise the issue of the evaluation of judges and prosecutors and make full use of the procedures already available for ensuring the integrity of the judiciary;

10.3. significantly step up their efforts to combat corruption among judges and prosecutors and, to this end, implement the GRECO recommendations;

10.4. continue co-operating with the Venice Commission and with the other Council of Europe organs and bodies.

11. With regard to Poland, the Assembly notes that in view of the concerns which it expressed in Resolution 2316 (2020) concerning the changes in the functioning of the justice system introduced since 2015, it has opened a monitoring procedure in respect of this country. Poland is the only European Union member State currently undergoing this procedure. The Assembly remains concerned about the events that followed the adoption of the said resolution, notably the entry into force of the law of 20 December 2019 (the so-called "repressive law" or "gag law"), new disciplinary proceedings against judges and proceedings with a view to lifting their immunity, even for things done in the performance of their judicial duties, and further cases of judges being harassed.

12. The Assembly notes that the concerns expressed in Resolution 2316 (2020) remain valid:

12.1. the “constitutional crisis” has not been resolved and the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law;

12.2. given the current composition of the National Council of the Judiciary (NCJ) and the judgment handed down by the CJEU on 19 November 2019, the NCJ can no longer be regarded as an autonomous body independent of the legislature and the executive;

12.3. the Disciplinary Chamber of the Supreme Court does not meet the requirements of independence and impartiality set out in the CJEU judgment of 19 November 2019, as the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors ; the same reasoning may be applied to the Supreme Court’s Chamber of Extraordinary Control and Public Affairs;

12.4. the powers of the Minister of Justice with respect to the appointment and dismissal of court presidents, disciplinary proceedings against judges and the internal organisation of courts, remain excessive, particularly in view of his powers as Prosecutor General.

13. The Assembly also remains concerned about the reaction of the Polish authorities to the Supreme Court resolution of 23 January 2020 and calls on the Polish authorities to fully abide by this resolution. It is concerned about the legal chaos which the “reform” of the judiciary has meant for citizens in Poland and abroad affected by the decisions of the Polish courts, whose validity has been called into question by the serious doubts over the legitimacy of the procedure for appointing certain judges, including judges of the Supreme Court and the Constitutional Court. It considers that the entry into force of the “gag law” will deter judges from exercising their rights to respect for private life and freedom of expression and association, as enshrined in Articles 8, 10 and 11 of the Convention respectively, and may prevent them from raising doubts as to whether the composition of a court might render proceedings void on grounds of nullity.

14. Accordingly, the Assembly calls on the Polish authorities to:

14.1. refrain from applying the provisions of the Law of 20 December 2019;

14.2. review the changes made to the functioning of the Constitutional Tribunal and the ordinary justice system in the light of Council of Europe standards relating to the rule of law, democracy and human rights; with regard to the changes to the ordinary justice system introduced since 2017, following the findings of the Venice Commission included in Opinion No. 977/2019 of 16 January 2020 it would be advisable to:

14.2.1. revert to the previous system of electing judicial members of the National Council of the Judiciary or adopt a reform of the justice system which would effectively ensure its autonomy from the political power;

14.2.2. review the composition, internal structure and powers of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber of the Supreme Court;

14.2.3. review the procedure for the election of the first President of the Supreme Court;

14.2.4. reinstate the powers of the assemblies of judges with respect to the appointment, promotion and dismissal of judges;

14.3. refrain from taking any legislative or administrative measures or other initiatives which might pose a risk to the rule of law and, in particular, to the independence of the judiciary;

14.4. co-operate fully with Council of Europe organs and bodies, including the Venice Commission, and with the institutions of the European Union, on issues related to reform of the judiciary;

14.5. institute a constructive and sustainable dialogue on justice reform with all stakeholders, including opposition parties, representatives of the judiciary, bar associations, civil society and academic experts.

15. The Assembly highlights and recalls the judgments handed down by the CJEU in the cases concerning the early retirement of Supreme Court judges (C-619/18) and ordinary court judges (C-192/18) and the legitimacy of the Disciplinary Chamber of the Supreme Court (C/585, C-624 and C-625/18), which have made it possible to remedy certain violations of the principles of judicial independence. In particular, it notes with satisfaction that, following the CJEU's judgment of 24 June 2019 (case C-619/18), the judges of the Supreme Court were reinstated in their posts, and calls on the authorities to comply fully and as soon as possible with the other two judgments handed down by the CJEU and with its order of 8 April 2020 (case C-791/19) on provisional measures mainly concerning the suspension of the application of the relevant provisions on the Disciplinary Chamber of the Supreme Court.

16. The Assembly refers to its Resolution 2178 (2017) on the implementation of judgments of the European Court of Human Rights and calls on Poland and the Republic of Moldova to fully implement these judgments and to give political priority to those judgments which reveal a pressing need for wide-ranging reform of the judicial system. As regards Poland, this is valid despite the progress it has realised in the implementation of the Court's judgments concerning excessive length of judicial proceedings.

17. Fully aware of the diversity of legal systems and cultures in Council of Europe member states, the Assembly calls on the Moldovan and Polish authorities to promote a political and legal culture conducive to the implementation of the rule of law and in particular to the independence of the judiciary, in law and in practice.

A. Explanatory memorandum by Mr Andrea Orlando, Rapporteur

1. Introduction

1.1. Procedure

1. Following a motion for a resolution entitled "Judges in Poland and the Republic of Moldova must remain independent",[2] tabled at its meeting in Paris on 4 March 2019, the Committee on Legal Affairs and Human Rights (the Committee) appointed me rapporteur on this subject. At its meeting in Strasbourg on 1 October 2019 the Committee considered this matter on the basis of my introductory memorandum, which was subsequently declassified,[3] and authorised me to arrange a hearing with three experts and to conduct a fact-finding visit to Poland. At its meeting in Paris on 10 December 2019, the Committee held a hearing with:

- Mr Massimo Frigo, Senior Legal Adviser, International Commission of Jurists, Geneva, Switzerland (by video conference),
- Ms Andrea Huber, Deputy Chief, Rule of Law Unit, OSCE Office for Democratic Institutions and Human Rights, Warsaw, Poland, and
- Mr Richard Barrett, member of the European Commission for Democracy through Law (Venice Commission) for Ireland.

2. As for the visit to Poland, this was scheduled for 17-18 February 2020, and the authorities had arranged high-level meetings, including with members of the lower chamber of the parliament (the Sejm) and the Senate, a Deputy Minister of Justice, members of the National Council of the Judiciary (NCJ), the First President and judges of the Supreme Court (SC) and the President of the Supreme Administrative Court (SAC). In the event, however, I had to cancel my trip to Warsaw at the last minute for health reasons. I wish to thank the Polish authorities for their invitation and the NGOs and judges' associations which sent me information. As the Covid-19 pandemic prevented me from going to Poland on another date and from organising a fact-finding visit to the Republic of Moldova, I decided to organise an exchange of views, which took place when the Committee met on 9 November 2020, by videoconference, with the participation of:

- Mr Jędrzej Kondek, member of the National Council of the Judiciary, Poland;
- Mr Dariusz Mazur, judge at the Cracow Regional Court, 3rd criminal section, spokesman for the "Themis" Association of judges, Poland;
- Ms Anna Dalkowska, Deputy Minister of Justice of Poland, and
- Mr Radu Foltea, Secretary of State at the Ministry of Justice, Republic of Moldova.

Moreover, on 1 December 2020, I took part in a videoconference organised by the head of the Polish delegation to the Assembly, Mr Arkadiusz Mularczyk (Poland, EC/DA), with the participation of representatives of the NCJ and the Constitutional Tribunal, the vice-minister of Justice, an advisor to the President of the Republic of Poland, the disciplinary prosecutor for ordinary courts and the First President and judges of the SC.

1.2. Issues at stake

3. According to the signatories of this motion for a resolution, the "independence of the judiciary is being seriously undermined in the Republic of Moldova and Poland by their current governments" and "dismantling the independence of the judiciary and manipulating its rulings for political gains bears signs of usurpation of power by legislative and executive powers". Accordingly, the Parliamentary Assembly was requested to examine this question and "make recommendations, in order to urge the governments of these two member States to restore the independence of the judiciary and constitutional order in line with their European and international obligations".

4. It should be pointed out that the Assembly has dealt with the question of the independence of the judiciary in Council of Europe member states on several occasions, particularly in Resolution 1594 (2007) on the principle of the 'Rule of Law'[4] and in Resolution 2187 (2017) on the Venice Commission's Rule of Law

[2] Doc. 14650, reference 4416 of 21 January 2019.
[3] AS/Jur (2019)37 declassified, 3 October 2019.
[4] See the report by Mr Erik Jurgens (Netherlands, SOC), former member of our Committee, Doc. 11343, 6 July 2007.

Checklist.[5] It has also adopted a series of resolutions and recommendations on strengthening the rule of law and reinforcing the independence of judges and prosecutors, particularly Resolutions 1685 (2009) on allegations of politically motivated abuses of the criminal justice system in Council of Europe member states and 2040 (2015) on "Threats to the rule of law in Council of Europe member States: asserting the Parliamentary Assembly's authority", Resolution 1703 (2010) and Recommendation 1896 (2010) on judicial corruption, Resolution 1943 (2013) and Recommendation 2019 (2013) on "Corruption as a threat to the rule of law", Resolution 2098 (2016) and Recommendation 2087 (2016) on "Judicial corruption: urgent need to implement the Assembly's proposals", and Resolution 2293 (2019) on Daphne Caruana Galizia's assassination and the rule of law in Malta and beyond: ensuring that the whole truth emerges.

5. In its resolution on this issue – Resolution 2188 (2017)[6] on "New threats to the rule of law in Council of Europe member States: selected examples" – the Assembly already expressed concern about certain developments "which put at risk the respect for the rule of law, and, in particular, the independence of the judiciary and the principle of the separation of powers" in the Republic of Moldova and Poland.[7] Having issued specific recommendations to the five states covered by this resolution, the Assembly called on all the Council of Europe member states to "promote a legal and political culture that is conducive to the implementation of the rule of law, in conformity with the underlying principles of all Council of Europe standards".

6. The Assembly's Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) also examines such questions. The Republic of Moldova is the subject of an Assembly monitoring procedure (see Resolution 1955 (2013) of 2 October 2013). On 10 September 2019, the Monitoring Committee adopted its report on the functioning of democratic institutions in that country,[8] and on 3 October 2019 the Assembly adopted Resolution 2308 (2019) on this subject.

7. As to Poland, the co-rapporteurs of the Monitoring Committee on the "Functioning of Democratic Institutions in Poland", Ms Azadeh Rojhan Gustafsson (Sweden, SOC) and Mr Pieter Omtzigt (Netherlands, EPP/CD), recently produced a report, which examines, inter alia, the most recent judicial reforms in Poland and which was adopted by the Monitoring Committee on 11 December 2019.[9] Following this report, on 28 January 2020, the Assembly adopted Resolution 2316 (2020), in which it was very critical of the reforms to the judiciary in Poland and, on the grounds that the latter were having a negative impact on the functioning of democratic institutions, it decided to open a monitoring procedure in respect of Poland until the concerns expressed by the Assembly were addressed in a satisfactory manner.[10] Accordingly, I will attempt to avoid any duplication with the work of the Monitoring Committee. However, I do feel it is my duty to highlight a number of problems regarding the functioning and independence of the judiciary in both countries.

2. Relevant Council of Europe standards

2.1. The concept of the rule of law

8. The relevant standards with regard to the independence of judges and prosecutors were already summarised by our former colleague in the Committee, Mr Bernd Fabritius (Germany, EPP/CD), in the report of September 2017 on "New threats to the rule of law in Council of Europe member States: selected examples".[11] There is a need, however, to highlight the most relevant texts in this sphere.

9. Under Article 3 of the Statute of the Council of Europe, every member state of the Council of Europe must accept the three closely linked principles of the rule of law, democracy and human rights. The rule of law ("*état de droit*" in French and "*Rechtsstaat"* in German)[12] is, or at least should be, one of the pillars of all

[5] See the report by Mr Philippe Mahoux (Belgium, SOC), former member of our Committee, Doc. 14387, 17 July 2017.
[6] Adopted on 11 October 2017 on the basis of a report by our committee (rapporteur: Mr Bernd Fabritius, Germany, EPP/CD), Doc. 14405, 25 September 2017.
[7] Paragraph 6 of the resolution.
[8] Doc. 14963, adopted by the Monitoring Committee on 10 September 2019, co-rapporteurs: Mr Egidijus Vareikis (Lithuania, EPP/CD) and Ms Maryvonne Blondin (France, SOC).
[9] Doc. 15025 of 6 January 2020 and doc. 15025 Add. of 27 January 2020 (addendum to the report).
[10] Paragraph 17 of Resolution 2316(2020).
[11] See footnote 6, section 2 of the report.
[12] Following Assembly Resolution 1594 (2007) on the principle of the Rule of Law, the Venice Commission studied this concept and published a report on the subject in 2011 – see CDL-AD(2011)003rev. "Report on the Rule of Law", Study No. 512/2009, adopted by the Venice Commission at its 86th plenary session on 25 and 26 March 2011, paragraphs 15-16 and 33. The "rule of law" stems from the English legal culture, while the French and the German terms have a continental background.

national legal systems and all international organisations,[13] although no binding text has been adopted which defines it. However, indicators making it possible to assess compliance with the rule of law in a given country were established by the Venice Commission in a document adopted in March 2016 entitled "Rule of Law Checklist".[14] According to the Venice Commission, there is a consensus on both the formal and the substantive core elements of the concepts of "rule of law", "Rechtsstaat" and "état de droit".[15] These are: (1) legality; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law. The Venice Commission specifies nonetheless that while these "ingredients" are constant, the way in which they are applied may differ from one country to another depending on the local context.[16] For its part, the European Union is still seeking to establish an effective and consistent mechanism to "discipline" states where the principle of the rule of law is at risk of being flouted.[17] On 30 September 2020 the European Commission published its 2020 rule of law Report, which presents both a synthesis of the rule of law situation in the European Union and 27 country chapters on significant developments in its member States.

2.2. Right of access to a court and independence of the judiciary

10. According to the European Court of Human Rights ("the Court"), the "rule of law" is "a concept inherent in all the articles" of the European Convention on Human Rights ("the Convention")[18] and the Court has often referred to this notion in its case law.[19] Furthermore, the right of access to an independent and impartial tribunal is specifically guaranteed by Article 6§1 of the Convention. This right is also enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") ("right to an effective remedy and to a fair trial").

11. The Court has built up an abundant body of case law on the subject of Article 6§1 of the Convention.[20] In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.[21]

12. Recently, it has delivered several judgments in which it concluded that there had been violations of Article 6§1 of the Convention because of the dismissal of judges; their implementation is still being supervised by the Committee of Ministers (see, in particular, *Oleksandr Volkov v. Ukraine,*[22] *Kulykov and Others v.*

[13] See, in particular, the Preamble to the Statute of the Council of Europe and the Preamble to the European Convention on Human Rights.
[14] This document was approved by the Committee of Ministers, the Congress of Local and Regional Authorities and the Assembly; see the report by our former Committee colleague, Mr Philippe Mahoux, and see footnote 4 and Assembly Resolution 2187 (2017).
[15] Paragraph 18 of the Rule of Law Checklist. See also paragraph 15 of that document, in which the Commission considers "that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".
[16] Paragraph 34 of the Rule of Law Checklist.
[17] European Commission, Communications of 11 March 2014, on A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, and 17 July 2019 on Strengthening the rule of law within the Union, a blueprint for action, COM(2019)343 final. See also Assembly Resolution 2273 (2019), "Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights", 9 April 2019.
[18] *Stafford v. the United Kingdom*, application no. 46295/99, judgment of 28 May 2002, paragraph 63.
[19] Through various expressions such as "the rule of law in a democratic society" or "the general requirement of respect for the rule of law"; see respectively, *Centro Europa 7 S.R.L. and di Stefano v. Italy*, application no. 38433/09, judgment of 7 June 2012, paragraph 156, and *Sylvester v. Austria*, applications no. 36812/97 and no. 40104/98, judgment of 24 April 2003, paragraph 63.
[20] See, in particular, the case-law guides on Article 6 (civil and criminal limbs) at the following address: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c= and also the factsheet on the independence of the justice system and the joint publication of the Council of Europe and the EU Agency for Fundamental Rights, Handbook on European law relating to access to justice, 2016.
[21] See, in particular, *Campbell and Fell v. the United Kingdom,* applications nos. 7819/77 and 7878/77, judgment of 28 June 2014, paragraph 78.
[22] Application no. 21722/11, judgment of 9 January 2013.

Ukraine,[23] *Báka v. Hungary*[24] and *Mitrinovski v. "the former Yugoslav Republic of Macedonia")*.[25] In addition, in March 2019, in the case of *Guðmundur Andr Ástráðsson v. Iceland*, the Court found that a breach of domestic law when appointing four judges to the new Court of Appeal of Iceland had resulted in a violation of Article 6§1 of the Convention. The Court emphasised among other things that pressure brought to bear in this procedure by the Minister of Justice, together with the failure of Parliament to vote separately on each of the candidates proposed, had meant that the balance between the executive and legislative branches had not been respected in this process.[26] This case was referred to the Grand Chamber of the Court on 9 September 2019. On 5 February 2020, the Grand Chamber held a hearing in this case and, on 1 December 2020, it delivered its judgment, finding a violation of Article 6§1 of the Convention.

13. Furthermore, the Committee of Ministers issued Recommendation CM/Rec(2010)12 on "Judges: independence, efficiency and responsibilities". This text points out that the independence of judges is "an inherent element of the rule of law, and indispensable to judges' impartiality and to the functioning of the judicial system", that it "secures for every person the right to a fair trial" and "therefore [that it] is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system". It is applicable to all persons exercising judicial functions, including those dealing with constitutional matters, and contains detailed provisions on the external and internal independence of judges, their efficiency, resources, status, duties and responsibilities, and ethics, as well as on councils for the judiciary. The recommendation reaffirms, in particular, that "the independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level" (paragraph 7 of the Appendix), and that "where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy" (paragraph 8 of the Appendix). The recommendation also deals with the role of "councils for the judiciary", which "seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system" (paragraph 26 of the Appendix). It stipulates that "not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary" (paragraph 27 of the Appendix).

14. It should also be noted that the Venice Commission has issued several opinions on bills concerning judges and prosecutors submitted to it by member states[27] and published thematic studies on the criteria guaranteeing the independence of the judiciary (see, in particular, the Report on the Independence of the Judicial System Part I: The Independence of Judges,[28] and the report on Judicial Appointments).[29]

15. The question of the independence of the judiciary was also addressed by former Secretary General of the Council of Europe Mr Thorbjørn Jagland in a report on the occasion of the Ministerial Session in Helsinki on 16 and 17 May 2019 – Ready for future challenges - Reinforcing the Council of Europe. Without mentioning specific countries, he noted that despite positive developments in some countries, "efforts to interfere with the work and composition of national judiciaries – including constitutional courts – have increased"[30] and "it appears that some political actors no longer see the separation of powers as inviolable".[31] Recently the importance of independent justice for the rule of law was discussed during a videoconference of Ministers of Justice on "Independence of Justice and the Rule of Law" held on 9 November 2020 under the Greek Chairmanship of the Council of Europe.

[23] Application no. 5114/09, judgment of 19 January 2017.
[24] Application no. 20261/12, judgment of 23 June 2016.
[25] Application no. 6899/12, judgment of 30 April 2014.
[26] Application no. 26374/18, judgment of 12 March 2019 (not final), paragraph 123.
[27] See, in particular, Republic of Moldova: draft Law on disciplinary liability of Judges of the Republic of Moldova, CDL-AD(2014)006; Law on professional integrity Testing No. 325 of 23 December 2013 (Lustration Law) CDL-REF(2014)041; Ukraine: Draft Law on the independence of judges CDL-AD(2013)034, 10 December 2013, and Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 17 June 2013.
[28] CDL-AD(2010)004, adopted at the 82nd plenary session, Venice, 12 and 13 March 2010.
[29] CDL-AD(2007)028, adopted at the 70th plenary session, Venice, 16 and 17 March 2007.
[30] P. 17 of the report.
[31] P. 18 of the report.

3. The judiciary in the Republic of Moldova

3.1. Introduction

16. The motion for a resolution states that "courts unduly influenced by Vlad Plahotniuc invalidated the democratic mayoral election in Chisinau after the victory of the opposition candidate Andrei Nastase. This sparked protests and criticism, undermining the European Union's trust in the country's intention to integrate and setting a dangerous precedent". Reference is also made to the case of Judge Domnica Manole (the current president of the Constitutional Court), who had handed down judgments which were inconvenient for the authorities; this case is said to be "a striking example of political prosecution of a judge".

17. In Resolution 2188 (2017), the Assembly noted that corruption, "which is a major challenge to the rule of law", remains a widespread phenomenon in the Republic of Moldova,[32] and called on the authorities to:

- "continue the reform of the Superior Council of Magistracy, the judiciary and the prosecution service in line with the recommendations of Council of Europe bodies";
- "considerably strengthen its efforts to combat corruption and, in particular, ensure full independence of the major institutions that are competent in this field" and;
- "refrain from taking measures which would undermine the separation of powers."[33]

18. Mr Fabritius's report, which formed the basis for this resolution, pointed out that corruption, including corruption of the judicial system, remained widespread and that the perception of the problem was high.[34] The rapporteur was concerned about the "excessive politicisation of State institutions and close links between politics and business"[35] and referred to the notion of a "captured state", which was said to be due to the concentration of powers in the hands of one businessman, Mr Vladimir Plahotniuc.[36]

19. According to Transparency International's Corruption Perception Index, in 2019 the Republic of Moldova was ranked 120th out of 180 countries in the world (down from 117th in 2018). It should also be pointed out that several of Moldova's senior civil servants were involved in the "Global Laundromat", which was the subject of a report by the Committee.[37] Fourteen judges and two prosecutors were accused of complicity in money laundering and deliberately issuing decisions contrary to the law.[38] In Resolution 2279 (2019), which is based on the report, the Assembly called on the Moldovan authorities to pursue their investigation on the subject and punish all those who have committed related offences and to "introduce provisions preventing persons charged or convicted of serious offences, including corruption and money laundering, from taking or exercising public office".[39]

20. The Monitoring Committee's latest report on the functioning of democratic institutions in the Republic of Moldova[40] examines the situation of the judiciary to a certain extent. In Resolution 2308 (2019), adopted on the basis of that report at the October 2019 part-session,[41] the Assembly pointed out that corruption remained widespread in the Republic of Moldova. It called on the authorities to implement the GRECO recommendations and to ensure that the reforms to the judicial system and prosecution office were implemented in full compliance with Council of Europe standards.

3.2. Political events

21. Although the political situation in the Republic of Moldova was analysed in detail in the Monitoring Committee report, a reminder should be given of some of the main events.

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[32] Paragraph 6 of the resolution.
[33] Paragraph 8 of the resolution.
[34] See document referred to in footnote 6, paragraph 39.
[35] Ibid.
[36] Ibid. paragraph 41.
[37] "Laundromats: responding to new challenges in the international fight against organised crime, corruption and money laundering", Doc. 14847 of 25 March 2019, Committee on Legal Affairs and Human Rights, rapporteur: Mr Mart van de Ven (Netherlands, ALDE).
[38] Ibid, paragraph 11.
[39] Paragraphs 7.2.1 and 7.2.2 of Resolution 2279 (2019), adopted on 11 April 2019.
[40] See document referred to in footnote 8.
[41] Resolution 2308 (2019) on the functioning of democratic institutions in the Republic of Moldova, adopted on 3 October 2019, paragraphs 13 and 15.

22. The most recent parliamentary elections in the Republic of Moldova were held on 24 February and resulted in a hung parliament. This led to an unprecedented political and constitutional crisis in the country following the decision of the Constitutional Court to dissolve Parliament on 7 June 2019 as it considered that the time limit to form a parliamentary majority had expired. Although, on 8 June 2019, the Socialist Party and the ACUM Bloc reached a "temporary political agreement for the de-oligarchisation of Moldova", enabling the formation of a parliamentary majority, the election of a Speaker of the Parliament and the designation of a Government, on the same day, the Constitutional Court declared these decisions unconstitutional. Furthermore, on 9 June 2019 it decided to temporarily suspend the President of the Republic, who had refused to comply with the Constitutional Court's request to dissolve Parliament and call early parliamentary elections. This resulted in a state of legal and political confusion, with two blocks trying to hold onto power. As a result, on 8 June 2019 the then Secretary General of the Council of Europe asked the Venice Commission to prepare an opinion on the subject.[42]

23. On 21 June 2019, the Venice Commission issued its opinion, in which it concluded that the Constitutional Court had not met the legal and constitutional conditions to order the dissolution of Parliament.[43] Since then, the Government has resigned and Mr Plahotniuc (who was a member of Parliament and leader of the Democratic Party) has resigned from office and left the country. Subsequently, the Constitutional Court decided to annul the controversial decisions it had made. This crisis cast a shadow over the Constitutional Court, which has long been considered a highly politicised institution.[44] At the end of June, all six judges resigned, including the President. Calls for candidates were made and as a result, new judges were appointed (two by Parliament, two by the Government and two by the Superior Council of Magistracy), though not without controversy.[45]

24. The new parliamentary coalition has agreed on an activity programme aimed at securing the de-oligarchisation and restoration of the Republic of Moldova in accordance with the Constitution, one of the priorities of which will be "releasing the state from captivity and strengthening the independence of the institutions, especially in the field of justice".[46] In August 2019, the authorities announced a new reform of the justice system, which was to substantially alter the election of the principal state prosecutor, the composition of the Supreme Court of Justice (SCJ), the Superior Council of Magistracy (SCM) and the Higher Council of Prosecutors, as well as the appraisal system for judges and prosecutors.[47] These reforms would prove to be impossible to implement, however, because Ms Sandu's government collapsed on 12 November 2019 following a motion of censure tabled by the Socialist Party and passed by Parliament. Tensions between this last party and ACUM were the result of a dispute over the appointment of the new Prosecutor General. Unconvinced about the calibre and impartiality of the candidates put to her following a procedure launched by the Minister of Justice, the Prime Minister proposed a draft law which would allow her to select the best candidates before presenting them to the Higher Council of Prosecutors for final appointment. As this draft law failed to secure the backing of the socialists, a new government was appointed on 14 November 2019, with Mr Ion Chicu as Prime Minister, who announced that justice reform would be one of the priorities of the new government. On 3 January 2020, the government submitted documents to the Council of Europe on the strategy for reform of the justice system (Strategy for ensuring the independence and integrity of the justice sector for 2020-2023), including a proposal to change the appraisal system for judges. Furthermore, a High-Level Working Group on judicial reform has been set up under the auspices of the Secretary General of the Council of Europe.

25. Following consultations between Council of Europe experts and representatives of the Moldovan authorities, on 21 January 2020 the Secretary General of the Council of Europe, Ms Marija Pejčinović Burić, made a statement on judicial reform in the Republic of Moldova.[48] She stressed the need to develop a clear strategic concept for the desired changes; this concept should be actively supported by all stakeholders, reflect the country's obligations as a Council of Europe member State and be based on a thorough needs assessment justifying and explaining legislative and policy initiatives. The Secretary General noted that the perception of corruption unfortunately remained high, including in respect of the judiciary, and called on the authorities to

[42] Statement by the Secretary General on the situation in the Republic of Moldova and the Venice Commission, 9 June 2019.
[43] "Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament", adopted by the Venice Commission at its 119th plenary session (Venice, 21 and 22 June 2019), CDL-AD(2019)012.
[44] See, in particular, the Monitoring Committee report referred to in footnote 8 above, paragraph 40.
[45] Ibid, paragraph 44, and "Moldovan Constitutional Court's new composition formed", Interfax-Ukraine, 18 August 2019.
[46] https://gov.md/en/advanced-page-type/government-activity-program.
[47] See the Monitoring Committee report referred to in footnote 8, paragraph 69, and International Commission of Jurists (ICJ): "Only an empty shell" The undelivered promise of an independent judiciary in Moldova", 13 March 2019, p. 18.
[48] DC 010(2020).

strengthen the anti-corruption framework and to implement the GRECO recommendations on preventing corruption with regard to judges and prosecutors, notably to prevent the appointment and promotion to judicial positions of candidates with integrity risks. She also called for the implementation of the recommendations contained in the opinions of the Venice Commission concerning the role and mandate of the SCM and steps to renew the judiciary or ensure its integrity. Before considering any large-scale evaluation, full use should be made of the procedures that are already available for ensuring the integrity of the judiciary, notably criminal and/or disciplinary proceedings in cases of specific misconduct involving corruption, and effectively enforcing an asset declaration scheme. Any general re-evaluation exercise for judges and prosecutors should be considered with the utmost caution in order to avoid disrupting the functioning of the judiciary and violations of Article 6 of the Convention.

26. On 15 November 2020, Maia Sandu won the second round of the presidential elections, beating the incumbent president Igor Dodon. She will take up office in December 2020. On 28 November 2020, the government approved a draft Strategy for ensuring the independence and integrity in the justice sector for 2021-2024 and the action plan for implementation. Both documents were approved by the parliament on 26 November 2020.

3.3. Issues related to the independence of the judiciary

27. According to the International Commission of Jurists (ICJ), which published a report in March 2019 following a visit to the Republic of Moldova in November 2018, the Moldovan judiciary is not yet entirely independent despite the reforms which have been carried out. This is mainly the result of a lack of political will and the attitude of the judges themselves.[49] The history of the country, which was under the yoke of the Soviet Union, where the judiciary was subject to the executive, still has a major impact on the judicial system and culture, although they are in the process of changing.

28. Between 2011 and 2017, an ambitious reform, the Justice Sector Reform Strategy, was implemented on the basis of the Association Agenda between the European Union and the Republic of Moldova of 2014. Its aim was to strengthen the independence, responsibility, impartiality, efficiency and transparency of the judiciary and much progress has been made, particularly in areas such as increases in the salaries of judges and court officials, the recording of hearings and the random allocation of cases. However, the implementation of this reform has not been equally efficient in all fields and this can be put down in particular to a lack of commitment by the Moldovan authorities. Evidence of this is provided by the low number of acquittals.[50] Public trust in the judiciary is also still very low – in 2018 81% of the population did not trust the judiciary and 75% believed it was corrupt.[51] The ICJ investigated many aspects linked to the independence of the judiciary and made several recommendations on various subjects (particularly the composition of the SCM and the procedures to appoint judges and take disciplinary measures against them).[52]

29. The Venice Commission has expressed its views on proposals for judicial reforms in the Republic of Moldova on several occasions. In October 2019 it examined a draft law on the reform of the SCJ and the Prosecutor's Office,[53] which sought to reduce the number of judges in the SCJ (from 33 to 17), to turn it into a court of cassation and to institute an extra-judicial mechanism for evaluating SCJ judges, court presidents and prosecutors. The role of the CSM would have been reduced. In its interim opinion, prepared jointly with the Council of Europe's Directorate General Human Rights and Rule of Law (DG 1), the Venice Commission acknowledged the efforts of the Moldovan authorities to reform the judiciary, but pointed out that the proposed mechanism could set a dangerous precedent, which could be used by any new government and reduce the independence of the judiciary. It therefore proposed amendments to the draft law.[54] In addition, in response to a request from the President of the Constitutional Court, it has prepared two amicus curiae briefs: one on the criminal liability of constitutional court judges[55] and one on certain provisions of the Law on the Prosecutor's Office.[56]

[49] ICJ, ibid. p. 3.
[50] In 2017, the acquittal rate was 1.65% in courts of first instance and 1.5% in appeal courts, and this was lower than the general figure for 2009, which was 2.1%; ibid., p. 6.
[51] ICJ, ibid. p. 6.
[52] Ibid, pp. 45-50.
[53] Opinion No. 966/2019, CDL-AD(2019)2020.
[54] Ibid, paragraphs 85-87.
[55] Opinion No. 967/2019, CDL-AD(2019)028, 9 December 2019.
[56] Opinion No. 972/2019, CDL-AD(2019)034, 9 December 2019.

30. On 22 January 2020, the Venice Commission, together with experts from the Council of Europe's Human Rights Directorate DG 1, issued an urgent opinion on the draft law amending Law No. 947/1996 on the CSM,[57] at the request of the Minister of Justice; however, the legislation was passed before the Venice Commission's opinion was adopted. Under this new law, the number of members of the CSM has increased from 12 to 15, adding three new members (one judge and two lay members). It now consists of seven judges (and seven substitutes) elected by the Assembly of Judges, five lay members appointed by Parliament from among law professors and three *ex officio* members (see Article 122(2) of the Constitution). In its opinion the Venice Commission welcomed these changes, stressing that they are aimed at ensuring a better representation of the lower courts. As to the election of lay members, it stressed that election by Parliament by a simple majority of MPs could be replaced by a qualified majority.[58] On 5 February 2020, the Minister of Justice asked the Venice Commission for an opinion on draft amendments to the Constitution of the Republic of Moldova. The Venice Commission, together with DG 1, gave its opinion on 19 June 2020.[59] It welcomed the proposed amendments to Article 122 of the Constitution, aimed at improving the independence, accountability and transparency of justice. The Venice Commission was pleased in particular that the number of members of the CSM (12) would be indicated in the Constitution and that the three *ex officio* members would be excluded; so half of the twelve members would be judges elected by their peers from all court levels, in line with applicable international standards. In addition, the lay members would be elected by a qualified majority (three-fifths) of MPs; however, the Venice Commission felt it would be useful for the Constitution to refer to an organic law providing for an anti-deadlock mechanism in case parliament fails to reach a qualified majority of three-fifths. It should also be specified that members of the CSM may only be revoked in exceptional circumstances, on the grounds of serious disciplinary sanctions or final criminal convictions, or of objective impossibility to exercise their functions (whereas the proposed amendment states that members of the CSM cannot be revoked). The Venice Commission also suggested postponing the taking of office of four new lay members of the CSM elected in March 2020 by a majority of MPs of the parties in power (two of whom were elected to fill vacant posts and the other two to fill newly created posts) until after the constitutional amendments had been adopted.[60]

31. The government subsequently submitted the draft amendments to the Constitutional Court, which rejected them on 22 September 2020, considering them incompatible with the Constitution. After consulting the Council of Europe's High-Level Working Group, on 30 September 2020 the government adopted modified draft amendments and submitted them to the Constitutional Court.

32. Moldova's judicial reforms have also been examined by GRECO in its last two compliance reports, published on 24 July 2019 (adopted on 7 December 2018)[61] and 13 October 2020 (adopted on 25 September 2020).[62] In this last report GRECO once again found that only four of the eighteen recommendations contained in the 2016 Fourth Round Evaluation Report had been implemented. Of the remaining recommendations ten have now been partly implemented and four have not been implemented. So the current low level of compliance with the recommendations is "globally unsatisfactory".[63]

33. Where judges are concerned the relevant GRECO recommendations (recommendations iv, vii, viii, ix, x and xiii) have been partly implemented. GRECO welcomed the fact that the draft law providing for a general vetting of judges and criticised by the Venice Commission (see above) had been abandoned. According to the group of experts, such large-scale evaluations can only be seen as an exceptional measure, and would not be compatible or proportionate with the requirement to check the integrity of judges before appointment, without creating large risks in respect of the independence of the judiciary.[64] While the SCM has taken measures to review the regulatory framework concerning the competitions for judicial positions and the promotion and transfer of judges, the testing of the integrity of candidate judges during the selection process does not appear

[57] Opinion No. 976/2019, CDL-PI(2020)001. Adopted by the Venice Commission on 18 June 2020, by a written procedure replacing the 123rd plenary session in Venice because of the Covid-19 pandemic; see CDL-AD(2020)015, 19 June 2020.
[58] Ibid, paragraph 34.
[59] Opinion no. 983/2020, CDL-AD(2020)007, adopted on 19 June 2020 by a written procedure replacing the 123rd Plenary Session, see in particular the conclusions in paragraphs 42-46.
[60] In this connection the President of the Constitutional Tribunal asked the Venice Commission for an *amicus curiae* brief to answer three legal questions concerning the mandate of members of constitutional bodies. The Venice Commission, together with DG 1, issued its opinion on 16 November 2020, (no. 1003/2020, CD-PI(2020)014, in English only).
[61] GRECO, Fourth Evaluation Round. Prevention of corruption in respect of members of parliament, judges and prosecutors. Compliance Report. Republic of Moldova, GrecoRC4(2018)10.
[62] GRECO, Fourth Evaluation Round. Prevention of corruption in respect of members of parliament, judges and prosecutors. Compliance Report. Republic of Moldova, GrecoRC4(2020)9.
[63] Ibid, paragraph 111.
[64] Ibid, paragraph 65 and 110.

to be adequately regulated[65] (recommendation vii). GRECO further noted that draft legislation comprising amendments to the Constitution abolishing the 5-year probation period for judges had not been approved following the Constitutional Court's opinion of 22 September 2020.[66] As regards the legal and operational framework for the disciplinary liability of judges (recommendation xiii), it noted that the system governing that liability and disciplinary inspection, as revised in 2018, has become operational and that the decisions on disciplinary matters are apparently public. However, it could not conclude that the Disciplinary Board's decisions are duly justified. [67]

34. GRECO has on several occasions criticised the fact that the Minister of Justice and the Prosecutor are still *ex officio* members of the CSM.[68] Noting that the draft law containing constitutional amendments to this effect was not adopted, it regrets the current composition of the CSM resulting from the rushed adoption of the amendments to the law on the CSM of December 2019. It sees the new regulatory framework for the selection of CSM members as a positive development, however, but regrets that the new regulation does not provide for criteria for assessing the integrity and reputation of candidates. [69]

35. As regards prosecutors, most of the recommendations have been partly implemented (xiv, xv and xvii). In spite of a legislative amendment providing for an increase in the number of members of the Superior Council of Prosecutors, the Minister of Justice and the President of the CSM continue to be *ex officio* members of that body, contrary to what is required in the GRECO s.[70] Written guidance to the Code of Ethics for prosecutors still remains to be elaborated, adopted and communicated to all prosecutors, and a system of confidential counselling set in place.[71] Lastly, GRECO notes that no progress has been made on the legal and operational framework for the disciplinary liability of prosecutors and that its recommendation on this matter has not been implemented (xviii).[72]

4. Changes in the functioning of the judiciary in Poland

4.1. Introduction

36. According to the authors of the motion for a resolution, "in Poland, courts remain the last resort for numerous prosecuted civil rights activists" and "'disobedient judges, such as Igor Tuleya, Wojciech Łączewski, Dominik Czeszkiewicz and Waldemar Żurek face disciplinary consequences from court newly appointed presidents". In addition, "the government is forcing Supreme Court judges to retire and appointing new, obedient ones. The newly adopted act undermines the independence of this authority in the face of the upcoming elections. This creates the possibility for the government not only to act arbitrarily but even to distort the election results".

37. In Resolution 2188 (2017), the Assembly already expressed concerns about "tendencies to limit the independence of the judiciary though attempts to politicise the judicial councils and the courts" and mass attempts to dismiss judges and prosecutors.[73] It called on the Polish authorities to:

- "refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary";
- "ensure that the justice reform which is now under way will be compliant with Council of Europe standards on the rule of law, democracy and human rights", and
- "fully co-operate with the Venice Commission and implement its recommendations, especially those with respect to the composition and the functioning of the Constitutional Court."

38. In his September 2017 report, our former committee colleague, Mr Fabritius (Germany/EPP), voiced concerns about the controversial reforms of the Polish judiciary threatening to compromise the existence of the rule of law and initiated by the Law and Justice (*Prawo i Sprawiedliwość*) Party, which had won an absolute

[65] Ibidem.
[66] Ibid, paragraph 66.
[67] Ibid, paragraph 81.
[68] GrecoRC4(2018)10, paragraphs 80 and 81.
[69] GrecoRC4(2020)9, paragraph 49.
[70] Ibid, paragraph 93.
[71] Ibid, paragraphs 99 and 100.
[72] Ibid, paragraph 106.
[73] Paragraph 6 of the resolution.

majority in Parliament (in the Sejm and in the Senate) in the parliamentary elections in October 2015.[74] These reforms concerned the Constitutional Tribunal (CT), the Supreme Court (SC), the ordinary courts and the National Council of the Judiciary (NCJ). In Resolution 2188 (2017) the Assembly asked the Venice Commission for an opinion on the compatibility with the Council of Europe's standards of the Law of 12 July 2017 on the organisation of ordinary courts and of the two draft laws amending the laws on the NCJ and the Supreme Court. In December 2017, the Venice Commission concluded that "the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, 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 judicial independence as a key element of the rule of law."[75] It should be noted that in 2016 the Sejm passed a law on the public prosecutor's office,[76] which merged the function of Minister of Justice and that of Prosecutor General and increased the latter's powers in relation to the public prosecutor's office. This legislation was also criticised by the Venice Commission, which concluded that "this merger falls short of international standards as to the appointment of the Prosecutor General and to his/her qualifications" and "creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law".[77]

39. Other Council of Europe bodies, including the Commissioner for Human Rights,[78] GRECO[79] and the Consultative Council of European Judges,[80] as well as the UN Special Rapporteur[81] have voiced very strong criticism of the reforms. Moreover, as Poland is a member of the European Union, on 20 December 2017 the European Commission concluded that "there is a clear risk of a serious breach of the rule of law in Poland"[82] and asked the Council of the European Union to find the same on the basis of Article 7, paragraph 1, of the Treaty on European Union (TEU). The European Commission has also initiated four infringement procedures, two of which have already come before the Court of Justice of the European Union (CJEU). Below, I will seek briefly to present the main problems raised by the latest reforms of the Polish justice system, bearing in mind the work already carried out by the rapporteurs of the Monitoring Committee.

4.2. The Constitutional Tribunal

40. The problems concerning compliance with the rule of law in Poland began with the "constitutional crisis" in 2015.[83] In November 2015, following the parliamentary elections, the Law and Justice Party challenged the election of five (out of 15) Constitutional Tribunal judges by the previous Sejm (the "October judges") based on a new law on the Constitutional Tribunal of 25 June 2015 passed by the former parliamentary majority led by the Civic Platform (*Platforma Obywatelska,* PO). Between November and December 2015, the Sejm amended the legislation on the Constitutional Tribunal twice.[84] In March and October 2016, the Venice Commission issued opinions on the successive legislative amendments passed by the Sejm,[85] but its recommendations were not fully followed by the latter. A great deal is at stake here, and the Venice Commission noted that the legislation of 22 December 2015 on the CT would have endangered "not only the rule of law, but also the functioning of the democratic system" and that "the effect of [the improvements brought about by the Act on the Constitutional Tribunal of 22 July 2016] is very limited, since numerous other provisions of the adopted Act would considerably delay and obstruct the work of the CT and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning";[86]

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[74] See footnote 6 above, section 3.5 of the report.
[75] Opinion No. 904/2017, CDL-AD(2017)031, 11 December 2017, paragraph 129.
[76] Law of 28 January 2016 on the Public Prosecutor's Office (*Prawo o prokuraturze*).
[77] Opinion No. 892/2017, CDL-AD(2017)028, 11 December 2017, see in particular paragraphs 109-116.
[78] Report by the Commissioner on Poland following her visit to the country in March 2019, CommDH(2019)17, 28 June 2019, and her Human Rights Comment, "The independence of judges and the judiciary under threat" of 3 September 2019.
[79] Ad hoc report on Poland (Article 34), Greco-AdHoc(2018)1, published on 29 March 2018, and the Addendum to the Fourth Round Evaluation report on Poland (Article 34), Greco-AdHocRep(2018)3, 22 June 2018, and the Fifth Round Evaluation Report, GrecoEval5Rep(2018)1, 28 January 2019.
[80] For the opinions and statements of its Bureau, see: https://www.coe.int/en/web/ccje/status-and-situation-of-judges-in-member-states.
[81] UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1, 5 April 2018.
[82] https://europa.eu/rapid/press-release_IP-17-5367_en.htm.
[83] For more details, see the report by the Monitoring Committee, Doc. 15025, footnote 9, sub-section 3.1, and the report by our committee on the "Venice Commission's Rule of Law Checklist", footnote 5, sub-section 4.1.
[84] Amendments of 19 November and 22 December 2016.
[85] Venice Commission, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, adopted at its 106th Plenary Session, 11-12 March 2016, CDL-AD(2016)001, paragraph 137.
[86] Venice Commission, *Poland – Opinion on the Act on the Constitutional Tribunal*, adopted at its 108th session, 14-15 October 2016, CDL-AD(2016)026, paragraph 123.

in also referring to other developments, the Venice Commission concluded that Parliament and the government had "obstructed the Constitutional Court, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights".[87]

41. The election of the five "October judges" was invalidated by the Sejm and they were replaced by judges elected by the new Sejm (the "December judges"). In spite of a ruling by the CT annulling the election of only two "October judges",[88] the other three "October judges" were not allowed to take up their duties, in particular because the President of the Republic refused to take their oaths, and the three "December judges" elected to replace them were allowed to adjudicate in December 2016 by the new President of the Constitutional Court, Ms Julia Przyłębska (whose election had been boycotted by seven judges). In the meantime, in November and December 2016, the Sejm passed new legislation concerning the Constitutional Court[89] (which has not been assessed by the Venice Commission). At present, the Constitutional Tribunal comprises one judge elected by the previous Sejm and fourteen[90] elected by the 8th Sejm (2015 – 2019) and the 9th Sejm (following the October 2019 elections), including three "December judges" and two judges elected following the death of two other "December judges".[91] This situation raises doubts about the validity of the Constitutional Court's judgments and hence also legal certainty. A case on the matter has recently been communicated to the Polish Government by the European Court of Human Rights under Article 6§1 of the Convention. In giving notice, the Court put the following question to the government: "Was the bench of the Constitutional Court, which included Judge M.M. and dealt with the applicant company's constitutional complaint, a 'tribunal established by law' as required by Article 6 §1 of the Convention, having regard to the applicant company's arguments regarding the validity of the election of Judge M.M.?", [92] the judge in question being one of the "December judges" sitting on the post of "an October judge", whose election was not ruled unconstitutional by the Constitutional Court. The appointment to the Constitutional Tribunal in December 2019 of two new judges – Ms Krystyna Pawlowicz and Mr Stanislaw Piotrowicz, both former MPs closely involved in the drafting of the controversial legislation on justice reform – was widely criticised.

42. It should be noted that the Polish Constitution of 1997[93] (Article 194, paragraph 1) provides that the judges of the CT are elected by the Sejm by a simple majority, which may create a risk of politicisation of the elections. The Venice Commission has already noted this problem and recommended that the Constitution be amended.[94]

43. According to the co-rapporteurs of the Monitoring Committee, the "constitutional crisis" has not yet been resolved; the CT "seems to have been firmly brought under the control of the ruling authorities", rendering it impotent "as an impartial and independent arbiter of constitutionality and rule of law in Poland" and its decisions are enforced in a selective and arbitrary manner.[95] According to Polish constitutional law moreover, ordinary court judges can rule on the constitutionality of legislative acts in individual cases. While this makes continued verification of the constitutionality of laws possible to some extent and increases the importance of the SC, it also creates tensions between the courts and the executive, which is increasingly opposed to such reviews.[96] In Resolution 2316 (2020), the Assembly expressed concern about the "constitutional crisis" and "the potential impact of the Constitutional Court's apparent illegal composition on Poland's obligations under the European Convention of Human Rights",[97] even though the Court has yet to rule on this issue.

[87] Ibid, paragraph 128.
[88] Judgment of 3 December 2015, case no. K 34/15.
[89] Two laws of 30 November 2016 (on the status of the judges of the Constitutional Tribunal and on the organisation of and procedure before the Constitutional Court) and a law of 13 December 2016 setting out transitional provisions.
[90] The fourteenth judge, Grzegorz Jędrejek, died on 19 January 2020 and has not yet been replaced. The Constitutional Tribunal thus currently comprises 14 judges, instead of 15 (as at 19 February 2020).
[91] Two "December judges" – Lech Morawski and Henrych Cioch – have died. In the case of the three "December judges" currently sitting on the Constitutional Court, the election of two of them (the President, Ms Przyłębska, and Mr Piotr Pszczółkowski) was declared constitutional by judgments of the Constitutional Tribunal in December 2015.
[92] *Xero Flor w Polsce Sp. z o.o. v. Poland*, Application No. 4907/18, communicated on 11 September 2019.
[93] See The Constitution of the Republic of Poland, 2 April 1997.
[94] CDL-AD(2016)001, see footnote 85, above, paragraph 140.
[95] Monitoring Committee, Doc. 15052, *op. cit.*, paragraph 42.
[96] Ibid., paragraph 44.
[97] Resolution 2316 (2020), paragraph 6.

4.3. National Council of the Judiciary

44. On 8 December 2017, the Sejm passed a law amending the law on the National Council of the Judiciary,[98] which came into force on 17 January 2018.[99] It provided that the 15 judges out of the 25 members of the National Council of the Judiciary (whose responsibilities include the appointment of judges) would no longer be elected by judges but by the Sejm and that the newly elected members would immediately replace those elected under the old legislation. It was criticised nationally and internationally, as it was held to be in breach of the Constitution, Article 187§1 of which provides that 15 members (out of 25) are to be chosen from amongst the judges of the SC, ordinary courts, administrative courts and military courts, but does not specify how these judicial members are to be elected.[100] On 6 March 2018 the Sejm elected fifteen judges as new members of the NCJ.

45. In its opinion on the draft version of the law, the Venice Commission concluded that the election of the "judicial members" of the NCJ by Parliament, in conjunction with the immediate replacement of the members currently sitting, would "lead to a far-reaching politicisation of this body". It recommended that judicial members be elected by their peers, as provided for in the previous version of the law.[101] The Venice Commission likewise criticised the early termination of the mandates of all judicial members of the National Council of the Judiciary following the election of new members.[102]

46. According to the Law on the NCJ, as amended, a judicial member may be nominated by a group of 2,000 citizens or by 25 other judges (Article 11 (a) paragraph 2); the law does not indicate the number of judicial members who should have the backing of their peers. In practice, this election has given rise to several controversies in view of the secrecy surrounding the support given to the judicial members who were ultimately elected by the Sejm to sit on the NCJ. In particular, following a judgment handed down by the SAC on 28 June 2019 the Sejm Chancellery was forced to publish the lists of judges (but not the lists of citizens) who backed candidates for seats on the NCJ, under the provisions on access to public information. The lists in question did not appear on the Sejm's website until 14 February 2020. According to the judges' associations IUSTITIA and THEMIS, it will be observed that the majority of judges elected to the NCJ were backed by judges who work in the Ministry of Justice, or have recently been promoted or transferred to more prestigious positions.[103] According to these associations, one of the members of the NCJ did not even get the required number of signatures and some of its members are said to have orchestrated a media campaign against the judges in the Ministry of Justice (see below). The new NCJ is said to be loyal to the party in power, promoting judges loyal to the party instead of those with the best appraisals.

47. According to the authorities, the reform of the NCJ increases the democratic legitimacy of its judicial members and lends its work more transparency. Compared with the different European countries which have adopted more or less politicised models of membership for their judicial councils, the new NCJ provides good representation of the members of the judiciary in the process for appointing new judges. The 15 members who were elected by the Sejm are professional judges, so there should be no reason to question their independence.

48. On 17 September 2018 the European Network of Councils for the Judiciary (ENCJ), a network of the judicial councils of the member States of the European Union, suspended the NCJ's membership, considering that it did not meet the criterion of independence from the legislative and executive branches. In April 2020 it proposed excluding it from the network.

49. In July 2019 the European Court of Human Rights gave notice to the Polish Government of the case of *Grzęda v. Poland*, concerning the early termination of the mandate of a judge on the NCJ following the entry into force of the new law, referring to Articles 6§1 and 13 (right to an effective remedy) of the Convention.[104]

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[98] An initial version of the legislation was passed on 12 July 2017, but the President of the Republic vetoed it and presented a new bill in September 2017.
[99] It was subsequently amended in 2018 to align it with the amendments to the Law on the Organisation of Ordinary Courts.
[100] Apart from the 15 judicial members, the National Council of the Judiciary comprises the First President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice, a member appointed by the President of the Republic and four members appointed by the Sejm and two by the Senate. For further details, see the report by the Monitoring Committee, Doc. 15025, *op. cit*., sub-section 3.3.
[101] CDL-AD(2017)031, *op. cit.*, paragraph 130.
[102] Ibid., paragraphs 28-31.
[103] https://www.iustitia.pl/en/activity/informations/3709-the-spokesman-for-national-council-of-the-judiciary-ncj-managed-to-gather-88-per-cent-of-his-signatures-in-the-ministry-of-justice-oko-press
[104] Application No. 43572/18, communicated on 9 July 2019.

In May 2020 it communicated another application, concerning the early termination of the mandate of Judge Waldemar Żurek, spokesman for the former NCJ, referring to Articles 6§1, 10 and 13 of the Convention,[105] as well as four other applications concerning the procedure for appointing judges (covering not only the system in use following the reform of 2017 but also the laws in force prior to that).[106]

50. In Resolution 2316 (2020) the Assembly expressed concern about the current composition of the NCJ, taking the view that it "can no longer be seen as an independent self-governing body of the judiciary" and urged the authorities to reinstate the former system, whereby judicial members of the National Council of the Judiciary were elected directly, by their peers.[107]

4.4. The Supreme Court

51. On 8 December 2017, the Sejm passed a new law on the SC, which came into force in April and June 2018.[108] In particular, it lowered the retirement age for SC judges from 70 to 65 years, which led to the automatic departure of 27 judges (out of 74, or over a third), including the First President of the SC. The law provided that the judges could remain in post if they had made a declaration to that effect to the President of the Republic and on condition that he had accepted it. It also introduced two new chambers: a disciplinary chamber and an Extraordinary Control and Public Affairs Chamber (whose members were to be elected by the National Council of the Judiciary and the lay judges by the Senate). They were effectively placed above those other chambers of the SC. The Disciplinary Chamber, which was granted a degree of autonomy relative to the other chambers, hears disciplinary cases involving judges while the Extraordinary Control and Public Affairs Chamber deals with electoral disputes and extraordinary appeals, lodged under the law of 8 December 2017, which have sparked controversy in the light of the principle of legal certainty.[109] These changes triggered various concerns at national and international level, including on the part of the Venice Commission, which concluded that "the early removal of a large number of justices of the Supreme Court […] violates their individual rights and jeopardises the independence of the judiciary as a whole" and that "the President of the Republic, as an elected politician, should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age"; it also found that the establishment of the new chambers was "regrettable", stating that by introducing a system of extraordinary review not only of future but also of past judgments, the proposed Extraordinary Chamber was "even worse than its Soviet predecessor".[110] In spite of the many concerns and criticisms voiced, in September 2018 the President of the Republic appointed 10 new judges to the Disciplinary Chamber and, in February 2019, the presidents of both new chambers.[111] In October 2018 and February 2019 he appointed the judges of the Extraordinary Control and Public Affairs Chamber (respectively 19 and one).

52. On 3 June 2018, the mandate of the judges who were to retire early expired. Three of them did not agree to leave and the SC subsequently applied to the CJEU for a preliminary ruling. On 24 September 2018, the European Commission also decided to refer the matter to the CJEU, on the grounds that the new legislation on the retirement of SC judges breached the principle of the irremovability and independence of judges and hence also European Union (EU) law. It also asked the CJEU to order interim measures[112] (case C-619/18), in particular to suspend the application of the national provisions on the lowering of the retirement age. By order of 17 December 2018 the CJEU granted in full the application for interim measures until the delivery of its judgment in the case, in spite of fresh legislative amendments of 21 November 2018.[113] In line with the opinion of the Advocate General, Mr Tanchev, of 11 April 2019, on 24 June 2019 the CJEU delivered its judgment, in which it concluded that the application of the provisions concerning the lowering of the retirement age of judges of the SC was not justified by a legitimate objective and undermined the principle of the irremovability of judges, that principle being essential to their independence, and was therefore contrary to EU

[105] *Żurek v. Poland*, application No. 39650/18, communicated on 14 May 2020.
[106] *Sobczyńska v. Poland*, application No. 62765/14, and three other applications, communicated on 14 May 2020.
[107] In paragraph 7.2.
[108] An initial version of the legislation was passed on 20 July 2017, but the President of the Republic vetoed it and presented a new bill in September 2017.
[109] CDL-AD(2017)031, *op.cit*., paragraphs 53-63, and paragraph 7.4. of Assembly Resolution 2316 (2020). See also the report by the Monitoring Committee, Doc. 15025, *op. cit.,* sub-section 3.5.
[110] CDL-AD(2017)031, *op.cit*., paragraphs 130 and 61.
[111] Amnesty International, Poland: free courts, free people. Judges standing for independence, 2019, pp. 9 and 27-28.
[112] European Commission, Press release, Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, 24 September 2018.
[113] https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf.

law.[114] In Resolution 2316 (2020), the Assembly expressed its satisfaction that these judges were reinstated following the judgment by the CJEU (paragraph 7.4).

53. In addition, following three requests for a preliminary ruling from the Labour and Social Insurance Chamber of the SC, the CJEU also considered the issue of whether the SC's new Disciplinary Chamber (which is competent for cases relating to the retirement of SC judges) offers sufficient guarantees of independence under EU law in view of the fact that its members were selected by the new NCJ. Advocate General Tanchev had expressed doubts in this regard.[115] On 19 November 2019, the CJEU delivered its decision, in which it examined the criteria for an independent and impartial tribunal, with reference, inter alia, to Article 6 of the Convention.[116] It noted that in a law-governed state, the independence of the judiciary must be ensured in relation to the legislature and the executive[117] and emphasised that "those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, (…) 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" and that those rules "must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned".[118]

54. In the operative provisions of the judgment, the CJEU concluded that Article 47 of the Charter and Article 9(1) of Council Directive 2000/78/EC[119] must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of Article 47 of the Charter. According to the CJEU, "that is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law".[120] Should such doubts arise, the principle of the primacy of EU law must be interpreted "as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field".[121] The CJEU thus left it to the SC to determine "in the light of all the relevant factors established before it", whether the Disciplinary Chamber met the requirements of an independent and impartial tribunal.

55. In response to this CJEU judgment and following one of the three requests for a preliminary ruling referred to above, on 5 December 2019 the Labour and Social Insurance Chamber of the SC (consisting of three judges) delivered a judgment in which it annulled a resolution of the NCJ refusing to extend the term of office of a SAC judge beyond the age of 65 years and denied the Disciplinary Chamber's request to send it the case file in question. It held that the CJEU's interpretation was binding on all courts and authorities in Poland. All courts, including the SC, are bound to consider *ex officio* whether the requirements arising from the CJEU judgment have been met in the cases before them. Accordingly, the NCJ is not an impartial body independent of the legislative and executive authorities, and the Disciplinary Chamber of the SC does not meet the requirements of independence and impartiality set out in the CJEU judgment. It cannot, therefore, be considered a court under EU and Polish law.[122]

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[114] See CJEU press releases nos. 48/19 and 81/19 respectively.
[115] See his opinion of 27 June 2019, CJEU press release, cases C-585/18, C-624/18 and C-625/18.
[116] *Case of A.K. v. the Supreme Court*, paragraphs 125-134.
[117] Ibid., paragraph 124.
[118] Ibid., paragraphs 123 and 125 respectively.
[119] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. According to Article 9, paragraph 1, "Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."
[120] Paragraph 172, sub-paragraph 2) of the judgment.
[121] Ibid.
[122] Case No. III PO 7/18, this judgment is available in English on the Supreme Court website: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=331-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach

56. Furthermore, on 23 January 2020, following a legal question from the first President of the SC at the time, the latter, comprising its three chambers - civil, criminal and labour and social insurance[123] - adopted a resolution on whether the inclusion of a judge appointed by the President of the Republic on the recommendation of the NCJ formed under the provisions of the law of 8 December 2017, in the bench of a court (ordinary, military or the SC itself) violated Article 45, paragraph 1, of the Polish Constitution,[124] Article 6, paragraph 1, of the Convention, Article 47 of the Charter and Article 19, paragraph 1, of the TEU,[125] and was liable to render criminal or civil proceedings null and void (see Articles 439 § 1 points 1 and 2 of the Code of Criminal Procedure[126] and 379 point 4 of the Code of Civil Procedure).[127] The SC found that this was indeed the case and ruled that:

1) civil and criminal proceedings shall be invalidated if the bench includes a person who was appointed as a SC judge on a proposal from the NCJ as formed pursuant to the law of December 2017 (this applies to all rulings made by judges of the Disciplinary Chamber);

2) proceedings shall likewise be invalidated if the bench includes a person who was appointed as an ordinary or military court judge on a proposal from the NCJ as formed pursuant to the law of December 2017 and defects in the appointment procedure are liable to result, in specific circumstances, in a breach of Article 45, paragraph 1, of the Polish Constitution, Article 6, paragraph 1, of the Convention and Article 47 of the Charter;

3) this interpretation does not apply to court decisions already rendered or to any which may be rendered in criminal proceedings that are already pending.

57. On the eve of the adoption of this resolution, the Speaker of the Sejm filed an application with the CT concerning a potential conflict of competence between the SC, Parliament and the President of the Republic, arguing that the SC had exceeded its powers (Case Kpt 1/20). In addition, on 24 January 2020, the Prime Minister also lodged a complaint with the CC, requesting a ruling on the lawfulness of the SC resolution of 23 January 2020 and alleging that the interpretation of law included in that resolution was unconstitutional (cases U2/20 and K5/20); similar complaints were also lodged by the NCJ and the President of the Republic (cases K3/20 and K2/20). Following the Prime Minister's complaint, on 20 April 2020 the Constitutional Tribunal delivered a judgment (U2/20) finding that the resolution of 23 January was in breach of the Polish Constitution, of Articles 2 and 4 para. 3 of the TEU (respectively on the values of the European Union and on "sincere cooperation" between the Union and its member States) and of Article 6 § 1 of the European Convention on Human Rights. In addition, acting on a complaint of the Speaker of the Sejm, on 21 April 2020 it delivered a decision stressing that the President of the Republic was the only authority empowered to appoint judges, at the recommendation of the NCJ, and that the SC had no say in the matter and had no power to interpret the provisions of the law in a way that would change the organisation of justice (Kpt 1/20).

58. According to the authorities, the SC resolution of 23 January 2019 was adopted solely by judges critical of the judicial reform, without the participation of the judges appointed by the new NCJ. In spite of the CJEU's judgment of 19 November 2019 the SC has no authority to invalidate national legal provisions incompatible with EU law, over which national constitutions take precedence.

59. In Resolution 2316 (2020), the Assembly said it was "deeply concerned" by the Polish Government's reaction to the SC resolution of 23 January 2020 and called upon the Polish authorities to fully abide by this resolution and the CJEU judgment and "to address without further delay these fundamental shortcomings in the Polish legal system" (paragraph 8).

[123] The "new" judges of the civil chamber were disqualified in this case and the judges of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber were not permitted to take part because they were directly affected by the matter.
[124] This provision guarantees the right to a fair trial.
[125] According to this provision, the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed" and "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."
[126] The appellate court is bound to set aside a court decision if a person who has no authority or capacity to make a ruling or who is subject to disqualification participated in the decision, or if the court was improperly constituted or one of its members was absent.
[127] Proceedings are null and void if the court was constituted in a manner contrary to the law or if a judge who should have been disqualified under the law sat on the bench.

60. Despite these events, the Disciplinary Chamber is still operating. On 14 January 2020, the European Commission asked the CJEU to issue an interim order demanding that the Polish Government suspend its functioning as a provisional measure (in case C-791/19, see below). Following that request, on 8 April 2020 the CJEU allowed the request for interim measures. It asked Poland to suspend the application of the national laws on the powers of the Disciplinary Chamber as the first-instance and appellate court for disciplinary cases concerning judges and to stop referring cases pending before the Disciplinary Chamber to a "judicial body which does not meet the requisite standards of independence as defined, in particular, in the judgment of 19 November 2019" (C-585/18, C-624/18 and C-625/18). That order will stand until the CJEU has delivered its final judgment in the infringement proceedings. The Disciplinary Chamber subsequently asked the Constitutional Tribunal to examine the constitutionality of the relevant provisions of the TEU on interim measures.[128] The Disciplinary Chamber has stopped examining cases concerning disciplinary proceedings; it does, however, examine requests to lift the immunity of judges (guaranteed by Article 181 of the Constitution). Also, in a decision of 23 September 2020 it declared that the CJEU's judgment of 19 November 2019 was not binding on the Polish legal system (case II DO 52/20).[129]

61. In June 2020 the European Court of Human Rights communicated three applications to the Polish Government concerning the alleged lack of impartiality and independence of the two new chambers of the Supreme Court (within the meaning of Article 6§1 of the Convention).[130]

4.5. The ordinary courts

62. On 12 July 2017 the Sejm passed a law amending the Law on the Organisation of Ordinary Courts, which also met with much criticism at national and international level. It came into force on 12 August 2017[131] and included provisions relating to the retirement of judges, disciplinary measures affecting them and the introduction of random assignment of cases. It also established the position of a disciplinary prosecutor for ordinary courts, appointed by the Minister of Justice, and allowed the latter, within six months after the law entered into force, to dismiss presidents and vice-presidents of courts without consulting the National Council of the Judiciary.[132] Between 12 August 2017 and 12 February 2018 the Minister of Justice actually dismissed 149 court presidents and vice-presidents. According to a report by the Helsinki Foundation, the reasons for these dismissals were unknown and were not based on questions of merit. Most of the dismissal notices were sent by fax.[133] The authorities play down the role of these dismissals, stressing that court presidents and vice-presidents only perform administrative management duties. In September 2019 the European Court of Human Rights communicated two cases to the Polish Government concerning the dismissal of vice-presidents of courts.[134] Following the end of the six-month transition period the Minister of Justice is required to justify dismissals on substantive grounds, as provided for in the law (Article 27 § 1), and to seek the opinion of the college of the court to whose president or vice-president the dismissal applies. If the college disagrees, the Minister must seek the opinion of the NCJ, which can decide by a two-thirds majority to block the dismissal.[135]

63. As the new law provided for a different retirement age for female judges (60 years) and male judges (65 years), on 29 July 2017 the European Commission initiated infringement proceedings against Poland.[136] It maintained that the new rules allowed the Minister of Justice to exert influence on judges, *inter alia* because of the vague criteria for the extension of their mandates, thereby undermining the principle of the irremovability of judges. While lowering the retirement age, the law allowed judges to have their mandates extended by the Minister of Justice by up to ten years for female judges and five years for male judges. In December 2017 the European Commission referred the matter to the CJEU, which held a hearing on 8 April 2019 (case C-192/18). In June 2019 Advocate General Tanchev presented his opinion, declaring the European Commission's complaints well-founded.[137]

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[128] Case P7/20.
[129] http://www.sn.pl/aktualnosci/SiteAssets/Lists/Komunikaty_o_sprawach/AllItems/Case%20II%20DO%2052-20.pdf (in English)
[130] *Reczkowicz v. Poland,* application no. 43447/19 and two other applications communicated on 5 June 2020.
[131] Published on 28 July 2017, Official Journal (*Dziennik Ustaw*) of 2017, Article 27. It was subsequently amended several times.
[132] Article 17 of the Law amending the Law on the Organisation of Ordinary Courts.
[133] Helsinki Foundation for Human Rights, "It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018", April 2018, pp. 16-17.
[134] *Broda v. Poland*, application no. 26691/18, and *Bojara v. Poland*, application no. 27367/18, communicated on 17 September 2019.
[135] For further details see the report of the Monitoring Committee, Doc. 15025, *op. cit.,* sub-section 3.4 and section 4.
[136] http://europa.eu/rapid/press-release_IP-17-2205_fr.htm.
[137] See his opinion of 20 June 2019, case C-192/18.

64. On 5 November 2019 the CJEU pronounced judgment on the case. It held that the introduction by Poland of a different retirement age for male and female judges, and the lowering of the retirement age for judges in the ordinary courts while allowing the Minister of Justice to extend the mandates of those judges, violated European Union law. According to the Court, the combined effect of lowering the retirement age and the discretionary power given to the Minister of Justice to allow judges to continue in active service was in breach of Article 19(1) TEU.138 However, following an amendment to the law, the powers of the Minister of Justice in the matter were transferred to the NCJ.

65. According to several sources, large numbers of judges and prosecutors have been subjected to various forms of harassment in recent years. Judges have been transferred to posts in moves which could actually be considered to amount to demotions. Disciplinary or pre-disciplinary ("explanatory") proceedings have been brought against judges who have spoken in public about the independence of the judiciary, criticised the reforms being made, taken part in activities to bring public attention to issues concerning the rule of law (such as organising informal discussion groups), or applied to the CJEU for preliminary rulings.[139] As indicated by Judge Mazur during the exchange of views on 9 November 2020, disciplinary proceedings have been brought against 22 judges who applied to the CJEU for preliminary rulings, or challenged the appointment of members of the NCJ or the independence of judges appointed on the recommendation of the NCJ. Judge Paweł Juszczyszyn, for example, who called for the publication of the lists of supporters of the candidates for seats on the National Council of the Judiciary, suffered a 40% decrease in salary and was suspended from duty by the Disciplinary Chamber of the SC.

66. Several judges have even been threatened. Judge Waldemar Żurek, for example, has been receiving hate messages since 2016[140] and has been the subject of at least five sets of disciplinary or "explanatory" proceedings. Concerning two of the judges mentioned in the draft resolution, the authorities point out that Judge Wojciech Łączewski gave up his post and no disciplinary proceedings are pending against Judge Dominik Czeszkiewicz.

67. In August 2019, the media revealed that the deputy Minister of Justice, Mr Łukasz Piebiak, was believed to have been behind a vast hate campaign orchestrated behind the scenes to discredit judges opposed to the reforms of the judiciary, which had been conducted on Twitter and through hundreds of anonymous e-mails and letters. Following these revelations, Mr Piebiak was forced to resign on 20 August 2019,[141] but so far he has not been held to account for his actions. A criminal investigation into the organisation of this smear campaign is pending before the Lublin district prosecutor

68. On 3 April 2019 the European Commission initiated a third infringement procedure against Poland regarding the new disciplinary regime for judges, on the grounds that it no longer offered them the necessary guarantees to protect them from political control. It stressed that Polish law allowed ordinary court judges to be subjected to disciplinary investigations and procedures and ultimately sanctions on account of the judgments they delivered. The new regime also did not guarantee the independence and impartiality of the Disciplinary Chamber of the SC, which was composed solely of judges selected by the NCJ, whose members were appointed by the Sejm. Moreover, Poland had failed to fulfil its obligations under Article 267 of the Treaty on the Functioning of the European Union (TFEU) – enshrining the right of courts to request preliminary rulings from the CJEU – because judges could be subject to disciplinary sanctions if they exercised that right. This had a chilling effect on use of the mechanism, which was the backbone of the EU's legal order.[142] On 10

[138] Case C-192/18, paragraph 137.
[139] For example, the report of the IUSTITIA association Justice under pressure, the report on the visit to the country by the Council of Europe Commissioner for Human Rights, see footnote 78 above, paragraphs 39-46, and the report by Amnesty International, footnote 111 above, pp. 23-26. See also the report of the Monitoring Committee, Doc. 15025, *op. cit.*, section 4.
[140] Amnesty International, Poland: The judges who defend the rule of law, 12 February 2019, and Barbora Cernusakova, When Polish judges become human rights defenders, 4 April 2019.
[141] https://www.lemonde.fr/international/article/2019/08/21/en-pologne-un-vice-ministre-harcelait-les-juges-en-coulisses_5501315_3210.html.
[142] European Commission, Press release, Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control, 3 April 2019.

October 2019 the European Commission decided to ask the CJEU to rule on these questions[143] (case C-791/19).

69. In Resolution 2316(2020) the Assembly expressed its "deep concern" about the powers conferred on the Minister of Justice, including with regard to the appointment and dismissal of court presidents, disciplinary proceedings against judges and the internal organisation of the courts, particularly in view of his powers as Prosecutor General, and called on the authorities to reduce them (paragraph 7.3). It also deplored the abuse of disciplinary proceedings against judges. According to the Assembly, "the very high number of investigations started against judges and prosecutors, on subjective grounds, which subsequently are neither formally ended nor result in the start of formal proceedings, deprives the judges and prosecutors concerned of their right of defence and has a chilling effect on the judiciary."[144] The Assembly condemned the fact that some of these investigations were started against judges solely for being critical about the justice reforms, or as a result of decisions they had taken. It also deplored the smear campaigns against members of the judiciary and called on the authorities to establish an independent public inquiry into the matter by 31 March 2020 at the latest.

70. In September 2019 the European Court of Human Rights communicated to the Polish Government Judge Igor Tuleya's application concerning the seven sets of disciplinary proceedings brought against him in 2018, under Articles 8, 10 and 13 of the Convention.[145]

4.6. The "gag law" of 20 December 2019

71. In response to the CJEU's judgment of 19 November 2019 and the Supreme Court's judgment of 5 December, on 12 December 2019 some "Law and Justice" MPs tabled a bill proposing a series of amendments to the law governing the ordinary courts, the law on the SC and other legislation. The bill was submitted to Parliament under an accelerated procedure and adopted at second reading on 20 December 2019. As it was a parliamentary initiative, no public consultation was needed and none took place. The opposition (several representatives of which did not take part in the vote on 20 December 2019) and a large part of the judicial community denounced this new draft law, calling it a "gag law" or "repressive law", which was then sent before the Senate. By a letter dated 30 December 2019 the President of the Senate (a member of the opposition, which has a majority of votes in the upper chamber) asked the Venice Commission to issue an opinion on this law. On 9 and 10 January 2020 a delegation from the Venice Commission visited Warsaw, where they met with representatives of the authorities, with the exception of those of the Ministry of Justice and the government majority in the Sejm. The Venice Commission and DG1 issued a joint urgent opinion on 16 January 2020.[146] Based on that opinion the Polish Senate rejected the draft law in its entirety on 17 January 2020, but the Sejm passed it by an absolute majority on 23 January 2020, and the President of the Republic promulgated it on 4 February.

72. The law entered into force on 14 February and includes provisions which:

- exclude "political questions" from debates in colleges and assemblies of judges; it is prohibited, for example, to adopt resolutions "which question the functioning of the authorities of the Republic of Poland and its constitutional bodies" (new Article 9d of the Law on the Organisation of Ordinary Courts);

- oblige judges to publicly declare their membership of any associations (new Article 88a of the Law on the Organisation of Ordinary Courts);

- prohibit any questioning of the legitimacy of the courts, constitutional bodies of the state and bodies responsible for overseeing and upholding the law, in the course of the courts' activities and those of the bodies attached to them; it is prohibited for the ordinary courts and state bodies to determine or assess the lawfulness of the appointment of a judge, or the judicial powers resulting from that appointment (new Article 42a of the Law on the Organisation of Ordinary Courts);

[143] European Commission, Press release, Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control, 10 October 2019.
[144] Paragraph 11 of the resolution.
[145] Application no. 21181/19, communicated on 1 September 2020.
[146] Opinion No. 977/2019, CDL-PI(2020)002, 16 January 2020.

- expand the list of disciplinary offences for judges, by including offences defined in vague terms such as “actions or omissions that may hinder the functioning of justice or make it considerably more difficult”, “actions which cast doubt on the subordinate status of a judge, the effectiveness of his or her appointment or the legitimacy of a constitutional body of the Republic of Poland”, or “public activity incompatible with the principles of the independence of judges”, as well as expanding the list of disciplinary sanctions (new Articles 107 and 109 of the Law on the Organisation of Ordinary Courts);

- increase the powers of disciplinary officers and introduce a fine of up to 3,000 PLN (about €700) for failure of a witness to appear (new Articles 112 and 114 of the Law on the Organisation of Ordinary Courts);

- limit the powers of assemblies of judges in favour of court colleges (see, for example, new Articles 28 and 30 of the Law on the Organisation of Ordinary Courts);

- change the procedure for electing the First President of the SC by considerably lowering the quorum for the third round of voting from 100 to 32 judges; if this quorum is not achieved, the President of the Republic can appoint a First President of the SC ad interim (new Articles 13 and 13a of the Law on the Supreme Court);

- give even greater powers to the two new chambers of the SC; the Extraordinary Control and Public Affairs Chamber now has the power to examine cases in which the legal status of judges is questioned (new Article 26 of the Law on the Supreme Court).

73. In its opinion, which the Assembly welcomed and supported in Resolution 2316 (2020),[147] the Venice Commission strongly criticised these new provisions, which it said could further undermine the independence of justice.[148]

74. As regards the restrictions on the political activities of judges, the Venice Commission emphasised that judges do “have a duty of restraint and discretion in cases where the authority and impartiality of the judiciary are likely to be called in question”. However, that does not mean that judges and judicial bodies have no right whatsoever to express opinions or criticise judicial reforms which affect them (see the *Baka v. Hungary* judgment). The new provisions, which are aimed essentially at imposing such a ban, are therefore incompatible with Article 10 of the Convention (the right to freedom of expression).[149] Although there are provisions in other member states which prohibit judges from being active members or taking leading roles in political parties, and the requirement for judges to make declarations about assets or activities which might constitute a conflict of interest is not unusual, the obligation for them to publicly declare their membership of any form of association, including professional associations, is a problem, particularly in the context of the excessive powers and control exerted over the judicial system by the Minister of Justice, who could use that information for ulterior purposes.[150]

75. The Venice Commission also criticised the ban on questioning the lawfulness of judicial appointments, the attribution of new powers to the Extraordinary Control and Public Affairs Chamber, the new disciplinary offences and sanctions and the changes to the structure and powers of the judicial self-governance bodies. As to the new rules on the choice of the First President of the SC, it felt that they gave more influence to minority groups of judges.[151] In conclusion, the Venice Commission pointed out that the new legislation would restrict judges’ freedom of association and expression and prevent them from examining the independence and impartiality of the courts by European standards, and that the participation of judges in judicial self-governance would be reduced. The reform of 2017 created a “legal schism”, the “old” judicial institutions *de facto* refusing to recognise the legitimacy of the “new” ones. This problem must be resolved, but not by the proposed amendments. The Venice Commission accordingly recommended not adopting those amendments.[152]

[147] Paragraph 9.
[148] Opinion No. 977/2019, CDL-PI(2020)002, 16 January 2020, paragraph 59.
[149] Ibid., paragraphs 26 and 27.
[150] Ibid., paragraphs 28 and 29.
[151] Ibid., paragraph 55.
[152] Ibid., paragraphs 59 and 60.

76. According to the authorities, the purpose of the law of 20 December 2019 is to implement the CJEU's judgment of 19 November, which they say confirms the right of the President of the Republic to appoint judges. The idea is to clarify the list of disciplinary offences of judges. For example, it is not justified to say that the content of judicial decisions can be classified as a disciplinary offence; disciplinary proceedings are brought against judges only if they are at the origin of a clear and flagrant violation of the law. The authorities also point out that disciplinary proceedings against judges are carried out by judges. As to the obligation to declare their membership of any association, the authorities place this in the context of membership of associations of judges. So such an obligation would be perfectly justified in so far as judges must remain neutral and refrain from making statements in public that must shed doubt on their impartiality.

77. On 29 April 2020, the European Commission initiated a fourth infringement procedure against Poland concerning the judicial reform,[153] considering that the law of 20 December 2019 undermines the independence of Poland's judges and is incompatible with the primacy of European Union law. The European Commission raised the following issues in particular: 1) the new law broadens the notion of disciplinary offence and thereby increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence; 2) the new law grants the new Chamber of Extraordinary Control and Public Affairs of the Supreme Court the sole competence to rule on issues regarding judicial independence, which prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the CJEU; 3) the law prevents Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges; and 4) the new law introduces provisions requiring judges to disclose specific information about their non-professional activities.

4.7. Latest developments

78. As indicated above, the law of 20 December 2019 changed the procedure for appointing the first president of the Supreme Court.[154] The term of office of the former president of the CS, Ms Małgorzata Gersdorf, having expired at the end of April, on 1 May 2020 le President of the Republic appointed a first president *ad interim* (Mr Kamil Zaradkiewicz) from among the judges who, under the terms of the resolution of the three chambers of the CS of 23 January 2020, no longer had the right to adjudicate. Following his resignation, he was replaced by another judge nominated by the new NCJ (Mr Aleksander Stępkowski). The electoral process was challenged, in particular because the members of the Disciplinary Chamber participated.[155] On 26 May 2020 the President of the Republic appointed Ms Magorzata Manowska (a Civil Chamber judge, also nominated by the new CNJ) first president of the SC; she was one of the five candidates proposed by the General Assembly of the SC, but she did not win a majority of the votes (25), whereas the candidate of the "former" judges, Mr Włodzimierz Wróbel, won 50 votes. The Polish Constitution says that the President of the Republic appoints the first president of the SC "from among the candidates proposed by the General Assembly of the Supreme Court", without further explanation (Article 183 §3).

79. Since the entry into force of the law of 20 December 2019 new disciplinary proceedings have been instituted against groups of judges, including 14 members of the permanent praesidium of the Judges' Cooperation Forum, for failure to declare their membership of that association, and 10 members of the bureau of the IUSTITIA association of judges, who had challenged the lawfulness of the Chamber of Extraordinary Control and Public Affairs of the CS. The disciplinary officer also tried to bring disciplinary proceedings against 1,278 judges who had signed a letter to the OSCE concerning the holding of the presidential elections initially scheduled for May 2020. Judge Waldemar Żurek, a member of the former NCJ, who was known to have criticised its reform, is the subject of disciplinary proceedings brought under the law of 20 December 2019, for having questioned the validity of the appointment of a judge to the SC (Mr Kamil Zaradkiewicz).

80. On 12 October 2020 the disciplinary Chamber of the SC lifted the immunity of Judge Beata Morawiec, president of the THEMIS association of judges, who was accused of connivance with an accused person and receiving a mobile phone from him. On 18 November 2020, it decided to lift the immunity of Judge Igor Tuleya, (an active member of the IUSTITIA association of judges), because of a decision taken by him to authorise the media to enter the courtroom when pronouncing a decision in a sensitive case concerning a vote in the Sejm

[153] European Commission, press release: *Rule of law: European Commission launches infringement procedure to safeguard the independence of judges in Poland,* 29 April 2020.

[154] The law raised the quorum of the General Assembly of the Supreme Court required to select a list of five candidates for the post of its first president: initially the presence of 84 Supreme Court judges is required. If not that many attend, the quorum drops to 75 judges. If that quorum is not achieved the following assembly, composed of at least 32 judges of the Supreme Court, can select the five candidates.

[155] European Commission 2020 Rule of Law Report, Chapter on the situation of the rule of law in Poland, SWD(2020) 320 final, Brussels, 30 December 2020, p. 7.

in 2017 and therefore revealing confidential information from a prosecutor's inquiry. Both judges have been suspended in their judicial activities. A request for the lifting of immunity is also being examined in respect of Judge Irena Majcher (who is purported to have omitted to re-register a commercial enterprise).

81. Following the judicial reforms in Poland, and in particular the law of 20 December 2019, certain criminal courts in other EU member states have questioned the judicial guarantees offered by the Polish system in the context of judicial cooperation within the European Union and the European Arrest Warrant (EAW). For example, on 17 February 2020 the Karlsruhe Regional Court (Germany) suspended the execution of an EAW against a Polish national because of doubts about his prospects of a fair trial.[156] Moreover, on 31 July 2020 a court in Amsterdam (the Netherlands) sought a preliminary ruling from the CJEU in connection with the execution of two European arrest warrants against Polish nationals. The case is still pending. However, on 12 November 2020 Advocate General Campos Sánchez-Bordona found that the worsening of the generalised deficiencies affecting judicial independence in Poland did not justify the automatic non-execution of every European Arrest Warrant issued by that Member State.[157] Referring to the CJEU *Minister for Justice and Equality* judgment,[158] which concerned the execution of an EAW by an Irish court, he pointed out that such a course of action is possible only if the European Council finds a serious and persistent violation by an EU member State of the principles enshrined in Article 2 TEU. According to the Advocate General, the systemic or generalised deficiencies affecting the independence of Poland's courts did not deprive them of their nature as courts. In the face of these increased deficiencies and in the absence of a formal determination by the European Council, the Amsterdam court must be even more rigorous in examining the circumstances of the EAW that it has been requested to execute, but it is not exempt from the duty to carry out that examination in particular.

5. Conclusions

82. As the Commissioner for Human Rights said in her human rights comment of September 2019, "The independence of the judiciary underpins the rule of law and is essential to the functioning of democracy and the observance of human rights." However, "we are now seeing increasing and worrying attempts by the executive and legislative to use their leverage to influence and instruct the judiciary and undermine judicial independence". The same conclusion was reached by the former Secretary General of the Council of Europe, who found that "It appears that some political actors no longer see the separation of powers as inviolable".[159] The cases presented above – the situation of the judiciary in the Republic of Moldova, which has been struggling with sweeping reforms for two decades, and that in Poland, which has recently introduced some highly controversial "reforms", jeopardising the rule of law, not least the fundamental principle of the separation of powers – confirm these serious concerns and require particular attention from the Assembly.

83. As regards the situation in the Republic of Moldova, which the Assembly has been monitoring for a number of years, several attempts at judicial reform have failed, notably because of resistance from the inside. Corruption, even in judicial circles, remains a widespread phenomenon in this country. The parliamentary coalition which prioritised "de-oligarchisation" did not last long and was unable to make any real reforms of the judicial system. It would seem that the new government has shown a certain willingness to launch new reforms in full co-operation with the Council of Europe. While I welcome these efforts, I call upon the authorities to focus on measures capable of producing concrete results, particularly addressing corruption in the judiciary and the various conflicts of interest among its members.

84. The situation with regard to the justice system in Poland is very serious. The "reforms" of 2017 generated a "legal schism" that could undermine people's right to a fair trial by a tribunal as guaranteed by Article 6 of the Convention. This is all the clearer in the light of the doubts expressed by several national courts, when examining the cases before them, as to the legitimacy of the judges appointed after the controversial reform of the NCJ.

85. The interventions of the EU, and in particular the CJEU, rectified certain "unfortunate" aspects of the "reform", such as those concerning retirement age. But the judgment pronounced by the CJEU on 19 November 2019 heightened the tensions between the SC, the NCJ, the legislature and the executive, in

[156] Oberlandesgericht Karlsruhe, order of 17 February 2020 – ref. Ausl 301 AR 156/19.
[157] CJEU, press release no. 138/20, 12 November 2020. Conclusions of the Advocate General in the joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* (Independence of the issuing judicial authority).
[158] CJEU, judgment of 25 July 2018, C-216/18 PPU.
[159] See page 18 of the report.

particular with the passing of the law of 20 December 2019. The new law raises questions as to its conformity with the Convention, particularly Article 6, and with EU law. This situation may lead to legal chaos to the detriment of the citizens. The decisions of certain courts are not recognised by other courts. In addition, the entry into force of the new law will have a chilling effect on judges, who may have doubts as to whether or not factors exist that might render criminal or civil proceedings void on grounds of nullity. Following the new restrictions and the introduction of new disciplinary sanctions, it is highly likely that judges will avoid raising these questions, even if one of the parties to the proceedings so requests. So there will continue to be doubts as to the validity of new decisions, which could negatively impact people's lives in different ways, economically or in the criminal law field, for example. This duality of the law will certainly have negative repercussions on legal relations between people and legal entities in Poland and in other countries, especially in the EU. What is more, the new provisions imposing restrictions on judges' freedom of expression are problematic with regard to Article 10 of the Convention, and those requiring them to declare their membership of any associations raise issues under Articles 8 (right to respect for private life) and 11 (right to freedom of association) of the Convention.

86. The context of these changes in the functioning of the judicial system is highly politically charged. Unfortunately, it appears that any dialogue between the two blocs – government supporters and the opposition – is increasingly hard to imagine. In its opinion of January 2020, the Venice Commission made recommendations to help resolve this crisis. In particular, it proposed returning to the old rules governing the election of judges to the NCJ, revising the composition of the new chambers of the SC and reducing their powers, and restoring the powers of the judiciary with regard to the appointment, dismissal or promotion of judges.[160] I can only reiterate those proposals and call on the Polish authorities to implement them without delay and to establish a lasting dialogue between all the parties to this conflict, which is not just a legal one but also a political one.

[160] Ibid., paragraph 61.