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The functioning of democratic institutions in Poland

Report[1]

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Summary

The Monitoring Committee recognises the challenges faced by the Polish justice system and judiciary, especially with regard to the efficiency of the administration of justice. It therefore welcomes the stated priority given by the Polish authorities to addressing shortcomings in the Polish Justice system. At the same time, it emphasises that it is essential that the reforms implemented are fully in line with European norms and standards and effectively strengthen judicial independence and the rule of law. In addition, it welcomes any reform of the judicial self-governance structures that aim to increase their transparency and accountability, while preserving their independence and autonomy. However, it considers it unacceptable if such reforms would amount to bringing the judiciary under the control of the executive or legislature, or even worse, political control of the ruling majority.

The Committee deeply regrets that the reforms of the judiciary and justice system in Poland in numerous aspects run counter to European norms and standards. They cumulatively undermine and severely damage the independence of the judiciary and the rule of law in Poland. Moreover, the reforms have made the judicial system vulnerable to political interference and attempts to bring it under political control of the executive, which challenges the very principles of a democratic state governed by the rule of law. The Committee therefore calls upon the authorities to revisit the total reform package for the judiciary and amend the relevant legislation and practices in line with Council of Europe recommendations.

The committee remains concerned about the unresolved constitutional crisis over the composition of the Constitutional Court. The restoration of the legality of the composition of the Court in line with European standards is essential and should be a priority. The full and unconditional implementation of all Constitutional Court decisions, including with regard to the composition of the Constitutional Court itself, should be a cornerstone of the resolution to the crisis.

The Committee deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland, which has a chilling effect on the judiciary and undermines its independence. In this context, the Committee calls for an independent public inquiry into the reported politically motivated smear campaign organised against members of the judiciary by, and with the involvement of, high ranking officials in the Ministry of Justice and National Council of the Judiciary.

The Committee stresses that its concerns about Poland's adherence to the rule of law, directly affect Europe as a whole and cannot be considered as an internal issue for Poland. The Committee therefore recommends all Council of Europe member states to ensure that the Courts under their jurisdiction ascertain in all relevant criminal and civil cases whether fair legal proceedings in Poland, as meant by article 6 of the European Convention for Human Rights, can be guaranteed for the defendants.

[1] Reference to Committee: Resolution 1115 (1997).

A. Draft resolution[2]

1. The Assembly reiterates that democracy, the rule of law and respect for human rights are interlinked and cannot exist without one another. Respecting, but also fostering and strengthening, these three fundamental principles is an obligation incumbent upon all member states. Conversely, any developments in a member-state that undermine or weaken one of these fundamental principles is of immediate concern.

2. Member states therefore not only have the right, but indeed have the obligation to address shortcomings in its justice system and to take any measure that strengthens the independence of the judiciary and the efficient administration of justice. The Assembly recognises the challenges faced by the Polish justice system and judiciary, especially with regard to the efficiency of the administration of justice – as noted by the judgements of the European Court of Human Rights in its judgments against Poland. It therefore welcomes the stated priority given by the Polish authorities to address the shortcomings in the Polish Justice system. At the same time, the Assembly emphasises that it is essential that the reforms implemented are fully in line with European norms and standards and effectively strengthen judicial independence and the rule of law, and not weaken or undermine them.

3. In addition, recognising the inherent vulnerability to corporatism and protection of self-interest of any professional self-governance mechanism, it welcomes any reform of the judicial self-governance structures that aim to increase their transparency and accountability, while preserving their independence and autonomy. However, it considers it unacceptable if such reforms would amount to bringing the judiciary under the control of the executive or legislature, or even worse, political control of the ruling majority. This would violate the principle of separation of powers and effectively end the independence of the judiciary and undermine the rule of law.

4. The Assembly deeply regrets that the reforms of the judiciary and justice system in Poland do not pass the two above mentioned litmus tests. It expresses its serious concern about the fact that these reforms in numerous aspects run counter to European norms and standards. They cumulatively undermine and severely damage the independence of the judiciary and the rule of law in Poland. Moreover, the reforms have made the judicial system vulnerable to political interference and attempts to bring it under political control of the executive, which challenges the very principles of a democratic state governed by the rule of law.

5. The centralisation of excessive and discretionary powers over the judiciary and prosecution service in the hands of the Minister of Justice and, to a lesser extent, the President of the Republic, render the justice system vulnerable to political interference and abuse and is of concern. This should be promptly addressed by the authorities.

6. The constitutional crisis that ensued over the composition of the Constitutional Court remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court. The full and unconditional implementation of all Constitutional Court decisions by the authorities, including with regard to the composition of the Constitutional Court itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the Court in line with European standards is essential and should be a priority. The Assembly is especially concerned about the potential impact of the Constitutional Court's apparent illegal composition on Poland's obligations under the European Convention of Human Rights.

7. The Assembly lauds the assistance given by the Council of Europe to ensure that that the reform of the justice system in Poland is developed and implemented in line with European norms and rule of law principles in order to meet their stated objectives. However, it notes that numerous recommendations of the Venice Commission and other bodies of the Council of Europe have not been implemented or addressed by the authorities. The Assembly is convinced that many of the shortcomings in the current judicial system, especially with regard to the independence of the judiciary could have been addressed or prevented by these recommendations. The Assembly therefore calls upon the authorities to revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations. In particular with regard to:

7.1. the reform of the Public Prosecutors Office, the Assembly considers that the ad personam merger of the posts of Minister of Justice and Prosecutor General, and the extensive discretionary powers over

[2] Draft resolution adopted by the Committee on 11 December 2019.

the prosecution service and the actual prosecution of individual cases itself, given to the Minster of Justice, undermine the impartiality and independence of the Prosecution Service and make it vulnerable to politicisation and abuse. The Assembly considers that these two functions need to be separated urgently, and that sufficient safeguards against abuse and politicisation of the prosecution service need to be introduced in the law. It calls upon the Polish authorities to do so as a matter of priority;

7.2. the reform of the National Council of the Judiciary, the Assembly expresses its concern about the fact that, counter to European rule of law standards, the 15 Judge members on the National Council of the Judiciary are no longer elected by their peers but by the Polish parliament. This runs counter to the principle of separation of powers and the independence of the judiciary. As a result, the National Council of the Judiciary can no longer be seen as an independent self-governing body of the judiciary. The Assembly therefore urges the authorities to reinstate the direct election, by their peers, of the judge members of the National Council of the Judiciary;

7.3. the reform of the Common Courts, the Assembly is deeply concerned about the excessive and discretionary powers over the justice system and judiciary conferred to 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. This is compounded by the equally excessive powers given to the Minister as Prosecutor General, and the absence of a counterbalance by a genuinely independent National Council of the Judiciary. These powers need to be reduced and proper legal checks and balances need to be introduced in the relevant legislation;

7.4. the reform of the Supreme Court, the Assembly deplores the attempts to force a considerable number of Supreme Court Judges into early retirement, in violation of European standards. The Assembly therefore expresses its satisfaction that these judges were reinstalled following the judgement by the Court of Justice of the European Union. The introduction of the possibility of a so-called extraordinary appeal, on wide ranging and subjective grounds, against judgements that are already finalised and whose appeals process has been terminated in accordance with the law, is of serious concern, as it violates the principle of legal certainty and *res judicata*. The Assembly is concerned that the introduction of the extraordinary appeal could considerably increase the number of applications against Poland before the European Court of Human Rights The composition, and manner of appointment, of the members of the disciplinary and extraordinary appeals chambers of the Supreme Court, which include lay-members, in combination with extensive powers of these two chambers, raise questions about their independence and their vulnerability to politicisation and abuse. This needs to be addressed;

7.5. The Assembly takes note of the recent ruling by the Polish Supreme Court that the National Council of the Judiciary cannot be considered an impartial and independent body, and that new disciplinary chamber of the Supreme Court cannot be considered a court within the meaning of European and Polish law. It calls upon the Polish authorities to fully abide by this judgment and to address without further delay these two fundamental shortcomings in the Polish legal system.

8. The often-heard argument that the Polish justice reforms are in line with European standards, solely because certain aspects of the reforms allegedly also exist in other countries, is invalid and should be disregarded. Even if certain provisions are similar to those in other countries, they cannot be taken out of the context of the overall legal framework and legal tradition in which they exist. Accepting such arguments would amount to the possible Frankensteinisation of legislation, which would be based on a combination of “worst practises” existing in other countries, instead of on best practise and common European standards.

9. The Assembly deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland. It reiterates is concern that the political control of the Minister of Justice over the initiation and conduct of these proceedings does not provide the required safeguard against their abuse. The very high number of investigations started against judges and prosecutors, on subjective grounds, which subsequently are neither formally ended or result in the start of formal proceedings, deprive the judges and prosecutors concerned of their right of defence and has a chilling effect on the judiciary. This therefore undermines its independence. The credible reports that disciplinary investigations have been started against judges and prosecutors solely for being critical about the justice reforms, and the fact that disciplinary investigations have been started against judges as a result of decisions they have taken when adjudicating cases in their courts needs to be condemned. In this context, the credible reports that a politically motivated smear campaign was organised against members of the judiciary by, and with the involvement of, high ranking officials in the Ministry of Justice and National Council of the Judiciary, is both deplorable and concerning: It undermines both the independence of, and the public trust in, the judiciary. The organisation of these smear campaigns needs to be fully investigated and those responsible identified. It is clear that an investigation by the prosecution service, which

is under direct control of the Minster of Justice, who is also a potential party to the investigation, would lack the required independence and credibility. The Assembly therefore calls upon the Polish authorities to establish, at the earliest opportunity, but no later than 31 March 2019, an independent public inquiry into these smear campaigns and those responsible for them.

10. The Assembly notes that the concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, directly affect Europe as a whole. The questions about the independence of the justice system and the respect for the rule of law are therefore not to be considered as internal issues for Poland. The Assembly calls upon all Council of Europe member states to ensure that the Courts under their jurisdiction ascertain in all relevant criminal cases - including with regard to European Arrest Warrants - as well as in relevant civil cases, whether fair legal proceedings in Poland, as meant by article 6 of the European Convention for Human Rights, can be guaranteed for the defendants.

11. The Assembly notes that, for part of the Polish population, the negotiated democratic transition of Poland following the fall of the Berlin wall, while a model for many, has failed to give closure for the crimes and excesses committed during the Communist era, and is perceived as having allowed those who profited from the Communist regime to have escaped justice for crimes committed and to safeguard their interests. The Assembly recognises that this issue is both sensitive and emotionally charged but considers that 30 years after the end of the Communist regime, the need for lustration cannot be considered as a valid argument or appropriate guideline for any reforms of the justice system in Poland.

12. The Assembly is concerned about the fact that the harsh and intolerant political discourse in the Polish political environment has created an increasingly permissive climate for and has fostered a perception of impunity for hate speech and intolerant behaviour against minorities and other, vulnerable, groups. This is unacceptable and should be addressed by the authorities.

13. With regard to the media environment, the Assembly regrets that the media reforms did not address the problem of the politicised and biased nature of the media environment and public broadcaster. Instead, the media reforms aimed mostly at transferring control over the public broadcaster from the previous authorities to the current ruling majority. The Assembly calls upon the authorities to ensure a genuinely impartial and professional public broadcasting system is established in Poland.

14. The Assembly welcomes the important role played by the broad and vibrant civil society in Poland. It therefore regrets that the polarisation in the political environment is affecting the space for civil society to operate, with consultations and cooperation between civil society and authorities increasingly being selective and based on ideological proximity.

15. The legal reforms and their detrimental effects on the rule of law Poland have an overall negative effect on the effective functioning of democratic institutions in Poland. Regrettably, there are no indications that this issue will soon be resolved. The Assembly therefore resolves to continue to closely follow the developments with regard to the functioning of democratic institutions and the rule of law in Poland. The Assembly therefore invites its monitoring committee to consider expediting the periodic review report on Poland in the framework of monitoring of membership obligations of all member-states of the Council of Europe.

B. Explanatory memorandum by the co-rapporteurs Ms Azadeh Rojhan GUSTAFSSON (Sweden, SOC) and Mr Pieter Omtzigt, (the Netherlands, EPP/CD)

1. Introduction

1. On 4 February 2016, Mr Schennach and others tabled a motion for a resolution on the functioning of democratic institutions in Poland. In this motion, the authors expressed their concern that *"reforms and changes, in particular with regard to the functioning of the Constitutional Court, the new broadcasting law or the new police law have given rise to concerns about the continued commitment of Poland to the main principles of the Council of Europe, in particular with regard to the rule of law"*[3]. On 27 May 2016, the Bureau of the Assembly seized the Monitoring Committee for a report on the functioning of democratic institutions in Poland.

2. Regrettably, due to unforeseen circumstances beyond the control of the persons concerned, there were frequent changes of rapporteurs for this report. As a result, the preparation of this report was much delayed and two requests for extension of the reference[4] for this report were made. On 6 March 2019, the Monitoring Committee appointed Ms Azadeh Rojhan Gustafsson (Sweden, SOC) to replace Mr Yves Cruchten (Luxembourg, SOC), who had been co-rapporteur since the start of this report and who had left the Assembly in January 2019. Mr Pieter Omtzigt (Netherlands, EPP/CD) was appointed to replace Ms Dora Bakoyannis, who resigned as co-rapporteur following her candidacy for the post of Secretary General of the Council of Europe.

3. In the framework of the preparation of this report, two fact finding visits to Warsaw were organised. The first visit took place from 3 to 5 April 2017. An information note outlining the findings of the rapporteurs was published after this visit. The second visit took on 5 and 6 September 2019. Our findings during that mission are an integral part of this report. In addition to the fact-finding visits, two exchanges of views were organised by the Monitoring Committee: one on 29 May 2018 and another on 16 May 2019. These exchanges took place with the participation of representatives of the authorities, judiciary and independent state bodies of Poland, as well as representatives of the international community and civil society.

4. In April 2019, the Committee Chairman received a letter from the Chairman of the Polish Delegation notifying the committee that this report would be published and debated in the Assembly just before the national elections in Poland, which could lead to the instrumentalization of this report for domestic party-political interest. He therefore requested that the report be postponed until after the elections. This would require the extension of our reference. As it is the principle of the Monitoring Committee not to present reports during the election period in a given country, the committee decided to hold the debate on this report during the January 2020 session instead of during the October 2019 session. The Committee thus requested an extension of its reference from the Bureau, which was granted on 12 April 2019. As a result, we also decided to postpone our factfinding mission from May 2019 until September2019.

5. During the preparation of this report, both us and our predecessors have benefited from an excellent co-operation with, and contributions from, a wide range of persons and bodies, including from the Polish government; the Polish judiciary and independent state bodies; representatives of the Council of Europe monitoring bodies and several other intergovernmental organisations; as well as experts and representatives of the civil society in Poland. The list is too long to mention all persons individually, but we would like to express our sincere gratitude to all that have been willing to meet us and otherwise contribute to the preparation of this report. At the same time, we regret that, despite our repeated requests, it was not possible on any occasion to meet with the Minister of Justice and the President of Poland (or even members of the President's Chancellery). These two personalities, ex officio, have obtained immense influence in, and power over, the justice system and judiciary as a result of the recent reforms. It would therefore have aided our work if we had had the chance to hear their views and clarifications regarding some of the issues, we discuss later in this report

6. As we will outline in this report, following their election into power, the Law and Justice Party led government initiated a broad set of reforms. However, the most important reform by far, and the most controversial, part of these reforms concerned the judiciary and justice system. These will therefore be the main focus of this report. While we will touch upon some of the other reforms, providing a complete analysis of all reforms and developments that were brought to our attention is beyond the scope of this report. At the same time, it should be emphasised that some of these reforms potentially raise issues that could be of concern and which could warrant a specific follow up by the Monitoring Committee and the Assembly.

[3] Doc. 13978 (2016).
[4] The current reference will expire on 25 July 2019.

2. Background

7. It is fair to state that the reforms initiated by the current authorities have led to a political and, as we will argue, also constitutional crisis in Poland. The political crisis began after the parliamentary elections in 2015. These elections took place in the context of an increasingly polarised political climate and the growing dissatisfaction of the Polish public with the ruling elites in the country. General elections, both for the Sejm and the Senate, were held on 25 October 2015. They were won by the Law and Justice Party (also known by its Polish acronym, PiS) which gained 235 seats out of 460 in the Sejm, the lower Chamber of Parliament[5], thus obtaining an absolute majority.[6] This was the first time since 1991 that one single party has had an absolute majority in Poland. It is important to note PiS did not obtain a two-thirds majority which would have allowed it to change the Polish Constitution. Regrettably the polarisation that characterised the political climate before the elections continued after the elections and even become more profound and entrenched, compounded by the profound shift of power following the elections. As a result, dialogue, let alone co-operation, between government and opposition parties, is minimal, if not non-existent and zero-sum political strategies are increasingly being deployed by the political sides. This it to some extend compensated by the existent of a broad and vibrant civil society in the country that actively participates in the debates on political and social developments in the country. However, as we outline below this has also resulted in increased pressure on NGOs including to control their political discourse.

8. In the view of the PiS, its overwhelming election victory gave it a clear popular mandate for profound reform of the political and social system in the country. At the same time, it felt that, when it came into power, the state structures and democratic institutions were still dominated by, and biased in favour of, the previous authorities, which – in its view – aimed to sabotage the implementation of the reform agenda of the new government. In particular, the incoming authorities viewed the justice system, and in particular the Constitutional Court, as a key mechanism through which the previous authorities could thwart the reform agenda of the new government. Regrettably, the new authorities were strengthened in their view by an unfortunate decision of the outgoing parliament that aimed to stack the Constitutional Court with the supporters of the outgoing authorities. The new ruling majority therefore set out to what it considered to be the "de-politicisation" of these institutions, with a view to bring them under the control of the new authorities. In that context, the first institution in its crosshairs was the Constitutional Court, which had considerable legal powers to block or hinder its ambitious reform programme, should it not be in line with Constitutional provisions.

9. As mentioned, the election victory of the PiS was, for a large part the result of its promise to address the increasing dissatisfaction of the Polish population with the ruling elites and what were depicted as their self-serving policies. In the view of the new authorities, the justice system and the judiciary were key areas of the entrenchment of the previous ruling elites that undermined its impartiality and was affecting the effective administration of justice in Poland. As those criticisms ostensibly guided the reforms initiated by the PiS led authorities, it will be important to outline, in summary, the state of the Polish justice system before 2015 and the criticisms thereof by the current authorities.

10. According to the Polish authorities[7], a key reason for the reform of the judiciary has been the – in their view - very low level of public trust in the judiciary and its independent functioning, as well as the systemic problem of excessive length of legal proceedings, despite the high number of judges and the high level of public spending on the judiciary in Poland. In addition, according to the authorities, the Polish justice system is characterised by a corporative culture resulting from a disbalance of powers that caused a lack of accountability within the judiciary, as evidenced from the ineffectiveness of disciplinary proceedings in cases were misconduct of judges, including corrupt activities, was allegedly found. Lastly, the Polish authorities mention as one of the grounds for the reform of the judiciary in Poland, its conviction that the Polish justice system has been unable to hold judges and prosecutors to account for illegal actions performed during the communist regime in Poland.

11. We have some questions regarding the data provided to justify the assumption that public trust in the judiciary was very low pre-2015. The 2017-2018 Rule of Law index of the World Justice Project (which is

[5] The Civic Platform, which had been in power for eight years with its coalition partner, the Polish People's Party, gained 138 seats (losing 59). The United Left, which ran as a coalition of left-leaning parties, did not pass the 8% threshold for party coalitions to enter parliament.

[6] PiS also secured 61 seats out of 100 in the Senate.

[7] Chancellery of the Prime Minister of Poland: "White paper on the Reform of the Polish Judiciary" pp 7 -23, and "Information for the Committee on Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) concerning the judicial reform in Poland" prepared by the Ministry of Justice of Poland. pp 2-3.

largely based on data from before 2016)[8] , quoted by the Polish authorities shows that - based on public and expert perceptions - Poland is ranked number 17 out of the 24 EU, EFTA and Nord America countries included in the survey (#25 in the global ranking of 113 countries surveyed) with a score of 0.67 0 being the worst and 1 being the best). Similarly, the report quoted from the European Network of Councils of the Judiciary (ENCJ)[9] to underscore the problems in the justice system perceived by the judges themselves, shows that while the perception of the independence of the judiciary is below average, public trust in the judiciary is within the (lower range of the) average of countries surveyed[10]. A 2017 report of the International Monetary Fund[11], that heavily uses data from Council of Europe bodies such as GRECO and the European Commission for the Efficiency of Justice (CEPEJ), shows that the independence of the judiciary sharply deteriorated between 1995 and 2003. However, since 2003 these figures improved steadily, albeit not to the 1995 levels[12]. Comparative data for 2015 shows that Poland scored between the 25 and 75 percentiles for judicial independence and impartiality of the courts, within the lower range of the European average[13]. In addition, in the 2015 Corruption Perception Index of Transparency International[14] Poland ranks #30 out of 167 countries with a score of 62 points[15]. Therefore, while the data provided to us by the Polish authorities undeniably shows that there is clear room for improvement in the Polish justice system, as well as the public trust in it, and therefore justifies the objective of the authorities to address these issues, this data does not seem to indicate that public trust in the judiciary was exceptionally low by European standards when the current authorities came into power in 2015.[16] Moreover, recent polls by the Public Opinion Research Centre (PBOS) show that in September 2015, 46% of the respondents considered that the courts were functioning badly. In March 2019, however, this figure was 45%[17], indicating that the trust in the judiciary has remained the same. Similarly, in September 2015, 27% of the respondents positively assessed the functioning of the courts. In March 2019, on the other hand, this was the case for 32%[18] of the respondents. From these figures it seems clear that the reforms have not achieved their stated objective with regard to increasing the public trust in the judiciary.

12. At the same time, it is undeniable that the Polish justice system and judiciary has faced, and is facing, systemic problems and challenges that affect the Rule of Law and that are of concern to the Council of Europe. A key concern, is the length of judicial proceedings and the lack of an effective remedy, principally resulting from the fact that domestic courts fail to consider the entirety of proceedings when evaluating their duration. Another concern is the disproportionally low amounts of compensation awarded by domestic courts[19]. The first judgment of the European Court of Human Rights ("the Court") that found a violation of article 6§1 of the Convention for excessive length in proceedings was on 30 October 1998. On 31 December 2014, the Court had found similar violations in 419 judgements. In 2004, Poland enacted the "Law on complaint about the breach of right to have a case examined in judicial proceedings without undue delay". However, this law proved to be ineffective: out of the 419 judgments mentioned above, 280 were given between 2005 and 2011-- *after the* law had been enacted. Moreover, in that same period, the Court struck out an additional 358 cases where friendly settlement had been reached after the government unilaterally acknowledged a violation of Article 6§1 and Article 13. On 7 July 2015, the Court delivered its judgment in the case of Rutkowski v. Poland[20] which had been made a pilot case covering 591 other applications, claiming a violation of Art 6§1 and Article 13. In addition, at that time, 256 additional prima facie well founded cases for the same reasons had been lodged with the Court. According to the most recent statistics[21] 650 similar cases are, at the time of writing, pending before the Court in different stages of the procedure.

13. In its judgment in the case of Rutkowski v. Poland, the Court unanimously held that the "*violations of Articles 6 § 1 and 13 originated in a practice that was incompatible with the Convention, consisting in the unreasonable length of civil and criminal proceedings in Poland and in the Polish courts' non-compliance with the Court's case-law on the assessment of the reasonableness of the length of proceedings and "appropriate*

[8]World Justice Project, Rule of Law Index 2017-2019, Report.
[9]European Network of Councils for the Judiciary, Independence, Accountability and Quality of the Judiciary.
[10] The report itself highlights the difficulties regarding the available data on public perceptions of the judiciary.
[11] https://www.imf.org/~/media/Files/Publications/REO/EUR/2017/November/eur-reo-chapter-2.ashx?la=en.
[12]International Monetary Fund: Regional Outlook Europe: "Reforming the judiciary: learning from the Experience of Central, Eastern and Southeastern Europe" pp 47-50.
[13] Ibid. p. 62.
[14] https://www.transparency.org/whatwedo/publication/cpi_2015.
[15] By comparison in the 2018 Corruption Perceptions Report Poland ranks #36 out of 180 countries with 60 points. Higher scores being better.
[16] This seems to be confirmed by a recent research from the GfK Verein, which shows that trust in judges dropped from 554% in 2016 to 48% in 2018 and for lawyers in general from 58% in 2016 to 51% in 2018 (https://www.nim.org/sites/default/files/medien/135/dokumente/2018_-_trust_in_professions_-_englisch.pdf).
[17] https://www.cbos.pl/SPISKOM.POL/2019/K_044_19.PDF, p. 8.
[18] Ibid.
[19] Department for the execution of judgements of the European Court of Human Rights. Country fact sheets: Poland.
[20] Rutkowski v. Poland, applications 72287/10, 13927/11 and 46187/11.
[21] https://echr.coe.int/Documents/CP_Poland_ENG.pdf.

and sufficient redress" for a violation of the right to a hearing within a reasonable time." It therefore held that "*the respondent State must, through appropriate legal or other measures, secure the national courts' compliance with the relevant principles under Article 6 § 1 and Article 13 of the Convention*"[22]. The general measures of this case are currently pending execution before the Committee of Ministers, which has opened an enhanced supervision of this case on the grounds that it has revealed important structural problems with the Polish justice system.

14. In this context, it should be noted that other structural problems in the Polish justice system, as identified by the judgements of the Court, most notably regarding the excessive use and length of pre-trail detention, were successfully addressed by extensive reforms. These include the 2009 reform of the Criminal Procedure Code, which led to the closure of supervision by the Committee of Ministers between 2011 and 2016.

15. It is important to note that none of the political forces or civil society organisations, denied that there were shortcomings in the justice system before 2015. All agreed that reforms were needed to address these shortcomings. However, it is clear that such reforms should adhere to accepted European standards and norms. Additionally, such reforms should aim to improve the independence of the justice system and the efficient administration of justice in the country. It is these principles that will guide our evaluation of the reforms that are outlined in this report. In addition, it will be impossible to discuss the reforms of the justice system without looking at the issue of the disciplinary procedures that have been initiated against judges, as well as what seems to be patterns of social media campaigns to discredit judges and the judiciary, which have stirred quite a bit of controversy, both on a national level and an international level.

16. As we noted above, the authorities mentioned that the bureaucratic, corporate culture in the Polish administration of justice—which in their view resulted from a disbalance of powers and which caused a lack of accountability in the judiciary--was one of the main motivations behind their reforms. A system of judicial self-governance, similar to the one currently in place in Poland, is the general norm in Europe. While we acknowledge that any system of self-governance has an inherent risk of corporativism and vulnerability to self-interest, and this definitely seems to have been the case in Poland, the Whitepaper mostly offers anecdotical information as evidence of a disbalance of powers and lack of accountability of the judiciary. The detailed assessment of individual cases is beyond the scope and competence of this report. We nevertheless wish to highlight that, whilst we welcome as a matter of principle any measure aimed at improving and strengthening the system of judicial self-governance, including its transparency and accountability, such measures should be in line with European standards and norms in order not to weaken the principle of judicial independence.

17. Lastly, another reason the authorities mention for the recent reforms, is the inability of the Polish justice system to hold judges and prosecutors to account for illegal actions performed during the communist regime in Poland. Poland has been at the vanguard of the democratic transitions in Central and Eastern Europe in the waning days of the Soviet Union. Its peacefully negotiated transition[23] from a communist to a democratic regime, which followed a painful period of martial law, is seen by many as a model for the democratic transitions that followed in other Central and Eastern European countries. However, it became clear during our visit that, for a part of the Polish population, this negotiated transition meant that there has not been full closure for the misdeeds that happened in the communist area. This, in turn, gave them the impression, rightfully or wrongly that alleged perpetrators of such misdeeds managed to safeguard their interest and escape justice. There has been no closure for crimes and excesses during the communist era in Poland. We are not able to comment on the veracity of the individual cases that have been mentioned by authorities and its supporters to underpin their claim. We realise that the communist period, which by many is seen as a period of de facto occupation by the Soviet Union that interrupted Poland's post-war democratic trajectory, remains a very sensitive and sometimes emotional issue for many citizens. However, we also realise that, by trying to link the shortcomings in the functioning of the justice system with the bygone communist era has substantially, and in our view unnecessarily, increased emotions and hardened the political discourse. The increasing polarisation of the Polish political environment, and increasingly the Polish society as such, negatively affects Poland's democratic consolidation and is therefore of concern in the context of this report.

18. Secondly, by explicitly stating that one of the objectives of the judicial reforms is to decommunize the Polish judiciary and to hold to account "*judges who were directly and shamefully involved with the communist system,*"[24] the authorities have made it clear that the judicial reforms are also meant as a *de facto* mechanism for lustration. The reforms should, in our view, therefore fully adhere to the high standards that a lustration process demands. The Venice Commission has provided an excellent outline in its 2014 interim opinion on

[22] Ibid, § 5 and 6 of the judgment.
[23] The so-called Round Table Talks between the authorities and Solidarity led to the participation of the latter in the 1989 elections. The landslide victories of its candidates led to the resignation of communist leader General Jaruzelski.
[24] Chancellery of the Prime Minister of Poland: "White paper on the Reform of the Polish Judiciary" § 10.

the lustration law of Ukraine[25].of the standards and norms that are applicable to a lustration process. This interim opinion also deals with the question of a lustration process for former communist officials a very long time after the democratisation of a country has started, and its deliberations are therefore of relevance for the Polish justice reforms in this respect. As mentioned by the Venice Commission in the above mentioned opinion, lustration is one of the tools of transitional justice, aimed at protecting "newly democratic states from threats posed by those closely associated with the previous totalitarian regimes and to prevent a return of such a regime[26]" Lustration is therefore not, as such, a violation of human rights, as long as it is necessary in a democratic society and strictly adheres to European standards concerning the rule of law and respect for human rights. Among the key criteria listed by the Venice Commission is the fact that "lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened[27]" In the case of the Lustration Law of Ukraine, and referring back to its opinions on the Albanian and Macedonian Lustration laws, the Venice Commission notes that it is questionable that a country needs to defend itself against those that were involved in the communist regime more than two decades after the fall of that regime, which, according to the Venice Commission risked raising actual doubts about the actual goals behind the lustration process. In our view, these observations are equally applicable to the Polish situation. Moreover, it should be noted a lustration process for supreme Court Judges was implemented after the fall of the communist regime, as demonstrated by the fact that, currently, the average age of a Polish judge is approximately 42 years, which means on, average, they were 12 years old when the Communist regime fell. Therefore, we cannot consider a need for lustration as a valid argument or appropriate guideline for any reforms of the justice system in Poland.

19. The political environment in Poland has remained contentious and polarised up until the moment of writing of this report. Regrettably, this polarisation is not only limited to the political environment but is also affecting many aspects of the Polish society. Despite the domestic and international criticism of its reforms and policies, the ruling majority remains popular among the Polish population. At the same time, the opposition in Poland remains fractious and seems unable to provide a joint alternative to the current ruling majority.

20. This was highlighted during the 2019 European elections that were seen as a dress rehearsal for the parliamentary elections in Poland on 13 October 2019. Overcoming their divisions, the current opposition parties united in an electoral coalition for the 2019 European elections. While some of the polls in the run up to the elections showed the united opposition as being close in popularity to the ruling coalition, this did not materialise on election day and the elections were comfortably won by PiS with 45.4% of the popular vote, against 38.5% for the opposition united in the European Coalition.

21. In the parliamentary elections on 13 October 2019, the opposition parties fragmented again in several election blocs. The election campaign was contentious and highlighted the deep divisions in the Polish society and continuing polarisation of the political climate. Regrettably, this was reflected in the campaign discourse which was dominated by intolerant rhetoric,[28] with the Ruling Party campaigning on the premise that LGTBI rights were a threat to the Polish identity and its values[29]. The outcome of the election reflects, and is feared to deepen, these divisions. The elections were won by PiS with 43.6% of the votes[30] which will give it 235 seats, and thus an absolute majority, in the 460 member Sejm. This is an increase of 4 seats, in comparison to the 2015 elections. The main opposition party Civic Coalition won 27.4 % of the votes or 134 seats. The left parties returned to the parliament with the coalition bloc Lewica that won 12.6% of the vote or 49 seats and the Polish Coalition -consisting of the Polish Peoples Party, Kukiz'15 and some smaller parties - won 8.6 % of the votes or 30 seats. A new coalition of far-right and ultra-nationalist parties called Confederation participated for the first time in the legislative elections and won 6.8% of the votes or 11 seats in the Sejm. No other party passed the 5% threshold to enter parliament. Voter turnout for these elections was 61.7% The main opposition parties had come to an election agreement were in most of the 100 single mandate constituencies for the Polish Senate, they would support one single candidate against the ruling party candidate. Arguably as a result of this strategy, PiS no longer has as majority in the Senate. It won 48 seats in the Senate, while the three main opposition parties won an equal number of seats. Four mandates were won by independent candidates, one of which is reported to be supportive of the ruling party. As a result, the majority in the Senate will depend on the other three independent senators. While the Senate's powers are more limited than the Sejm, and while the latter can override decisions of the Senate with an absolute majority, losing the majority in the Senate

[25] Venice Commission, Opinion 788/2014, CDL-AD(2014)044.
[26] Ibid § 15.
[27] Ibid, § 20, other criteria are inter alia, the clear differentiation between lustration and criminal accountability as well as the presumption of innocence, the latter which sometimes seems challenged in political discourse in Poland.
[28] https://www.osce.org/odihr/elections/poland/435932?download=true.
[29] As reported by Reuters, Deputy Digitalisation Minister Andrzej Andruszkiewicz tweeted after the (for PiS positive, election results were announced that "We saved Poland. ... It is time to complete decommunization. It is time to stop the LGBT dictate!"
[30] https://wybory.gov.pl/sejmsenat2019/en/wyniki/sejm/pl.

would make it more difficult for PiS to push through legislation than it did in the last four years. In addition, the Senate is involved in the nomination of representatives on a number of key institutions and regulatory bodies, which could complicate PiS' efforts in achieving its goal of bringing the Polish institutional framework fully under its political control.

22. On 21 October 2019, PiS requesteda recount of the votes of the senate races in six districts where they claimed the results were very close, but where there had also been, in their view, a high number of spoilt ballots. A day later, the opposition requested the recount of the results in another three districts for a variety of reasons. Given the fact that the ruling party lacks a majority in the Senate by one vote, the recount requests were widely perceived as an attempt to change the election results via the courts. These requests are heard by the newly established Chamber on Extraordinary Control and Public Affairs of the Supreme Court, which is responsible for hearing election-related appeals. As we will outline later in this report, the independence of this institution is open to questione, and it is vulnerable to political pressure and interference. As a result, it does not have the required trust by all stakeholders as an impartial arbiter in election disputes[31]. Therefore, on 24 October 2019 we issued a statement[32] calling upon the authorities and the Supreme Court to ensure the utmost transparency and impartiality in the handling of the appeals. By 13 November 2019, the Special Chamber of the Supreme Court had dismissed all 6 appeals by the PiS. Of the appeals filed by the opposition, one had been dismissed, whilst one was found admissible and well-grounded, but had not changed the outcome of the elections in that particular race. At the time of writing, the other appeal was still under consideration.

3. Reform of the Judiciary and Justice system

23. In the following sections, we will outline and analyse the main components of the reform of the Justice system and judiciary, as implemented by the Polish Authorities since 2015. Under this heading, we will also look at some of the clearly connected developments, such as the increasing trend in disciplinary measures against judges, allegedly for having delivered verdicts contrary to the interest of the authorities, as well as the crisis for control over the Constitutional Court that was one of the grounds for the Motion for Resolution that lead to this report.

24. There is one issue we want to make clear from the start with regard to our analysis of the reforms. On several occasions, we have heard the argument that, because certain aspects of the reform would also exist in other countries, that would mean that these aspects therefore automatically would be in accordance with European rule of law standards. However, even if certain provisions in the new legislation would be exactly the same as in some other country, it should still be analysed in the context of the total corpus of legislation and the reality of the country concerned. Moreover, this could easily be seen as a justification for what the President of the Venice Commission aptly called the" Frankensteinisation of legislation" where legislation would be based on a combination of "worst practise" existing in other countries, which, we are fully convinced, has never been the objective of our intermediaries in Poland.

3.1. Reform of the Constitutional Court

25. As we mentioned earlier, the ruling majority's perception of the Constitutional Court as an impediment to its reform programme was strengthened by the fact that the previous ruling majority had changed the law governing the appointment of Constitutional Court judges. This allowed the previous majority to fill all five positions that would become available in the Constitutional Court in 2015, including 2 that would become available after the elections had taken place. This was seen by the new authorities as a clear attempt by the previous administration to stack the Court with members loyal to it in order to protect its interest after the elections, as it was clear they l would lose their control over the levers of power. Immediately after the elections, the new ruling majority set out to rectify what it saw as an unacceptable situation and to install its own supporters in the Constitutional Court, which quickly developed into a constitutional crisis that impeded the independent functioning of this institution.

26. The Polish Constitutional Tribunal is composed of 15 judges, elected by the Sejm by a simple majority for a non-renewable term of office of nine years. The term of office of three of its judges was due to expire on 6 November 2015, and the tenure of another two was due to expire on 2 and 8 December 2015 respectively. On 25 June 2015, three months before the parliamentary elections, the Sejm under the previous majority led by the Civic Platform (Sejm of the 7th convocation)- adopted a law on the Constitutional Tribunal, which allowed the outgoing Sejm to appoint the replacements for all Constitutional Court judges whose mandates expired in 2015. Subsequently, on 8 October 2015, just before the elections, the outgoing Sejm elected five new Constitutional Tribunal judges. To be able to take up their duties, newly elected judges must be sworn in by

[31] See also § 86.
[32] Statement by the co-rapporteurs.

the President, in accordance with Article 21 (1) of the Constitutional Tribunal Law. However, President Duda, who is from the Law and Justice Party, refused to take the oath of these five newly elected judges.

27. The law of on the Constitutional Tribunal (passed on 25 June 2015) was challenged before the Constitutional Tribunal by a number of deputies in the Sejm. On 3 December 2015, the Constitutional Tribunal ruled that Article 137 of the law was unconstitutional insofar as it enabled the previous Sejm to elect two judges whose term of office would only expire after the first sitting of the new Sejm, i.e. in December 2015. The election by the previous Sejm of the three judges, whose term of office expired on 6 November, was deemed constitutional. The Tribunal further considered that Article 21 (1) imposes an obligation upon the President to take the oath of newly elected judges right away and that any other interpretation of this provision would be unconstitutional.

28. On 19 November and on 22 December 2015, the Sejm adopted a series of controversial amendments to the Law of the Constitutional Tribunal whose cumulative effect was, as also noted in the Venice Commission in its opinion on these amendments[33], to intentionally render the functioning of the Constitutional Court in its legal, albeit politically disputed, composition impossible. In addition, on 25 November. the Sejm adopted a resolution invalidating all five appointments of Constitutional Court Judges of 8 October 2015 and appointing another five judges who were sworn in by President Duda the same night at 1.30 a.m.!

29. These two sets of amendments were the subject of an appeal before the Constitutional Court, who ruled respectively on 9 December 2015 and 9 March 2016 that the amendments of 19 November and 22 were, by and large, unconstitutional. It also ruled, on 19 December 2015, that the Sejm could only have made 2 appointments on 25 November, and not five as 3 judges had been constitutionally elected by the previous Sejm.

30. According to Article 190 of the Constitution, the Tribunal's judgments are binding and final and should be published immediately in the official publication in which the original normative act was promulgated. However, in both cases mentioned in the previous paragraph, the Prime Minister's Office refused to publish these judgements[34]. We wish to note that the non-publication of Constitutional Court judgements, or intentional undue in the delay of their publication, violates the Polish Constitution and is contrary to international rule of law standards and norms.

31. On 23 December 2015, the Minister of Foreign Affairs of Poland requested the opinion of the Venice Commission on the amendments to the law on the Constitutional Court. In its opinion, adopted during its plenary in March 2016[35], the Venice Commission emphasised that, inter alia, a democracy that respects the rule of law requires the judgments of the courts, and especially the Constitutional Court, to be executed fully by the authorities. The Venice Commission therefore urged the Polish authorities to respect their international democratic and rule of law obligations and to publish and respect the decisions of the Constitutional Court.

32. On 22 July 2016, the Sejm adopted a new law on the Constitutional Court. On 11 August 2016, the Constitutional Tribunal issued a judgment in which it declared several provisions of the new law as unconstitutional and annulled them. This judgment was also not published by the authorities. On request of the Secretary General of the Council of Europe, the Venice Commission adopted an opinion on this new "Act on the Constitutional Tribunal" during its plenary on 14 and 15 October 2016[36].

33. In its opinion, the Venice Commission welcomed the fact that some of its recommendations in relation to the December amendments were addressed. It nevertheless concluded that regrettably several other important concerns were left unaddressed.

34. The new law lowered the quorum for a full bench from 13 to 11 judges[37], and abolished the two-thirds qualified majority for decisions, which together were seen as a serious obstacle to the efficient functioning of the Constitutional Court. At the same time, the law still contains provisions allowing three judges to request that a case be heard in full bench. These provisions also allow the President of the Court to declare a case particularly complex, meaning that a case will be heard by a full bench, without the possibility of the plenum to

[33] CDL-AD(2016)001.
[34] Please see the information note published following the visit to Warsaw from 3 to 5 April 2017 for a detailed discussion of these amendments. The judgements were finally published, not as judgements "wyroki" but as findings "rozstrzygnięcia," on 5 June 2018.
[35] CDL-AD(2016)001.
[36] CDL-AD(2016)026.
[37] This is still higher than in most European countries but low enough so as not to endanger the efficient functioning of the Constitutional Court.

overrule such request. This is problematic and in violation of the Polish Constitution[38]. As noted by the Venice Commission in its opinion, "*In absence of the possibility for other judges to reject a transfer request, there is a danger of politicisation and obstruction to the effective functioning of the [Constitutional] tribunal*[39]".

35. In a welcome development, the new law removed the much-criticised provision that the President of Poland or the Minister of Justice could start disciplinary proceedings against Constitutional Court judges.

36. On the other hand, according to the law, the Court President is appointed by the President of Poland from among three candidates proposed by the General Assembly of Judges, in which each judge has only one vote. In effect, this means that any grouping of three judges would be able to present a candidate. This leaves considerable discretion to the President of Poland with regard to the appointment process and could allow a Court President, who does not have the support of the majority of the judges of the court, to be appointed. Moreover, the law stipulates that the presence of the Prosecutor General is required in all cases before a full bench. In his or her absence, the case in question cannot be heard, potentially allowing the Prosecutor General to block the proceedings before the Court simply by not showing up at a hearing. It should be noted in this context that, according to Polish legislation, the Minister of Justice is also ex officio the Prosecutor General (see below). Given the fact that complex cases and cases of *a priory* control over bills are required by law to be heard by a full bench, this would theoretically allow the Minister of Justice, in his function of Prosecutor General to block the hearing on legislation prepared by his ministry. The possibility for the Court to hear cases in repeated absence of the Prosecutor General and/or his substitution by a Deputy Prosecutor, should be allowed for in the law.

37. The new legislation introduces a series of exceptions to the rule that cases should be considered in chronological order. In addition, the law allows the President of the Court to change the order of cases in exceptional circumstances to safeguard the individual freedoms of citizens, national security or the constitutional order. While a welcome improvement over previous legislation, it should be up to the Court itself to agree on the order of cases. This provision was the subject of an appeal before the Constitutional Court, which ruled that it violated the principle of separation of powers and therefore was unconstitutional.

38. The new law stipulates that the President of the Court "requests" the publication of the judgements in the official gazette in order for them to come into force, instead of "ordering" the publication, as was the case in the previous legislation. This is an important difference in the context of the refusal by the authorities to publish the decisions of the Constitutional Court when they were not of their liking. As mentioned, the possibility for a decision to go arbitrarily unpublished is in contradiction with the country's rule of law obligations. This provision should therefore be changed.

39. On 16 August 2016, the government published 21 judgments of the Constitutional Court, but most notably not the decisions of 9 March and 11 August 2016. On 5 June 2018, the government published the last three until then, unpublished judgments of the Court following an act of Parliament. However, these judgments were not published as judgements "wyroki, as required by law, but as but as findings "rozstrzygnięcia." They were further accompanied by a note stating that, in the view of the authorities, these decisions had been taken illegally and were therefore not recognised. In our view, the notion that a parliament could decide on whether or not decisions of the Constitutional Court will be published and enforced is unacceptable. It is equally abhorrent and contrary to basic rule of law principles for the authorities to question the legality of individual court decisions and to arbitrarily decide whether or not they are going to implement them.

40. It should be noted that many of the provisions in the Law on the Constitutional Court, that in the view of the Venice Commission ran counter to European standards, have in fact been annulled by the Constitutional Court judgement of 11 August 2016. This makes the non-publication and enforcement the Constitutional Court decisions all the more deplorable.

41. On 19 December 2016, the term of office of the President of the Constitutional Court expired. Following a controversial and legally questionable procedure,[40] one of the newly appointed judges, who is seen as loyal to the new authorities, was appointed President of the Court by the President of Poland on 21 December 2016.

42. During our visit, it was clear that the constitutional crisis, as a result of the developments surrounding the Constitutional Court, has not yet been resolved. This is having a long-lasting effect on the legal system and respect for the rule of law in Poland. The Constructional Court seems to have been firmly brought under

[38] Constitutional Court judgment of 11 August 2016.
[39] CDL-AD(2016)026 § 36.
[40] Inter alia, the three judges whose appointment in December 2015 had been judged as unconstitutional – and thus illegal – by the Constitutional Court were allowed to participate and vote in the assembly selecting the new Court President.

the control of the ruling authorities and has been rendered impotent as an impartial and independent arbiter of constitutionality and rule of law in Poland. In addition, the selective and arbitrary enforcement of the Constitutional Court decisions by the authorities violates one of the main tenets of the principle of rule of law, ands sets a very dangerous precedent, for example, for future governments.

43. A key issue arises from the fact that the composition of the Tribunal has not been resolved. As a result, there are three judges participating in the work of the Tribunal whose appointment, on 2 December, is, per decision of the Constitutional Court itself, illegal. This, in turn, raises questions about the legality of any of the judgments in which these judges have participated, which undermines the principle of legal certainty in the country. The extend of this problem, is clear from the application Xero Flor w Polsce sp. z o.o. v. Poland[41], which was communicated by the Polish authorities on 2 September 2019. In this application, the applicant alleges that his rights under article 6§1 (right to a free trial) were violated because the bench of five judges of the Constitutional Court that examined his case was composed in violation of the Constitution, *"in particular, Judge M.M. had been elected by the Sejm (the lower house of the Parliament), despite that post having already been filled by another judge elected by the preceding Sejm"* [42] We reserve our conclusions until the Court has issued its judgement in this case, but the potential effect on the case load of the Court is clear, underscoring our argument that the justice reforms in Poland cannot be considered a domestic affair only, but have a direct impact on the international legal system and human rights protection mechanisms.

44. According to Polish Constitutional Law, common court judges can rule on the constitutionality of legislative acts in individual cases before them. This would, to some extent, allow the continued verification of the constitutionality of laws and government decisions, although by normal courts. This increases the importance of the Super Court as the highest court of appeals, including for the uniformity of law with regard to judgements on the constitutionality of contested pieces of legislation and government decisions. The government strongly opposes the possibility of an *in concreto* review of legislative acts by ordinary Courts and, reportedly, the Minister of Justice has threatened judges with disciplinary proceedings if they try to apply the Constitution directly in individual cases[43].

3.2. Reform of the Public Prosecutor's Office

45. On 24 December 2015, a group of individual members of the ruling majority tabled a new draft law on the Public Prosecutors Office in Poland. As this law was tabled by individual members, and not by the government as such, a formal public consultation process on the draft law was not required, which is rather regrettable given the importance of this law and the subject matter it covers. In a rather speedy process, that did not reflect the importance of its contents, the law was adopted in final reading by the Sejm on 28 January 2016 and by the Senate on 30 January 2016. It was signed by the President on 12 February and came into force on 4 March 2016.

46. After the re-establishment of democracy in Poland in 1989, the previously de-jure independence[44] of the Prosecution Service was abolished and the prosecution service was made accountable to the executive power and in particular to the Minister of Justice. Reportedly, this situation led to repeated interference, for ulterior reasons, by consecutive ministers of justice in specific individual criminal cases, counter to European standards[45]. In a major and welcome reform of the prosecution service in 2009, this was changed, and the offices of the Public Prosecutor and Minister of Justice were fully separated. One of the stated goals of this separation of offices, was to exclude any political influence on, and interference in, the public prosecution service. This was also underscored by the single 6-year term limit for the prosecutor general and the legal safeguards to ensure his independence and protection against "abusive dismissal"[46]

47. While the subordination of the public prosecutor to the executive does not per se runs counter to European standards, the overall trend in Europe is to increase the independency of the Prosecutors office from the executive. The 2009 reform of the Polish Prosecution Service was therefore highlighted by the Venice Commission as an example of this trend in its 2010 report on the independence of the Justice System[47]. We find it therefore difficult to understand why Poland would move away from this edging trend in Europe, especially when this seems clearly, as we outline below, to the detriment of the impartiality and independence, both perceived and real, of the Prosecution service.

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[41] Application no. 4907/18).
[42] Press release by the European Court of Human Rights, ECHR 304 (2019), 11 September 2019.
[43] Pawel Filipek: "Challenges to the rule of law in the European Union, the distressing case of Poland §4_6.
[44] We have no doubts about the de facto dependency of the procuratura on the executive power during the communist regime.
[45] See CLD-AD(2017)028 § 8.
[46] CLD-AD(2017)028 § 11-12.
[47] CLD-AD(2010)040.

48. The new law on the Prosecution office completely reverses the 2009 amendments and merges the posts of Minister of Justice and Public Prosecutor into one single person, the Minister of Justice. The new law was challenged before the Constitutional Court by the Commissioner for Human Rights (Ombudsperson) of Poland However, the legality of the Constitutional Couth bench hearing this case was questioned, as it contained illegally appointed judges and therefore the Ombudsperson decided to withdraw his application. In light of the concerns raised about this law, including with regard to the independence of the judiciary, an issue also raised in connection with the newly adopted law on the Common Courts (see below) and the possible politicisation of the prosecution service, the Monitoring Committee, on 27 April 2017, decided to request an opinion on the Act of the Public Prosecutors Office, as amended. Subsequently, the Venice Commission adopted its opinion[48] on this law during its plenary on 8 and 9 December 2017.

49. As mentioned, the most prominent, and controversial, aspect of the new law on the Prosecution Service is the merger of the functions of the Minister of Justice and of the Public Prosecutor General. In the authorities' view, such a merger reflects Polish legal tradition and improves the accountability and efficiency of the prosecution service. The authorities have argued that, in reality, the 2009 amendments only had provided an illusionary independence of the prosecution service from the executive, which was non-existent in reality, according to the authorities. The new law therefore reflected, in their view, this de facto situation. The Polish authorities have also argued that similar systems of subordination of the prosecution exist in other Council of Europe member states. That latter proposition must however be rejected. While the subordination of the prosecution service to the executive is not per se against Europeans standards, and while this kind of subordination still exists in various forms in some Council of member states, the Polish system is unique in the fact that it completely merges the two functions and that the Minister of Justice becomes de facto and de jure the Public Prosecutor. Moreover, in those countries were the prosecution service is subordinated to the executive, effective legal provisions exist that interdict direct government interference in individual cases. Not only are such provisions absent in the Polish situation, the new law on the prosecution service explicitly grants the Minister of Justice new and elaborate powers allowing him to directly intervene in individual cases, in contravention of European standards.

50. We would like to refer to the Venice Commission opinion for a detailed analysis of the law. In this report we wish to discuss the most serious concerns, as outlined in the Venice commission opinion. These concerns raise questions regarding the respect for the principle of rule of law as well as the vulnerability of the prosecution service to politicisation.

51. Under the new law, the Minister of Justice, a politician, has become, as Public Prosecutor, the head of the prosecution service of Poland. Important previously existing safeguards to ensure the functional independence of the prosecution service and to avoid its politicisation, such as term limits, strict dismissal procedures for the Prosecutor General and an interdiction prohibiting the Prosecutor General from holding public office, have therefore become obsolete, as the Minister of Justice is a political appointee accountable to Prime Minister, Parliament and his party. In addition, the merger of the functions of Prosecutor General and Minister of Justice seems to run counter to the Polish Constitution, which states that the Public Prosecutor shall not exercise the mandate of Deputy[49]. This seems to be confirmed by the law on the Prosecution Service itself, which states that the "*public prosecutor cannot belong to a political party or participate in any political activity.*"[50] It is clear that this cannot be compatible with the merger of the post of Prosecutor General with that of the Minster of Justice, who is also currently a deputy in the Sejm.

52. The new law gives the Public Prosecutor, and thus the Minster of Justice, extensive discretionary powers to directly intervene in individual cases. According to the law, prosecutors are obliged to enforce guidelines and orders of a hierarchically superior prosecutor.[51], The latter has the legal right to change or revoke a decision of a subordinate public prosecutors or indeed take over the handling of the case directly[52]. Moreover, the Public Prosecutor General can request operational and investigative activities to be undertaken by competent bodies (as long as they are directly pertinent to the proceedings) and inspect any materials collected in the course of such activities. These provisions give the Minster of Justice full access to all prosecutorial case files in Poland and the power to give individual instructions in relation to them[53]. At the same time safeguards

[48] CLD-AD(2017)028.
[49] Art 103(2) of the Polish Constitution.
[50] Art. 97§1 g the Act on the Public Prosecutors Office.
[51] A prosecutor can only refuse instructions from the hierarchy if (s)he resigns from the case.
[52] It is important to note in this context that according to Art 13§2 of the law *"the Public Prosecutor General is the superior public prosecutors of universal prosecutorial bodies.*"
[53] CDL(2017)028 § 51.

to guarantee the transparency of the functioning of the prosecution service and its protection against political interference are absent or week in the new law[54].

53. As mentioned by Venice Commission, these extensive powers in the hands of a Minister of Justice, a politician: "pose a real risk for abuse". During our visits, we heard numerous allegations, some of which credible, that such abuse did indeed happen. Irrespective of the veracity of these allegations, the mere fact that the prosecution system is vulnerable to political abuse and that safeguards against this are lacking in the law, undermines the rule of law in Poland and is of serious concern. The Prosecutions Service, and indeed the justice system in general, should not only be independent and impartial, it should also be perceived as such.

54. In addition, the law confers considerable powers on the Prosecutor General, and thus the Minister of Justice in relation to the appointment and promotion of, and disciplinary actions against (including dismissal), individual prosecutors[55]. Prosecutors are appointed by the Public Prosecutor General upon a motion of the National Public Prosecutor (the Deputy Prosecutor General who is also a political appointee). While the Public Prosecutor General may seek advice of the board of prosecutors, he is not obliged to follow it. Moreover, he can appoint directly the candidate suggested by the National Public Prosecutor, without a public competition, in "*particularly justified cases*". After the first appointment, no more competitions are foreseen, and promotions are decided upon by the hierarchy. Regarding disciplinary procedures, the Public Prosecutor General inter alia has the right to inspect the activities of the disciplinary courts (which are composed of prosecutors who are subordinate to the Public Prosecutor General), reprove transgressions found, request explanations and remedy the effects of transgressions.

55. Combined, these powers give the Public Prosecutor total control over the careers of the individual prosecutors and over the prosecution service as such. The fact that the National Public Prosecutor, who is the Deputy Public Prosecutor General, is in charge of the day to day management of the prosecution service does not alleviate our concerns in this respect, as the National Public Prosecutor is a political appointee normally appointed by the same ruling majority to whom the Minister of Justice belongs. In addition, the law explicitly gives wide and discretionary powers to the Minister of Justice, as Public Prosecutor General, to intervene in individual cases.

56. During our visit, we were informed that following the adoption of the law, 114 Prosecutors have been moved from the general prosecutor's office and regional offices to what are widely considered as lower ranking positions. Among these cases, were reportedly prosecutors that had been working on sensitive cases that involved interest of members of, or close to, the ruling party. At the same, there is reportedly an increase in the use of secondments or "delegated prosecutors", a process that bypasses any existing appointment and transfer procedures. At the same time the national office and its regional offices are reportedly mostly staffed with such secondments, leading to allegations that these positions are "given" as "rewards".

57. The concerns about these excessive powers are compounded by the powers given to the Minister of Justice by the Act on the Organisation of Ordinary Courts (see below) to dismiss and replace court presidents.

58. The concentration of all these –(excessive) powers in the hands of the Minister of Justice, make the system open to abuse, undermine the independence of the judiciary and run counter to the principle of the respect for the rule of law. The mere fact that the system is vulnerable to abuse should be of serious concern to the authorities and legislators and needs to be urgently addressed in the legislation.

3.3. Reform of the National Council of the Judiciary

59. A key component of the judicial reforms initiated by the Polish authorities was the reform of the National Council of the Judiciary, who—according to the authorities—did not represent the whole of the judiciary, was prone to judicial corporatism, and mostly acted in its own self-interest.

60. According to the Polish Constitution[56], the National Council of the Judiciary, also known by its Polish abbreviation KRS, is the autonomous self-governing body of the judiciary established to safeguard the independence of the judiciary. It is responsible for, inter alia, selecting the candidates for the first instance and appeals courts, as well as for the Supreme Court[57]. In addition, it has the authority to appeal laws affecting the courts and judges before the Constitutional Court and can give opinions on draft laws concerning the judiciary.

[54] Ibid § 52.
[55] Ibid § 81-92.
[56] Article 186 of the Polish Constitution.
[57] These nominations are then sent for confirmation to the President of the Republic.

61. According to article 187 of the Polish Constitution, the KRS is composed of 25 members, 15 of whom should be chosen from amongst judges. Furthermore, 4 must be elected by the Sejm from among its members, 2 must be selected by the senate from amongst its members, whilst one member is to be appointed by the President of Poland. The Council has 3 ex-officio members: the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice.

62. The Constitution does not specify how the 15 judge members are to be chosen, but until the 2017 reform, it was to be understood that, these members were judges elected by their peers as recommended by European standards[58]..

63. In February 2017, the government announced its plans to reform the National Council of the Judiciary. The initial draft amendments to the law on the National Council of the Judiciary and certain other acts of Poland proposed that, inter alia, the judge members would from now on be elected by the Sejm (in addition to its own constitutional quota). The Council would also be split into two chambers: one for judicial members and the other for political representatives. As both chambers would have to agree to a decision to appoint a judge, this would give the political representatives a de facto veto over decisions made by the judicial members. In addition, the proposed amendments specified that the mandates of all judicial members would be terminated within 90 days of the adoption of the new law.

64. These draft amendments were strongly criticised by domestic and international actors, who feared that they would politicise the appointment of judges and erode the independence of the judiciary. The draft amendments were assessed by the OSCE/ODIHR. In its opinion, the OSCE/ODIHR noted that as a result of the proposed amendments the "*legislature rather than the judiciary would appoint the 15 judge representatives..."* to the KRS, which would give the legislature and the executive "*decisive influence over the selection of judges*". As a result, in the view of the OSCE/ODIHR, the proposed amendments "*raise serious concern with regard to key democratic principles, in particular the separation of powers and the independence of the judiciary*". It concluded that "*if adopted the amendments would undermine the very foundations of a democratic society governed by the rule of law*". The OSCE/ODIHR recommended therefore that the amendments should be reconsidered in their entirely and not be adopted[59]. Nevertheless, despite these extensive criticisms, the draft amendments were adopted by the parliament in July 2017. However, on 24 July 2017, the act on the National Council of the Judiciary was veto-ed by the President of the Republic together with the act on the Supreme Court.

65. On 26 September 2017, a new draft act on the National Council of the Judiciary, as well as a new draft act on the Supreme Court, was proposed by the President. While the draft proposed by the President contained some welcome provisions to address some of the criticisms made, his draft did not fundamentally differ from the draft law adopted by the parliament. This draft was therefore also strongly criticised by domestic and international actors[60].In a positive development, the Presidential proposal abandoned the division of the National Council of the Judiciary into two chambers and introduced a 3/5 majority for the election of the judicial members by the Sejm. However, the fact that the judicial members would be elected by the Sejm and not by their peers was regrettably maintained. Following the adoption of Resolution (2017)2188 on "New Threats to the Rule of law in Council of Europe member states" the President of the Parliamentary Assembly requested the opinion of the Venice Commission on the draft Act on amending the Act on the National Council of the Judiciary and the draft Act on amending the Act on the Supreme Court as proposed by the President. The opinion would also cover the Act on the organisation of Ordinary Courts, as adopted by the Polish parliament in July 2017. The Venice Commission adopted its opinion[61] on these laws during its plenary on 8 and 9 December 2017. Nevertheless, the Sejm adopted, unamended, the two Presidential draft laws on 8 December 2017 and the Senate on 15 December 2017. The Presidents signed both laws into force 5 days later, on 20 December 2017.

66. In its opinion, the Venice Commission emphasised that, according to European standards, at least half of the members of the National Councils of the Judiciary should be elected by their peers from members of the judiciary. Even with the introduction of a 3/5 majority for the election of the members by the Sejm, the election of judicial members remains at odds with European standards as "*judicial members are not elected by their*

[58] According to European standards at least half of the members of national judicial councils should be judges elected by their peers.
[59] OSCE/ODIHR JUD-POL/305/2017-Final.
[60] See CDL-AD(2017)031 § 9. The UN Special Rapporteur stated that the draft law on the National Council of the Judiciary proposed by the president and his proposal for the Supreme Court, taken together "pose a serious threat to the independence of the Polish judiciary and the separation of powers" The OSCE/ODIHR concluded that the proposed law on the National Council of the Judiciary represented "a major step back as regards judicial independence in Poland."
[61] CDL-AD(2017)031.

peers but receive their mandates from Parliament" Taken into account the fact that the Senate and Sejm combined also elect 6 members who are parliamentarians, this means that the National Council of the Judiciary is "*dominated by political appointees*"[62] , which could lead to its politicisation. This is compounded by the fact that the Sejm is not obliged to appoint members who are proposed by the judiciary itself. According to the law, candidates for the judicial positions can be nominated by either a group of 25 judges or 2000 citizens. Each political faction then freely selects 9 candidates from these proposals which will then be brought to a vote in the Sejm. At none of these steps is there a requirement for at least a number of these candidates to have been proposed by the judiciary itself, again counter to European norms and standards.

67. According to the Polish authorities, the change in the election method was dictated by the need to address the under representation of district court judges on the National Council of the Judiciary. While this is in itself a valid objective, we agree with the Venice Commission that there are far better mechanisms to ensure their representation on the National Council of the Judiciary that would not run counter to European norms and standards[63].

68. In addition to changing the appointment procedure for the judicial members of the National Council of the Judiciary, the law also provided for the early termination of the mandates of all judicial members on the Council. Ostensibly this was done to address the judgment of the Constitutional Court that held, inter alia, that all members of the National Council of the Judiciary should have the same term of office. In the view of other interlocutors, the change of appointment mechanism and early termination of the mandate of sitting judges combined, amounted to a hostile take-over of the council, with a view to bring it firmly under control of the authorities. In addition, the combined effect of these two changes weakens the independence and allows for the politicisation of this important institution, which, in turn, undermines the independence of the judiciary.

69. In this context, it is important to note that the Constitutional Court had called for all members on the National Council of the Judiciary to have the same term of office. In the law, this was interpreted as a joint term of office, implying the same starting and end dates for the mandates for all members. We are aware that the correctness of this interpretation is questioned. In addition, as noted by the Venice Commission, the principle of a joint tern of all members is questionable, as it hinders the continuity and preservation of institutional memory of the National Council of the Judiciary[64].

70. Following the decision of the Court of Justice of the European Union with regard to the retirement age of Supreme Court Judges, those judges who were forced on early retirement before the CJEU decision appealed their forced retirement before the Supreme Court. However, the Supreme Court questioned whether the newly established disciplinary Chamber of the Supreme Court could be considered independent. It noted that the judges on the disciplinary chamber are appointed by the President following consolation by the National Council of the Judiciary. In this context, the Supreme Court noted that the independence of the National Council of the Judiciary is itself open to question, following its recent reform that resulted in the 15 judiciary members now being elected by the parliament. In light of this, the Supreme Court decided to refer this question to the Court of Justice of the European Union. On 26 November 2018, the Court granted the request of the Polish Supreme Court and decided to hear the case under accelerated procedure

71. On 27 June 2019, in his opinion before the Court on that matter, the Advocate General of the European Union considered that the manner of appointment of the members of the National Council of the Judiciary compromises its independence from the legislative and executive authorities. This, in turn, gives legitimate reasons to doubt the independence of the Disciplinary Chamber of the Supreme Court. As a result, in his view the newly established disciplinary chamber does not satisfy the requirements of judicial independence established by EU law[65]. At the moment of writing the Court of Justice of the European Union has not delivered its judgement, but we note that the opinions of the Advocate General are often followed by the Court. The ramifications for the justice system would be devastating if not immediately addressed. Given the clear questions raised about the independence of the National Council of the Judiciary, we can only urge the authorities to revisit the reforms of this important institution without delay.

3.4. Reform of the Common Courts

72. The Act on the Organisation of the Common Courts was amended by the Polish parliament in March and July 2017. Despite strong domestic and international criticism of these amendments, they were signed

[62] Ibid § 24.
[63] Ibid §27.
[64] Ibid § 28-29.
[65] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190083en.pdf.

into law by the President of Poland on 25 July 2017[66]. Following the launch of an infringement procedure by the European Union on the grounds that the differentiation of the new retirement age between male and female judges amounted to a violation of EU anti-discrimination legislation, the parliament adopted further amendments to the law. These amendments sought to address – as we will outline below in our view only partially - some of the criticism on the Act.

73. Already, under the previous incarnation of the Act, the Minister of Justice had extensive, and in our view excessive, powers[67] over the Polish Justice system, including with regard to the appointment and dismissal of court presidents, disciplinary proceedings against judges and the internal organisation of the courts. These already extensive powers and competencies were considerably strengthened by the amendments to the Act on the Organisation of the Common Courts.

74. Following its adoption, the Act allowed for a 6-month transitionary period, during which the Minister of Justice could appoint and dismiss court presidents and vice-presidents fully at his discretion, without the possibility for these decisions to be appealed. Reportedly, more than 160 court presidents and vice presidents - about 20% of all such positions - were arbitrarily dismissed and replaced by the Minister. Even following this period, the Minister of Justice maintained his nearly full discretion over the appointment over Court Presidents. As mentioned by the Venice Commission and the CCJE, the judiciary itself should have an involvement in these appointments. Normally, this could have been through the National Council of the Judiciary. However, following the changes to its appointment procedure (which do not allow for a decisive influence of the judiciary itself) this is no longer enough to ensure that the appointment and process would adhere to European standards.

75. Following the expiry of the 6-month transitional period, the Minister of Justice needs to justify a dismissal on substantive grounds. However, the grounds provided for this in the law are very broadly formulated and allow for considerable discretion by the Minister. For example, legal grounds for dismissal are: "*serious or persistent failure to comply with official duties*" "*particularly ineffective management of the court*" and "*other reasons which render the remaining in office incompatible with the sound administration of justice*". After the amendments adopted in April 2018, the Minister must ask an opinion of the college of the court whose (vice) president the Minister wishes to dismiss. If the college disagrees, then the Minister needs to request an opinion of the National Council of the Judiciary, which can decide with a two third majority to block the dismissal[68]. In the context of our concerns regarding the composition of the National Council of the Judiciary, we question whether the requirement for a two-thirds majority by the High Council of the Judiciary to block the dismissal of a court (vice) president constitutes an effective safeguard against the possible abuse of powers by the Minister of Justice. An additional concern is that a decision to dismiss a court (vice) president cannot be appealed before a court of law, which seems incompatible with the findings of the European Court of Human Rights in the case of Baka vs Hungary[69].

76. The Act on the Organisation of the Common Courts has increased and strengthened the roles of the Minister of Justice in disciplinary proceedings against judges. The Act provides for the possibility for higher level court presidents, or the Minister of Justice, to admonish[70] lower level court (vice) presidents regarding alleged mismanagement. The lower level court (vice) president can appeal to the Minister of Justice, who has the final say. Such admonishments can lead to a 50% reduction of post allowance for up to 6 months. In addition, court presidents are obliged to submit an annual report of activities to the Minister of Justice. While the reporting in itself is not problematic per se, the Minister of Justice may, on the basis of these reports, decrease or increase post allowances. These decisions by the Minister cannot be appealed. These indirect disciplinary mechanisms are of concern. As mentioned by the Venice Commission, they create a de facto pyramid of hierarchical power with the Minister at the top, which undermines both the internal and external independence of the judiciary[71]. Such disciplinary powers should not be given unchecked to the Minster and court presidents, especially not without the possibility of a legal appeal by those concerned.

77. Also, the powers of the Minister of Justice in formal disciplinary proceedings against judges have been considerably increased under the new Act and are of concern. The judges at the disciplinary chambers of first level and appellate courts are now selected by the Minister after consultation with the National Council of the

[66] As mentioned previously, two other controversial laws, on the Supreme Court and on the National Council of the Judiciary were vetoed by the President on 24 July 2017.
[67] For a list of these powers see CDL-AD(2017)031 § 97-98.
[68] See GRECO, Addendum to the Fourth Round Evaluation Report on Poland (Rule 34) (Greco-AdHocRep(2018)3) § 44 and Pawel Filipek: "Challenges to the rule of law in the European Union, the distressing case of Poland §2.4.1.
[69] Application no. 20261/12.
[70] Via so-called written remarks.
[71] CDL-AD(2017)031 § 110 -117.

Judiciary[72]. As we outlined in a previous section, the Minister can appoint a disciplinary officer from among the judges, or in case of criminal allegations, from the prosecution service. This is compounded by the fact that the Minister of Justice himself is also the prosecutor general, who personally may take over and intervene in the disciplinary proceedings.

78. The Act on the Organisation of Ordinary Courts originally brought the retirement age for judges down from 67 to 65, for male judges and 60 for female judges. The European Commission considered this divergence in the retirement age for male and female judges a violation of EU antidiscrimination legislation. It therefore opened an infringement procedure and brought a case before the Court of Justice of the European Union. In response, the 12 April 2018 amendments introduced the same retirement age of 65 years for both male and female judges but allowed female judges, at their own request, to retire at 60 years of age. The new retirement age has taken immediate effect on sitting judges. The tenure of judges can be prolonged until the age of 70, in case of a need resulting from the workload of the individual court. At first, this was the prerogative of the Minister of Justice; but since the 12 April 2018 amendments, it is now the National Council of the Judiciary that decides on the request to continue working after the retirement age. GRECO reported that, by May 2018, despite the 600 open vacancies in the Judiciary, only 32 prolongations of contract had been granted out of the 130 such requests[73].

79. On 5 November 2019, the Court of Justice of the European Union issued its judgement[74] with regard to the lowering of the retirement age of common court judges and prosecutors. In its judgment, the Court ruled that Poland broke EU law by establishing a different retirement age for male and female judges and prosecutors. The Court also took ruled against the lowering the retirement age for common court judges, while giving the Minister of Justice the power to decide on the prolongation of the tenure of judges beyond the retirement age. In the view of the Court, the combination of the lowering of the retirement age and the arbitrary power of the Minister of Justice to prologue the tenure violated the principle of irremovability of judges. Following the judgement, the Polish authorities stated that the findings of the judgment had already been addressed with the 12 April 2018 amendments. However, it is not clear how this judgment will affect the 98 judges that were forced into early retirement and whose tenure was not prolonged before the adoption of the 12 April 2018 amendments.

80. In a welcome development, the new act introduced the random assignment of cases among judges. However, according to the rules of procedure of the ordinary courts[75], the Minister of Justice maintains considerable competences in the assignment of cases.[76] Court chairpersons have maintained their competencies in altering the composition of the benches, including the right to replace a judge hearing a case for the sake of the efficiency of the proceedings[77].

81. We wish to highlight that several of the above-mentioned shortcomings already existed in the law before it was amended by the current parliament. However, the amendments adopted in 2017 and 2018, not only failed to (fully) address these shortcomings, but in a number of cases – substantially – aggravated them.

3.5. Reform the Supreme Court

82. As mentioned above, despite strong criticisms from domestic and international partners, the new law on the Supreme Court, as proposed by the President of the Republic, was adopted by the Sejm on 8 December 2017 and by the Senate on 15 December 2017. The President signed both laws into force 5 days later on 20 December 2017. The main, controversial provisions of this law entail the creation of two new chambers in the supreme court: one for hearing disciplinary proceedings against Supreme Court judges; and one for hearing the so-called extraordinary appeals as well as electoral and public law disputes. The new law provides that lay members are part of the benches in these chambers. Moreover, the law lowered the retirement age for Supreme Court Judges, including for sitting judges, from 70 to 65, but gave the President of the Republic large discretion to allow individual judges to continue working beyond the new retirement age.

83. The law foresees the creation of two new Chambers for the Supreme Court, which have special powers that, de facto, put them above the other chambers of the Court. According to the law, in both chambers'

[72] See our analysis of the impact of the new law on the National Council of the Judiciary on the independence of this important institution.
[73] Greco-AdHocRep(2018)3 § 46-48.
[74] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190134en.pdf.
[75] The rules of procedure for ordinary courts are established by the Minister of Justice after consultation with the National Council of the Judiciary (Art 41 Act of the Act on the organisation of the ordinary courts.
[76] CDL-AD(2017)031 § 120.
[77] Ibid, §123.

judgments will be made with the participation of lay members[78]. These lay members are elected by the Polish senate for a four-year term. No requirements regarding legal knowledge[79] and education – not even the requirement of having finalised secondary education is obligatory - are set in the law for these members. Moreover, the first president of the Supreme Court has full discretion in appointing the lay members to the bench of the disciplinary and extra ordinary appeals chambers. The participation of lay members, as foreseen in the law, is problematic. Both chambers deal with cases that are legally very complex and sensitive, and the participation of lay members without legal knowledge, could, as mentioned by the Venice Commission, endanger the efficiency and quality of the judicial proceedings[80]. The other judges on these chambers are selected by the NCJ, whose independence is questionable as a result of the appointment procedure for its own members[81]. The appointment procedure for lay member by the senate, combined with the selection of the judges by the NCJ and the full discretion accorded to the first president of the Supreme Court to appoint them to the different benches, make the proceedings vulnerable to political abuse. This concern is reinforced by reference to social justice in the provisions dealing with the extra-ordinary appeals procedure (see below). During our visit to Warsaw in September 2019, Professor Gersdorf, the current first President of the Supreme Court expressed her serious concerns about the establishment of the extra-ordinary appeals chamber, which de facto functioned as a court within the court, whose members are not equal to other Supreme Court Judges. This is reflected in their higher salaries.

84. The law on the Supreme Court introduces the possibility of extraordinary control, or extraordinary appeals to revise legally binding judgments from other courts, including the other chambers of the supreme court itself. These extraordinary appeals can be initiated by the Ombudsperson and by the Minister of Justice in his ex officio capacity as the General Prosecutor. Both have very broad discretion with regard to the grounds for filing an extraordinary appeal[82] , which include filling an appeal for "the sake of social justice ". While the principle of reopening of closed cases under very strict circumstances and criteria is not per se problematic, the instrument of extraordinary appeals provided for in the Act is of serious concern, as it violates the principles of legal certainty and *res judicata*. This is compounded by the excessively broad time limits to file such an extra ordinary appeal. While in criminal law cases, where reversal would be in the detriment of the accused, the appeal has to be filed within 6 months after the final judgment. In all other cases, the time limit is five years and, as a transitional measure, in the first three years after the adoption of the law, appeals can be filed to reopen any case decided after 17 October 1997! Moreover, extra-ordinary appeals can be filed against the Court decisions reached in these reopened cases. As the Venice Commission rightfully concludes: "no judgment in the Polish system will ever be final anymore" [83] . The mechanism of extra ordinary control "jeopardises the stability of the Polish legal order[84]" and should be reconsidered.

85. We were informed that, until now, only the ombudsperson has availed himself of his right to file an extraordinary appeal, despite his publicly stated reservations about the legality of this new legal procedure. When questioned about this contradiction, he informed us that more that 4000 requests to initiate an extra-ordinary appeal, had been received by him from the public. By categorically refusing to use this mechanism available to him, he would open himself up to accusations of abuse of powers. Therefore, while maintaining his reservations about the legal principle of the extra-ordinary appeal, he had filed a small number of them, where he felt that they could potentially address serious existing social injustices.

86. The newly established Chamber on Extraordinary Control and Public Affairs of the Supreme Court is responsible for hearing all election related appeals, including for European Parliament elections. As we outlined above[85], due to the appointment of its members, the independence and impartiality of this new chamber is open to questione, and it is vulnerable to political pressure and interference. As a result, it is not perceived as an independent and impartial arbiter in election related complaints by all stakeholders, which is crucial for a democratic election process. Given its role in adjudicating European Parliament election related appeals, any questions regarding its impartiality and independence therefore potentially[86] affect all European Union member states.

[78] For first instance cases the bench will consist of two judges and one lay-member, for second instance cases 3 judges and 2 lay members.
[79] It seems that the law actually excludes legal professionals from becoming lay members.
[80] CDL-AD(2017)031 § 64-70.
[81] See also § 107.
[82] As mentioned by the Venice Commission, "the act provides for very few restrictions in the use of this instrument" CDL-AD(2017)031 § 57.
[83] CDL-AD(2017)031 § 58, moreover an extraordinary appeal can be filed without the knowledge or consent of the parties concerned.
[84] Ibid § 63.
[85] See also § 83.
[86] We wish to emphasis that no appeals were filed against the conduct of the 2019 European Elections in Poland.

87. In our view, there is a serious risk that the introduction of the extra-ordinary appeal in Poland could considerably increase the number of applications against Poland before the European Court of Human Rights in Strasbourg. This view which was shared by many of our interlocutors in Warsaw. This underscores our concern that, as a result of the judicial reforms in Poland, the European legal structures such as the ECtHR and CJEU will increasingly become the facto court of last resort for Polish citizens, which is of concern.

88. An aspect that very visibly created considerable controversy, was the provision in the law that reduced the retirement age of members of the Supreme Court from the age of 70 to the age of 65. This provision also applied retroactively for sitting members. This provision reportedly affected 27 Judges, including the First President of the Supreme Court. This provision was therefore widely viewed as an overt attempt by the authorities to stack the Supreme Court with party supporters and to bring it under control of the ruling majority. One of the stated arguments of the authorities for lowering the retirement age has been the need to decommunize the Supreme Court. In the introduction of this report, we already expressed our general concern about the lustration aspects of these reforms, which we will not repeat here. However, we wish to highlight that a key principle of lustration is the need to prove the individual guilt of the persons concerned by these processes. The lowering of the retirement age of all judges to remove a few individuals amounts to collective punishment in violation Council of Europe norms. In this context, it should also be noted that a lustration process was carried out in Poland in 1990 and that 80% of the Supreme Court Judges were removed from their function at that time. The new retirement age reportedly only affected one judge that served in communist times, clearly raising questions about this stated objective[87].

89. As a transitional measure, the law allowed serving Supreme Court judges who had reached the age of 65 before the law went into force, or at the latest on 3 July 2018, to request an extension of their mandate until 70 years of age from the President of the Republic. The law gave the President full discretion to accept or deny such a request, or even not to act on it. The latter would lead automatically to the retirement of the judge in question. No legal appeal against the decision of the President is possible. This gives the President of the Republic excessive influence over judges reaching their retirement age. To our knowledge[88] , until these provisions were frozen by the temporary measures of the CJEU, 12 Supreme Court Judges asked for an extension of their mandate. Of these, only five requests were accepted by the President[89].

90. As mentioned, the retrospective lowering of the retirement age for the Supreme Court was controversial and decried by national and international actors. Professor Malgorzata Gersdorf, the first President of the Supreme Court, noting that her term in office is set in the Constitution and cannot be altered by ordinary legislation, refused any notion of early retirement and continued working. On 3 October 2018, the European Commission filed a complaint with the Court of Justice of the European Union in Luxembourg on the grounds that the forced early retirement of judges, combined with the discretionary mechanism allowing the President of Poland to selectively grant an extension of the mandate, violated the principle of irremovability of judges. It thus, according to the Commission, undermined the independence of the judiciary and infringed EU law. The Commission requested the Court, as interim measure, to order the Polish authorities to, inter alia: suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges; to ensure that the Supreme Court Judges would remain in their position, with the same rights and able to perform their duties; and to refrain from adopting any measures to replace the Supreme Court Judges concerned by the retroactive lowering of the retirement age. Pending the final decision of the Court, its Vice President preliminarily granted the request of interim measures by the European Commission. This was confirmed when, on 17 December 2018, the Court decided to grant the requested interim measures in full and ordered Poland, inter alia, to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges[90].

91. On 21 November 2018, following the provisional granting of the interim measures, the Polish Parliament had adopted the required legislation to reverse the provisions in the law regarding the early retirement of Supreme Court judges. This legislation was signed in force by President Duda on 17 December 2018, after the Court had issued its judgment**.**

92. On 24 June 2019, the Court of Justice of the European Union issued its final judgment in case C-619/18 of the Commission against Poland regarding the lowering of the retirement age of judges of the Polish Supreme Court. In its judgment[91] the Court considered that the lowering of the retirement age of judges of the

[87] Pawel Filipek: "Challenges to the rule of law in the European Union, the distressing case of Poland," §2.2.1.
[88] Ibid.
[89] It should be noted that all forced retirements were annulled, and Supreme Court Judges reinstated, following the decision of the Court of Justice of the European Union on 17 December 2018 (see below).
[90] Court of Justice of the European Union, Press Release no. 204/18.
[91] Court of Justice of the European Union, Press Release no. 81/19.

Supreme Court is not justified by a legitimate objective and undermines the principle of irremovability of judges, which is essential to their independence. Furthermore, it considered that the procedure allowing the President to give an extension to the retirement age is discretionary and could allow for external pressure and influence on judges, again undermining their independence. The Court therefore ruled that the Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court is contrary to EU law.

93. The Act on the Supreme Court stipulates that the first President of the Supreme Court is appointed by the President of Poland from a list of five candidates selected by the General Assembly of the Supreme Court. Under previous legislation, this choice was made from a list of two proposed candidates. The new legislation therefore grants the President considerably more discretion in his choice. The legalisation also gives considerable discretionary powers to the first President of the Supreme Court, including about disciplinary proceedings and the composition of the benches. Moreover, as we already mentioned, the first President of the Supreme Court has complete discretion regarding the appointment of the lay members of the benches of the disciplinary chambers and the chamber for extra-ordinary appeals. While individually, these discretionary powers are not problematic per se, cumulatively they make the court vulnerable for political abuse. This is particularly concerning, given the attempts to politicise the court we are currently witnessing in Poland.

3.6. Combined effects

94. While we have discussed the different parts and acts of the judicial reform in Poland in separate sections, it should be noted that they are part of a comprehensive and integrated reform of the judiciary and justice system. The different acts and measures are designed, and act to, complement and reinforce each other. Naturally, our concerns expressed on the different parts of legislation therefore also compound and reinforce each other. While individual aspects of the different acts and policies discussed are already of serious concern , when taken cumulatively these acts "*bring the judiciary under direct control of the parliamentary majority and President of the Republic – contrary to the very principle of separation of powers."*[92] The acts also open the justice system to political abuse and endanger the rule of law in the country. This cannot have been the objective of these reforms and, in our view, is unacceptable. The Polish authorities should therefore be urged to promptly address all the concerns identified both in this report and in reports from the Venice Commission and to implement their corresponding recommendations.

4. Disciplinary proceedings against judges

95. As we outlined in the previous sections, a main objective of the reform started after the 2015 legislative elections, has been to bring the judiciary firmly under the control of the ruling majority. In that context, the reports of disciplinary proceedings against, and harassment of, judges and prosecutors who are seen as acting against the interests of the ruling majority, or who have been openly critical of the reforms, is extremely concerning. This is all the more the case, since recent disclosures that a campaign of harassment of judges was orchestrated with the involvement of leading personalities in the Ministry of Justice and High Council of Justice closely connected to the current ruling majority. We will outline this so-called Piebiak[93] affair below.

96. In our discussions on the Act on the Ordinary Courts, the Act on the Supreme Court and the Act on the Public Prosecutor, we already expressed our concern that the disciplinary mechanism for judges and prosecutors established by these acts are open to political abuse. In addition, as we outlined when discussing the Act on the National Council of the Judiciary, after the initial appointment of a judge, promotions and transfers (including ones that can be considered as de facto demotions) are fully the prerogative of the Minister of Justice. Similarly, as we outlined in the context of the Act on the Public Prosecutor, the Minister of Justice - in his function of Prosecutor General-has practically full control over the careers of individual prosecutors.

97. As we mentioned in the section on the reform of the prosecution service, since the adoption of the law, at least 114 prosecutors have been transferred to other posts in what several interlocutors alleged to be politically motivated demotions. The fact that a number of board members of the national prosecutor's association "Lex Super Omnia" – which represents the interest of individual prosecutors and which has been publicly critical of the prosecution service reforms - have been placed under disciplinary investigation for allegedly violating the dignity of their profession gives some credence to these allegations.

[92] CDL-AD(2017)031 § 95.

[93] After former Deputy Justice Minister Łukasz Piebiak, who allegedly coordinated a smear campaign against several judges. Following these accusations, which he denies and considers to be fabricated against him, he resigned from his position as Deputy Justice Minister.

98. According to the Polish Constitution, judges cannot be members of political parties or engage in activities that would be incompatible with the principle of the independence of the courts and judiciary. While judges should refrain from political activities, the law does not clearly define what amounts to political activity and what is protected under the right to freedom of speech[94]. While we concur with the prohibition of party-political activities for judges, this cannot have the effect of forbidding judges from being able to express an opinion on the legal system and changes to it that would affect them directly.

99. Regrettably, on numerous occasions, disciplinary proceedings have been initiated against judges who have been critical about the judicial reforms and their effect on judicial independence. Apparently, these criticisms have been the main motivation behind these proceedings. Even more disturbingly, disciplinary proceedings have been started against judges for decisions they have taken when adjudicating cases[95]. Of particular concern in that context, are the disciplinary proceedings started for "judicial excess" against judges, including 7 Supreme Court judges, who used their statutory right to request a preliminary ruling of the Court of Justice of the European Union on the compliance of provisions on disciplinary liability of judges with EU legislation[96] . Regrettably, the list of such cases is extensive as demonstrated by several well documented reports.

100. A key issue of concern is the fact that after prosecutors and judges have been informed by the Disciplinary Inspectors that a disciplinary investigation has been started against them, these investigations often continue indefinitely without formal disciplinary charges being brought before the relevant disciplinary chambers. This puts the judges and prosecutors concerned in a precarious limbo, being investigated but not being able to defend themselves against the alleged violations that led to these investigations. The Chairman of the National Council of the Judiciary informed us that, in the last year and a half, 1174 disciplinary investigations were started[97]. Only in 71 instances had disciplinary cases been opened. Of these cases 34 had been brought to the court, while the others were closed without wrongdoing found. Of the 34 cases brought before the disciplinary tribunals, 19 had been adjudicated (in either first or second instance). In cases were disciplinary violations had been found by the court, the most frequent sanction had been an official reprimand or notice in the file of the person concerned. The very high number of disciplinary investigations started, combined with the very small number of disciplinary cases that result from them, raise serious questions about the underlying reasons for these investigations and the grounds and justification on which they are started. Irrespective of the small number of actual disciplinary cases opened, the large number of investigations started by disciplinary officers directly accountable to the Minster of Justice, and the time it takes to close these investigations – if at all – clearly has a chilling effect on the judiciary and affects their independence.

101. Similar to what we heard from the prosecutors' association, representatives of the judges' associations Iustitia and Themis, as well as members of the board of the Polish Bar Association that assist judges in disciplinary proceedings, informed us that practically all of them had been placed under disciplinary investigation. The investigation is reportedly often based on vague and subjective charges such as violating the dignity of the judicial profession.

102. In addition to the reports on disciplinary proceedings, we have also received several reports about cases where the Minister of Justice has used his extensive rights to transfer judges to places that can de facto be considered a demotion, or to otherwise make decisions that aversely affected the careers of judges and prosecutors., who had allegedly criticised the judicial reforms or adjudicated in particular cases in a manner not favoured by the authorities. As we mentioned earlier, it is beyond the scope of this report to discuss these individual cases, but it underscores our concerns about the vulnerability to political abuse of the provisions on disciplinary proceedings as well as the excessive powers of the Minister of Justice over the judiciary and justice system.

103. In this context, the negative portrayal, even stigmatisation, of the judiciary and individual judges and prosecutors by high ranking members of the authorities and ruling majority, as well as the public media, is of concern. This deteriorates public trust in the judiciary, contrary to the stated aims of the reforms initiated by the government and can have a chilling effect on individual judges.

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[94] Disciplinary proceedings against judges and prosecutors, Helsinki Foundation for Human Rights, February 2019.

[95] It is beyond the scope of this report to mention all individual cases. For additional information on some of the cases se for example: "Disciplinary proceedings against judges and prosecutors", Helsinki Foundation for Human Rights, February 2019 or "A country that punishes – Pressure and repression of Polish judges and prosecutors" – Justice Defence committee (KOS), February 2019. Also Amnesty International, "Poland: Free Courts, Free People" July 2019.

[96] "A country that punishes – Pressure and repression of Polish judges and prosecutors" – Justice Defense committee (KOS) p .10.

[97] There are approximately 11.00 judges in Poland, 1174 disciplinary cases opened means approximately 10% of them are under disciplinary investigations which seems very, if not excessively, high.

104. The issue of politically motivated smear campaigns and harassment of judges and prosecutors came to the foreground when a political scandal broke out broke out on 19 August 2019. The scandal involved Deputy Justice Minister Lukasz Piebiak, who was, until then, one of the main driving forces be behind the reform of the judiciary. On that day, the Onet news portal, published alleged WhatsApp and Facebook communications between Deputy Justice Minister Piebiak and a woman called Emelia. Other newspaper reports later identified Emelia as the wife of a leading judge with close connections to the ruling party. According to these communications, which were widely distributed on the internet, Emelia executed a smear campaign against several judges at the behest of Mr Piebiak, who also allegedly orchestrated the campaign and provided her with personal information about these judges, including their private addresses, which would constitute a gross violation of privacy regulations. In addition to Mr Piebiak, two other judges seconded to the Ministry of Justice, alongside two members and an employee from the National Council of the Judiciary, were identified as being involved in this smear campaign that targeted, among others, the President of the Iustitia judges' association. According to Emilia, in subsequent interviews, the actions of her and her co-conspirators would have harmed the careers and private lives of at least 20 judges.

105. Mr Piebiak, while denying the allegations, and alleging that the published message exchanges had been fabricated, resigned on 20 August 2019[98]. The President of the National Council of the Judiciary informed us that the Council, while condemning the smear campaign, had failed to come to an agreement on how to deal with the issue of the members that were allegedly involved in what amounts to be a troll farm to smear members of the judiciary. In order to protect the independence of the members of the NCJ, the only manner a sitting member can be removed is by disbarring him or her. This was clearly not one of the competencies of the NCY. However, the President of the National Council of the Judiciary informed us that, using his prerogatives as President with regard to the composition of committees and working groups of the Council, he had removed the two members from any committee that dealt with appointments or other career issues, as well as policy matters pending the investigation into these matters. The revelation of the existence of this troll farm caused an uproar inside the government, with the Prime Minister officially asking for an explanation from the Minister of Justice. The latter has denied any involvement in this case and announced that he had asked the Prosecution Service to launch an official investigation

106. The First Deputy Minister of Justice, and ministry officials we met, categorically insisted that, if the allegations turned out to be true, this smear campaign had been the work of individuals and in no manner could be linked to the Ministry as an institution. This again was questioned by a number of interlocutors, who noted that, in some of the message exchanges, Mr Piebiak indicated that "his boss" would be happy with the results of the Emilia's activities. Even if not organised by the Ministry - and despite the allegations we heard ,we have no concrete indications that this would have been the case - it is clear that the alleged smear campaign was organised from within the Ministry, with the involvement of high ranking officials in the Ministry and National Council of Justice, who are responsible for the justice reforms and the careers of judges and prosecutors. This is both deplorable and of serious concern. As mentioned, the Minister of Justice has announced that the Prosecution Service has started an investigation into these allegations. However, given the tight control of the Minister of Justice over the Prosecution Service, the trust of the stakeholders and public in the efficiency and impartiality of these investigations is very low, if not non-existent. For the benefit of both the legal system in Poland, including the Ministry of Justice itself, we therefore call upon the authority to establish, at their earliest convenience, but by 31 March 2019 at the latest, an independent, impartial public enquiry commission, whose composition and mandate should be in line with accepted European standards for such independent investigations.

107. There has been increasing concern about the disciplinary regime for judges and prosecutors among Poland's international partners. On 9 April 2019, the European Commission launched a new infringement procedure against Poland on the grounds that its disciplinary regime for judges undermined judicial independence and does "not protect them from political control". In its decision, the Commission specifically mentioned the fact that, according to Polish legislation, disciplinary proceedings can be started against judges on the basis of the content of their judgments. In addition, the Commission argued that the disciplinary regime does not "*guarantee the independence and impartiality of the disciplinary chambers Disciplinary Chamber of the Supreme Court, which is composed solely of judges selected by the National Council for the Judiciary, which is itself politically appointed by the Polish Parliament (Sejm)*"[99] As the Polish authorities failed to address the concerns of the Commission, the latter decided, on 10 October 2019, to refer Poland to the European Court of Justice. Given the importance of this issue for the independence of the judiciary and rule of law in Poland, the European Commission asked the Court to an expedite the procedure. On 19 November 2019, the CJEU delivered its judgement in joint cases C-585/18, C-624/18 and C-625/18 regarding the independence of the Disciplinary Chamber of the Supreme Court. In this judgment, the CJEU considered that the manner by

[98] However, he was reinstated as a judge, a position he held before being appointed Deputy Minister.
[99] EU Commission Press Release, 10 October 2019.

which this chamber has been formed and its members appointed has given "*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.[100]" While not outright ruling that this special disciplinary chamber of the Supreme Court lacked the required independence, it held that the Supreme Court should consider in each individual case whether this chamber had the required independence to hear the particular case. Therefore, in EU law related cases - which include the cases on the retiring of judges of the Supreme Court - the CJEU decided to disapply the provisions in the domestic legislation that give exclusive jurisdiction to the Special Chamber to hear the retirement cases. We hope that this judgment will entice the Polish authorities to address the legitimate concerns with regard to the independence of the Special Disciplinary chamber. This is especially the case in the context of several pending cases in front of the CJEU, which have the independence and impartiality of this body is at the heart of them.

5. Miscellaneous Issues

108. As we mentioned in the introduction, this report has focused on the reforms of the judiciary and justice system. However, during our work, several other reforms and developments were brought to our attention that raised questions and concerns. Even though we cannot discuss them in detail in this report, in our view these developments warrant the attention of the Monitoring Committee and Assembly, including through expediting a periodic review report on Poland that should, inter alia, cover these issues. Nevertheless, several issues were raised frequently, and we wish to outline these in summary in this report.

5.1. Law on assemblies

109. In December 2016, the Sejm adopted a series of amendments to the law on assemblies. These amendments, inter alia, stipulate that assemblies can be prohibited, if they coincided with so-called cyclical assemblies. These are defined as demonstrations organised by the same organiser at least four times a year, or on a yearly basis for more than three years. In the draft law, it was originally proposed that no demonstration would be allowed to coincide with official assemblies organised by the public authorities, or by the Church. However, this provision was removed by the legislator during the adoption process. On 29 December 2016, the President sent this law to the Constitutional Court for an opinion on its constitutionality. On 17 March, the Constitutional Court ruled that the law was constitutional, after which it was signed into force by President Duda.

110. During the first visit of the rapporteurs in 2017, the law and its effects were discussed with different stakeholders It became clear that the main practical effect of this law, is that counter demonstrations are not allowed to take place within a 100-metre perimeter of the protest against which they are held. While this may limit counter demonstrations on some occasions, we note that several, if not most, member states have public order regulation that spatially separate manifestations and their counter manifestations.

111. While we are not aware of any other member states with similar provisions regarding cyclical demonstrations, they do not run counter to European standards per se, unless the cyclical status would only be available to a limited group or type of organisations or manifestations. While we were initially informed that the cyclical status would be reserved for "historical" or "cultural" manifestations, the authorities informed us that, in practice, there are no such limitations. Therefore, as long as no discriminatory practices take place when attributing cyclical status to manifestations, these provisions do not raise concerns. Moreover, after the initial focus on these provisions, the public and media attention to this law subsided and initial concerns thankfully did not materialise.

5.2. Reform of the Public Media

112. Poland has a pluralist, well developed, but also highly polarised media environment at both national and regional level. The media landscape encompasses a wide range of printed press as, well as radio and tv outlets. Like in many countries, television stations are a main source of information in Poland, with public television playing an important role, although its market share is declining. Internet is becoming an increasingly important source of information, with internet access enjoyed by well over 75% of the population[101]. Private media is mostly controlled by foreign investors and media concerns. This has been a thorn in the eye of, inter alia, the authorities, which have called for the re-polonisation of the media sector.

[100] Court of Justice of the European Union, Press Release no. 145/19.
[101] Freedom House, Pluralism under attack, the assault on press freedom in Poland Chapter 2.1.

113. The Polish Constitution guarantees freedom of the press. It provides for a National Broadcasting Council, also known by its Polish abbreviation KRRiT, with the objective to "safeguard the freedom of speech, the right to information, and the public interest in radio and television broadcasting." It is composed of five members appointed for a six-year term: two by the Sejm, two by the President of Poland and one by the Senate. Until the adoption of the so-called "small media law" in 2016 (see below), the National Broadcasting Council was responsible for the appointment of the supervisory and management boards of the public radio and television broadcasters. While the members of the KRRiT cannot be members of a political party, they remain political appointees and normally reflect the political majority in parliament that appointed them.

114. As mentioned, the overall media landscape is pluralist, but highly polarised, with the different individual private media outlets reflecting the political preferences of their owners. Regrettably, the public broadcaster does not provide an impartial counterweight. As the result of the above described appointment procedure for the KRRiT, the Public Broadcaster has historically been biased in favour of the party or coalition that has the majority in the parliament. While there have been reforms of the National Broadcasting Council under several previous governments of different political colour, none of these reforms addressed the political bias of the National Broadcasting Council, for example by enshrining a genuinely technocrat composition.

115. While biased in favour of the ruling majority that appoints them, the terms in office of the National Broadcasting Council and supervisory boards of the public broadcaster are different from those of the parliament. Therefore, following the 2015 elections, the new ruling majority found itself in a situation where the public broadcaster was perceived, and was, biased against it, which it considered to be an unacceptable situation.

116. On 28 December 2015, the ruling majority tabled the so-called small media law in the parliament, which, despite domestic and international criticism, adopted this law two days later. The stated objective of the law was to rationalise the, by all accounts, bloated[102] structure of the public broadcasters. However, a key provision of the law was to move the appointment of the members of the supervisory and management boards of the public radio and tv from the National Broadcasting Council to the Ministry of Finance, and to terminate all mandates of all siting members of these bodies. This therefore brought the public broadcaster firmly under the control of the new authorities.

117. The small media law had a temporary character. On 2 April 2016, the authorities tabled three new media laws, collectively known as the "big media law". These draft laws sought to transform the public broadcasters into national broadcasters obliged to promote the views of the President, Prime Minister and Speakers of the Sejm and Senate. These laws were sent to the Council of Europe for an expertise which concluded that they constitute a move back towards a State Broadcaster[103].

118. In reaction to the public outcry and domestic and international criticism against these three draft laws, the authorities decided to withdraw them from the agenda of the parliament. Instead, a more limited law was introduced that moved the appointment of the management and supervisory bodies of the public broadcasters away from the Ministry of Finance to a newly established National Media Council. The National Media Council consist of 5 members: three appointed by the Sejm and two by the President of Poland, on the basis of proposals by the two largest opposition factions in the Sejm**.** While, in a welcome development, this ensures the representation of the Council, it does not address the shortcoming of the politicisation of the media oversight bodies and their subordination to party political interests

119. Regrettably, the main aim of these legal reforms seems to have been mainly to move the control over the public broadcaster from the previous authorities to the new ruling majority. The reforms did not address at all the problem of the politicised and biased nature of the public broadcaster public broadcaster. This is a missed opportunity. The authorities should be urged to address this important weakness and ensure a genuinely impartial and professional public broadcasting system in Poland

5.3. Civil Society

120. Poland has a broad and vibrant civil society, consisting of more than 120.000 different Civil Society Organisations (CSOs). Regrettably, the political discourse about civil society has hardened and the environment for CSOs to operate is deteriorating. Many CSO interlocutors have noted an increasing lack of consultation and dialogue between authorities and civil society, as, inter alia demonstrated by the fact that

[102] Most journalist councils and trade unions met by the delegation in 2017 admitted that the structure of the public broadcaster had grown beyond its needs.

[103] Council of Europe, DGI (2016) 13, Opinion of Council of Europe Experts, Mr Jean-François Furnémont and Dr Eve Salomon on the three draft acts regarding Polish public service media.

many new pieces of legislation have been introduced as private member bills, which are not subject to the consultation process that is legally required for government bills.

121. The current authorities have a clear worldview about Polish society and the norms and values which, in their view, define the Polish identity. The strengthening and cementing of this identity and associated norms and values in the Polish society is a clearly stated objective and priority of the PiS and its coalition partners. Regrettably, CSOs that are critical to one or the other policy of the authorities, or do not share the word view of the authorities, are increasingly painted as a fifth column for the current opposition. This has led to an environment were dialogue and consultation between authorities and CSOs is selective and limited, based on ideological proximity. This seems confirmed by the fact that CSOs that are ideologically close to the authorities and their allies do not share the view that the CSO environment is shrinking or deteriorating. This division is of concern, especially since we have received indications that this division is also reflected in the distribution of – government - funding among CSOs.

122. In September 2017, the Polish Parliament adopted the Act on "the National Institute of Freedom – Centre for Civil Society Development" which, inter alia, is responsible for the distribution of government funding, as well as nationally attributed EU funding, to NGOs. NGOs have complained that they are in the minority on the Council, which is chaired by a member of the Polish cabinet, thus very much limiting their influence in the attribution process.

123. Another act affecting civil society, and a point that underscores some of our concerns with regard to the drive by the ruling majority to instil its world view and value base on the Polish society, is the act on the Institute of National Remembrance. This act introduces criminal liability for any statements that imply any responsibility of Poland and the Polish nation for Nazi Crimes. The adoption of this bill created quite some controversy, both domestically and internationally. It is evident that the provisions in this law limit freedom of expression and hinders freely discussing Poland's recent history. These developments have also affected academia. In January 2017, an exhibition opened in the Museum of the Second World War in Gdansk. This exhibition reportedly took a novel approach to presenting the events of 1939 to 1945, which did not follow the more conventional view on Polish history that is promoted by the current authorities. This led to the replacement of the museum's director by the Minister of Culture. The new director then considerably altered the exhibition to bring it in line with the more traditionalist views promoted by the ruling majority[104].

5.4. Intolerance and hate speech

124. As mentioned previously, the Ruling Party espouses a clear view about the Polish national identity and the values and norms that, in its view, underline this identity. Regrettably the public discourse by members of the ruling majority has increasingly become less tolerant about individuals and groups that do not conform to these, very narrow, values or have diverging views on its social agenda. This intolerant discourse has created a permissive environment and a sense of impunity for hate speech – and even violent actions - against minorities and other, vulnerable, groups, especially LGTBI people who are painted as a threat to the Polish national identity[105].

125. This intolerant discourse is also affecting the debate on womens' rights, which has become increasingly more polarised and contentious. Reportedly,[106] there have been increasing attacks on womens' rights activists and organisations, who also have seen their funding being reduced or denied[107]. In this context, in her report following her visit to Poland, from 11 to 15 March 2019, the Commissioner for Human Rights of the Council of Europe expressed her concern that the interruption of access to central government funding has obliged leading womens' rights organisations to limit their activities in recent years, negatively affecting their ability to help victims of domestic violence[108].

[104]The Guardian, news article 17 September 2019.
[105] https://www.bbc.com/news/world-europe-49904849.
[106] Human Rights Watch, Attack on Women's rights in Poland.
[107] See also § 121.
[108] Commissioner for Human Rights of the Council of Europe, Report on Visit to Poland, 11-15 March 2019.

6. Conclusions

126. The main focus of the Polish authorities since the current ruling coalition came to power in 2015 has been a far reaching, ambitious and also controversial programme of reforming the judiciary and justice system. The objective of these reforms was to address the increasing dissatisfaction of the Polish population with the shortcomings of the Polish justice system, which had been a major plank of the ruling party's election programme. A second stated objective of the authorities was to address the lack of accountability and efficiency of the Polish judiciary as a result of what it considered to be corrupt, corporatist and self-serving governance structures. At the same time, the newly elected authorities saw the judiciary as bulwark of the former authorities, now in opposition, that would use the justice system to thwart and sabotage the overall reform agenda of the newly elected authorities. Therefore, it is undeniable that, under the pre-text of wanting to de-politicises the state institutions, one of the main objectives of the judicial reform programme was to bring the judiciary and justice system firmly under the control of the newly elected ruling majority.

127. It is undeniable that the Polish justice system and judiciary are and have been facing systemic problems and challenges that affect the rule of law, especially with regard to the efficiency of the administration of justice – as recognised by the judgements of the European Court of Human Rights in its judgments against Poland. The need for continuing reforms of the judiciary is clear and recognised. Therefore, the importance and priority given by the authorities to address these systemic shortcomings is not only valid but should be welcomed. At the same time, it is essential that any reforms implemented are fully in line with European norms and values and effectively strengthen judicial independence and the rule of law.

128. Similarly, any system of self-governance has an inherent risk of corporativism and vulnerability to self-interest, and addressing this vulnerability is a valid reform objective. Again, such reforms should be in line with European norms and values and aim to improve judicial self-government by strengthening its transparency and accountability, while respecting its independence. It would be unacceptable if such reforms would aim, or amount to, bringing the judiciary under the control of the executive or legislature, or, even worse, political control of the ruling majority. This would violate the principle of separation of powers and would effectively end the independence of the judiciary and undermine the rule of law.

129. To our great regret, it is clear that the reforms of the judiciary and justice system in Poland do not pass these two important litmus tests. The reforms individually and taken together run counter in numerous aspects to European norms and values. They cumulatively undermine and severely damage the independence of the judiciary and the rule of law in Poland. They bring the justice system under the political control of the executive and ruling majority and challenge the very principles of a democratic state governed by the rule of law.

130. The concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, affect all European Union member states, as Polish courts are responsible for upholding EU law in the Country. The questions about the independence of the justice system and the respect for the rule of law are therefore not be considered as internal issues for Poland. Given the developments in Poland, judges in other European Union and Council of Europe member states should, where pertinent, ascertain in criminal cases - including with regard to European Arrest Warrants - as well as in civil cases, whether fair legal proceedings in Poland, as meant by article 6 of the European Convention for Human Rights, can be guaranteed for the defendants.

131. Without wanting to mitigate other important concerns regarding the reforms we wish to highlight two aspects that, in our opinion, are especially worrisome: namely, the vulnerability of the newly reformed justice system to political abuse and manipulation; and the centralisation of excessive powers over the judiciary in the hands of the Minister of Justice and, to a lesser extent, the President of Poland. If one of the stated reform objectives was to depoliticise state institutions, then these two issues have achieved exactly the opposite.

132. As outlined above, the subordination of the Prosecution to the Minister of Justice ad personam, and the excessive powers given to him as Prosecutor General, have made the prosecution service open for abuse and politicisation. This is compounded by the excessive powers granted to the Minister of Justice – and to a lesser extent to the President of the Republic – over the appointment and careers of judges and the management of the courts. The mere fact that the justice system is vulnerable to politicisation and abuse is unacceptable and should have led to immediate action by the authorities, which, to this very day, has unfortunately still not happened. The abuse of disciplinary proceedings against judges and prosecutors, and the smear campaigns organised against them by leading personalities, or persons close to them, in the ruling majority, show that this vulnerability to abuse and politicisation is unfortunately not a hypothetical question. The concentration of excessive powers with regard to the judiciary undermines the independence of the judiciary and the rule of law in Poland and needs to be addressed without delay. This entails reforming the current legal framework for career management and disciplinary mechanisms within the judiciary, with a view to ensuring its impartiality

and complete independence from the executive and external interest, be it political or corporatist self-interest from sectors of the judiciary itself.

133. The reform of the National Council of the Judiciary had brought this institution under the control of the executive, which is incompatible with the principle of independence. This, in turn, creates the risk that this institution and a number of others whose composition depends on it, will be in violation of EU law and other European Rule of Law and Human Rights mechanisms, including the European Convention on Human Rights. While supporting efforts to improve the transparency and accountability of the National Council of the Judiciary, we call upon the Polish authorities to revisit the reform of the NCJ and address these concerns.

134. The argument that the Polish justice reforms are automatically in line with European standards, because certain aspects of the reforms allegedly also exist in other countries, is invalid and should be disregarded. Even if certain provisions are similar to those in other countries they cannot be taken out of the context of the overall legal framework and legal tradition in which they exist. Otherwise, this could result in the Frankensteinisation of legislation, where legislation would be based on a combination of "worst practise" existing in other countries instead of on best practise and common European standards.

135. From our visit, it is clear that, for part of the Polish population, the negotiated democratic transition of Poland following the fall of the Berlin wall, while a model for many, has failed to give closure for the crimes and excesses committed during the Communist era, and is perceived as having allowed those who profited from the Communist regime to have escaped justice for crimes committed and to safeguard their interests. This is an important consideration for the ruling majority in guiding its policies. This is understandably a sensitive and emotional issue, but also one that could be misconstrued for political mobilisation and support. The Polish authorities have stated that the decommunization of the judiciary has been one of the objectives and an underlying reason for the reform of the judiciary and justice system. However, as we have outlined in our report, based on objective grounds the need for lustration cannot be considered as a valid argument or appropriate guideline for any reforms of the justice system in Poland.

136. No democratic government respecting the rule of law can decide to selectively ignore court decisions it does not like. This is especially true with regard to the judgments of the constitutional court. The first step of the solution of the Constitutional Crisis in the country is the implementation of the decisions of the Constitutional Court, starting with those regarding the composition of the Court itself. The legality of the composition of the Constitutional Court should be restored by removal of 3 of the 5 so-called "8 October 2015" judges. The authorities should seek advice from the Venice Commission regarding the manner in which this should be implemented. The issue of legality of judgements adopted by benches of the Constitutional Court that included illegally appointed judges should be addressed in line with European norms and standards.

137. While the focus of the reforms has been on the control over the judiciary, other reforms initiated indicate that a general objective of the authorities is to cement, including beyond this electoral mandate, its vison of a Polish identity and its norms and values in the institutional framework of Poland. To that extent, several other reforms, as for instance regarding the media environment, seem to be aimed at bringing independent institutions and regulatory bodies under the political control of the authorities. This is concerning especially in context of a judiciary whose independence is increasingly compromised and that is increasingly vulnerable to pressure interference from the authorities.

138. The harsh and intolerant political discourse in the Polish political environment has created an increasingly permissive climate. It has also fostered a perception of impunity for hate speech and intolerant behaviour against minorities and other vulnerable groups which is unacceptable and should be remedied.

139. Due to the deterioration of the independence of the judiciary in Poland, as well as the increased vulnerability of the legal system for political interference and abuse by the executive, the European rule of law and human rights protection mechanisms such as the European Court of Human Rights in and the Court of Justice of the European Union increasingly risk becoming the de facto court or arbiter of last resort for Polish citizens and institutions. While the brunt of the cases has, until now, been before the Court of Justice of the European Union, there are indications that there will be an increasing number of applications before the ECtHR as a result of the judicial reforms. Not only does this create an unacceptable increase of workload for the Court, but it also runs counter to the obligation upon all Council of Europe member states to ensure that the rule of law and protection of human rights are foremostly guaranteed by the national justice structures.

140. Following their victory in the 2019 Parliamentary Elections, the authorities have indicated that the continuation of the reform of the judiciary will be one of the main priorities of the new government. The developments with regard to the judiciary, and especially its compromised independence and vulnerability to political interference and control by the executive are of serious concern. A number of other reforms that could

limit the autonomy of nominatively independent state institutions and regulatory agencies, are equally threatening for the rule of law and the functioning of democratic institutions in Poland. They should therefore continue to be followed closely by the Assembly and its Monitoring Committee. This should take place in one of two ways: through a follow up report on the functioning of democratic institutions in Poland; or through expediting the periodic review report on Poland in the framework of monitoring of membership obligations of all member-states of the Council of Europe.

Appendix 1

Dissenting opinion presented by Mr Dominik Tarczyński (Poland, EC/DA) pursuant to Rule 50.4 of the Rules of Procedure

Pursuant to Rule 50.4 of the PACE Rules, I wish to submit a dissenting opinion to the report of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe entitled "*Functioning of democratic institutions in Poland*".

The Report, as it currently stands, violates the freedom of the state to shape the constitutional system, including the judicial council, and the prosecution service. Some of the expressions used in the Report unfairly infringe the good reputation of Poland and go far beyond the mandate conferred on the Monitoring Committee. This is all the more prejudicial to Poland as the same has never refused to cooperate with the Committee, has actively participated in its meetings and hosted its representatives.

I would like to stress that the balance of powers between individual authorities is an inherent element of the separation of powers.

It is completely unacceptable not to indicate the source, author and place of publication of so-called "credible reports". It is also completely unacceptable to base certain arguments of the Report merely on media reports or the authors' assumptions.

It is highly questionable to accept the statement regarding the existence of "European standards for the formation of a judicial council" as there are no such standards. Nothing in the Report refers to any binding legal source which would suggest the existence of such allegedly uniform European standards. It also ignores the recent CJEU judgment of 19 November 2019 in which the Court, contrary to the Advocate General's view, found no European standards as regards the appointment of judicial councils. I would also like to bring it to the attention of the Monitoring Committee that the models of shaping judicial councils in European countries significantly differ from one another, starting from their non-existence in the legal systems of some jurisdictions, through shaping them by way of decisions of the executive authority – the Minister of Justice, to their shaping by election by judges. Sadly, for reasons unknown to me, these comments were altogether disregarded by the Monitoring Committee.

The Report disregards the fact that the model of judicial appointments, under which the appointment of judges by the executive is not only acceptable, but is even a standard, prevails in Europe. In some European states, the impact of the executive on the process of appointing judges even takes on a direct form. This has been accepted in the case law of the ECtHR which emphasises that the Convention does not impose on States a particular constitutional model regulating, in one way or another, the relations and interactions among different state authorities; nor does it require them to follow this or another constitutional model. The ECtHR does not question judicial appointments with the participation of the Judicial Council chaired by the President, nor does it question the procedure for judicial appointments even where the Parliament is involved.

I would like to emphasise that the prosecution service has been and remains a special institution in the system of legal protection authorities, performing tasks related to prosecution of offences and protection of the rule of law. The major principle of the prosecution service is the independence of the public prosecutor in the course of the proceedings. Both in the past and at present, the hierarchical subordination, which is the essence of the functioning of the prosecution service, does not run counter to the independence of the public prosecutor.

Dominik Tarczyński