

Rule of law in Poland 2020:

INTERNATIONAL AND EUROPEAN RESPONSES TO THE CRISIS

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Civil Development Forum (FOR Foundation) is a non-governmental think tank based in Poland promoting and defending economic freedom, the rule of law, individual liberties, private property, entrepreneurial activities, and ideas of limited government.



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Rule of Law in Poland is an English-language online resource on recent developments concerning all principles which fall within the scope of the rule of law. The website was founded by two distinguished civil society organisations: the Wiktor Osiatyński Archive and the Civil Development Forum (FOR) in cooperation with the Helsinki Foundation for Human Rights.

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LIST OF ABBREVIATIONS:

CCBE – Council of Bars and Law Societies of Europe
CJEU – Court of Justice of the European Union
CoE – Council of Europe
CT – Constitutional Tribunal
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
ENCJ – European Network of Councils of the Judiciary
EU – European Union
FBE – Federation of European Bars
NCJ – National Council of the Judiciary
LIBE Committee – European Parliament Committee on Civil Liberties, Justice and Home Affairs
OSCE – Organization for Security and Co-operation in Europe
PACE – Parliamentary Assembly of the Council of Europe
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
UN – United Nations

EXECUTIVE SUMMARY

- As a member of various international and European organisations, Poland is bound by the requirement to respect the rule of law so as to effectively fulfil its commitments and ensure sincere cooperation between all member states.
- The crisis of the rule of law in Poland endangers the proper functioning of the international organisations Poland belongs to. That risk depends directly on the level and scope of integration and the importance of mutual commitments.
- The European Union has not sufficiently used its tools to combat the crisis. While judicial measures employed by the Court of Justice effectively prevented the situation from getting worse, political tools, such as Article 7(1), have been watered down and require improvements.
- Despite the limited array of measures at the disposal of the Council of Europe and the United Nations, they form an important basis for judicial bodies and contribute to the prevention of a crisis. In particular, the opinions of the Venice Commission and the summary of the UN Special Rapporteur on the Independence of Judges and Lawyers provide independent and reliable assessments of the state of play in Poland in light of international standards.
- Moreover, tools employed by individual actors, in particular international organisations of judges and lawyers, allow the international community to familiarise itself with Poland's situation, and provide reliable sources in specific areas of the crisis, e.g. the role of the National Council of the Judiciary.
- It is highly recommended that international bodies, most importantly the European Union, realise the fact that time is of the essence when it comes to deal with the rule of law crisis in Poland. Since infringement actions before the Court of Justice have been the most efficient measures so far, it is important that other tools facilitate them by providing up-to-date and reliable evidence, also covering new developments in Poland.

1. INTRODUCTION: RULE OF LAW AS A PRECONDITION FOR MEMBERSHIP IN INTERNATIONAL ORGANISATIONS

As a member of various international and European organisations, Poland benefits from mutual cooperation, access to foreign markets and reciprocal advantages. Some of them have achieved a degree of integration far beyond that of casual international commitments.

As the Court of Justice (CJEU) said in its landmark judgments of the 1960's, in contrast with ordinary international treaties, the European Union constitutes a new legal order the subjects of which comprise not only member states but also their nationals¹. That is why, in order to effectively fulfil their duties stemming from EU law and thus to protect the rights and freedoms of individuals, its member states are required to adhere to the rule of law which further became explicitly mentioned as one of the values upon which the EU was founded (Article 2 TEU) and a precondition for applicant states (Article 49 TEU).

Similarly, in its founding statute, the Council of Europe obliges its members to accept the rule of law (Article 3) which reaffirms their devotion to principles that form the basis of all genuine democracies and is considered a part of the common heritage of European countries, as stated in the preamble to the statute and the European Convention on Human Rights. It is therefore not surprising that, according to the European Court of Human Rights (ECtHR), rule of law inspires the whole Convention and is inherent in all its articles being linked to the notion of democratic society and European public order².

The crisis of the rule of law in Poland that has been witnessed since late 2015 poses serious threats not only domestically, but also endangers the proper functioning of the international organisations Poland belongs to. That risk depends directly on the level and scope of integration and the importance of mutual commitments. Since non-compliance with the rule of law standards, in particular with regard to the judiciary, concerns every issue the organisation deals with – as it risks the proper application of its law regardless of the subject-matter – in order to prevent such challenges from emerging and deepening, international organisations must employ sufficient retaliatory measures. Unless, as in the case of the European Union, the whole project may be jeopardized to the detriment of other member states and their citizens.

1 Judgments of the CJEU: of 5 February 1963, *van Gend en Loos*, 26/62, EU:C:1963:1; of 15 July 1964, *Costa*, 6/64, EU:C:1964:66.

2 Judgments of the ECtHR: of 8 June 1976, *Engel and Others v. the Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72; of 2 August 1984, *Malone v. United Kingdom*, application no. 8691/79; of 25 June 1996, *Amuur v. France*, application no. 8691/79; of 17 May 2016, *Karácsony and Others v. Hungary*, application nos. 42461/13 and 44357/13.

The report covers international and European responses to the rule of law crisis in Poland. It deals mostly with the political and judicial measures adopted by the European Union, due to the profound impact of the situation in Poland to the bloc and the broad array of tools used against it, but also refers to the Council of Europe, the United Nations and its agendas, and private or unilateral responses to the crisis. The report further elaborates on the assessment of the tools deployed by the said actors and, lastly, offers recommendations on how to deal with the rule of law crisis in the most efficient way.

Note that the report does not concern international (mainly judicial) measures employed by domestic actors. That means it does not cover, for instance, requests to the Court of Justice for preliminary rulings issued by member states' courts and applications to the European Court of Human Rights referred to by Polish nationals. Nevertheless, due to their profound legal importance, these tools should be used more frequently so as to address particular issues regarding the crisis.

This is the second volume of the series of four reports on the rule of law crisis in Poland by the Civil Development Forum (FOR). In the first part we analysed the current state of the rule of law from domestic and comparative perspectives. We explained the reasons behind the key Law and Justice policies regarding the justice system and presented main changes in the courts and prosecution service since 2015. Moreover, we examined the impact of deterioration of the rule of law in Poland on key indices regarding the rule of law and quality of democratic institutions³. It is recommended to familiarise with the first report before reading this one so as to understand the background of the crisis.

This and other reports as well as the Rule of Law in Poland project⁴ are based on our belief that the rule of law in Poland and other EU member states is important not only for the citizens of these countries, but also for the future of the European project as a club of countries with high-quality democratic institutions safeguarding human rights.

3 M. Tatała, E. Rutynowska, P. Wachowiec, *Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law From a Comparative Perspective*, Warsaw 2020, <https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-a-diagnosis-of-the-deterioration-of-the-rule-of-law-from-a-comparative-perspective>.

4 Rule of Law in Poland project: www.ruleoflaw.pl.

2. EUROPEAN UNION

Since the earliest attempts to subjugate the Constitutional Tribunal in late 2015, the European Union has been concerned about the deterioration in the judicial system which have already occurred. The very first effort to involve the Union's bodies in the crisis was made by the Polish opposition, which urged the main groups of the European Parliament to put the issue on the agenda, resulting in a plenary sitting in January 2016 with the participation of Poland's Prime Minister.

As far as the Commission is concerned, Frans Timmermans, at that time the Commission's Vice-President, expressed his concerns as to the new legislation concerning the CT and the new legal framework for public media in his letters to the Polish government dated 23 and 30 December 2015 respectively⁵. The lack of constructive discussion with Poland's authorities on the one hand and the rapid law-making process, and the refusal to publish and implement the CT judgments concerning its composition on the other resulted in the first orientation debate in the Commission on the rule of law held on 13 January 2016. More attempts to exchange views with the government, in particular Timmermans' meetings in Warsaw in April and May 2016, did not dispel the Commission's doubts as to the threats to the rule of law.

However, the situation in Poland was initially considered to be a rather domestic constitutional issue with no significant impact on the European Union. It changed in June 2016 when the Rule of Law Framework was formally activated as Poland failed to address the Commission's concerns in a satisfactory way.

In the meantime, in October 2020, the Commission presented its first annual Rule of Law Report⁶ that presents both a synthesis of the rule of law situation in the EU and its member states. Despite the broad approach employed by the Commission and the assessment of the state of play in all EU countries, this document is beyond the scope of the report as it is not a response to the crisis in Poland.

2a. Rule of Law Framework

In order to “resolve future threats to the rule of law before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met”, in 2014 the Commission established an informal mechanism called the Rule of Law Framework⁷. This non-binding measure relies on the duty of sincere cooperation between EU institutions and member states

5 *Problem praworządności w Polsce w świetle dokumentów Komisji Europejskiej. Okres „dialogu politycznego” 2016–2017*, J. Barcz, A. Grzelak, R. Szyndlauer (eds.), Warsaw 2020, <https://op.europa.eu/en/publication-detail/-/publication/730ddd0f-77ac-11ea-a07e-01aa75ed71a1>, pp. 104–108.

6 European Commission, *2020 Rule of law report*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en.

7 Communication from the Commission to the European Parliament and the Council of 11 March 2014, “A new EU Framework to Strengthen the Rule of Law”, COM(2014) 158 final.

(Article 4(3) TEU) and aims to address systemic threats to the rule of law in an effective and coherent way through a three-step procedure conducted before the Commission.

The first step consists of general assessment of the state of play in the member state concerned and may end with a rule of law opinion in which the Commission formally expresses its concerns and asks the member state for a response. Following this stage, should the exchange of views not resolve the issue, the Commission, having based on the gathered evidence, issues a “rule of law recommendation” in which, apart from expressing its concerns, it recommends the member state to sort out the issue within a fixed time limit. It may also result in further recommendations if new developments or evidence come to light. Under the last step of the procedure the Commission makes an assessment of how the member state addressed the recommendations. An unsatisfactory follow-up may result in triggering one of the Article 7 TEU mechanisms. However, it does not exclude the possibility of making use of casual infringement proceedings under Article 258 TFEU.

As far as the situation in Poland is concerned, the Commission reached the first step on 1 June 2016. In its opinion⁸ the main issues of concern included the appointment of members of the Constitutional Tribunal, the implementations of the Constitutional Tribunal judgments relating to its composition and the mode of proceedings and, more generally, the lack of effective constitutional review concerning, in particular, legislation adopted by the new ruling majority.

In the following months the situation did not improve. Polish authorities adopted further legislation aimed at subjugating the Constitutional Tribunal, which resulted in its effective capture in December 2016. Moreover, during 2017 the Polish parliament passed new laws concerning, among other things, ordinary courts, the Supreme Court and the National Council of the Judiciary accompanied with a systemic campaign to undermine the legitimacy of courts and individual judges. In response, between July 2016 and December 2017 the Commission issued four rule of law recommendations⁹ each time after the situation in Poland continued to deteriorate.

8 The opinion has not been officially published. It is available in: J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *supra* note 5, p. 118.

9 See: Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146, and Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

The list of actions recommended by the Commission to the Polish authorities under the Rule of Law Framework:

- to ensure the judges of the CT, as well as its President and its Vice-President, are lawfully elected and appointed so as to restore the independence and legitimacy of the CT as guarantor of the Constitution;
- to publish and fully implement a number of rulings of the CT from before its capture in December 2016;
- to ensure that the following laws are withdrawn or amended so as to ensure their compatibility with the Constitution and with basic European standards on judicial independence: the law on the Supreme Court, the law on the National Council for the Judiciary, the law on Ordinary Courts Organisation, and on the National School of Judiciary;
- to refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole;
- to ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence and is prepared in close cooperation with the judiciary and all interested parties.

In general, Poland did not comply with these recommendations. Although in July 2017 the President of the Republic vetoed two out of three laws concerning the Supreme Court, the National Council of the Judiciary and ordinary courts, similar acts were eventually passed by Parliament in December 2017, triggering Article 7(1).

2b. Article 7(1) procedure

Since the recommendations put forward by the Commission did not contribute to resolve the growing problems regarding the rule of law, and due to the adoption of the most far-reaching legislation concerning the Supreme Court and the National Council of the Judiciary, on 20 December 2017 the Commission, for the first time ever¹⁰, activated the Article 7 procedure aimed at sanctioning a member state for non-compliance with the EU values laid down in Article 2 TEU¹¹.

¹⁰ The second Article 7(1) procedure was triggered by the European Parliament against Hungary in September 2018.

¹¹ Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final, 20.12.2017).

Among two procedures referred to in Article 7 TEU, the Commission requested the less severe one under which a qualified majority of the member states may determine “a clear risk of a serious breach” of EU values (Article 7(1) TEU) rather than a determination of “the existence of a serious and persistent breach” of those values (Article 7(2) TEU) that requires unanimity. The Commission’s proposal to activate the Article 7(1) procedure contains almost identical recommendations that were issued under the Rule of Law Framework.

Recommendations addressed to Poland under Article 7(1):

- (a) to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution:
 - by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed,
 - by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;
- (b) to publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016 regarding the composition of the CT and its members;
- (c) to ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;
- (d) to ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;
- (e) to refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

In July 2018 the government eventually decided to publish the mentioned judgments of the CT in official journal, annotating that they had been issued with “a breach of law” and calling them “resolutions” to

convince the public that they lacked legal basis. Other issues raised by the Commission were completely ignored.

Article 7(1) requires the Council to organise formal hearings during which a member state concerned may present evidence and exchange views with its counterparts. Until now there were only three such hearings that took place under the Finnish presidency on 26 June, 18 September and 11 December 2018. They were accompanied by multiple informal meetings during which the Commission updated the member states about the state of play with regard to the rule of law in Poland and, more generally, under the Annual Rule of Law Dialogue that allows the Council to exchange views with regard to the situation in all member states.

To date no decisive steps under the Article 7(1) procedure have been taken. Apart from obtaining further evidence which confirms that the situation in Poland continues to deteriorate, among other things, the Council is accused of lacking transparency and of changing the procedure to be rather a peer review-type that fails to deal precisely with the concerns identified by the Commission. Despite the adoption of the so-called “Muzzle Law”¹² and growing case-law of the Court of Justice regarding the deficiencies in Poland’s justice system, for almost 2 years no formal hearing took place. As it was rightly pointed out, the “nuclear option” enshrined in the Treaty became a “damp squib”¹³. Nevertheless, the Article 7(1) TEU procedure allows all member states to be informed about the situation in Poland which results in more evidence that can be used in other fields, for instance before the Court of Justice. **It is highly recommended that the Council go back to a more systematic approach and organise new hearings so as to cover the recent developments in Poland, for instance the non-compliance with CJEU’s interim measure regarding the Disciplinary Chamber and the “Muzzle Law”.**

2c. European Parliament’s initiatives

Contrary to rather inconclusive actions taken by the Council under the Article 7(1) TEU procedure, with regard to the rule of law in Poland, the role of the European Parliament, despite its limited powers, has been growing.

During the Rule of Law Framework phase, the European Parliament endorsed the Commission with multiple resolutions underlining the impact of the situation in Poland on fundamental rights and democracy¹⁴. It also

12 The so-called “Muzzle Law” introduced new disciplinary measures and was intended to stop judges from questioning judicial nominations of the new NCJ. It has also prohibited judicial bodies from adopting opinions “undermining the principles of the functioning of the authorities of the Republic of Poland and its constitutional organs”, which in fact was a response to numerous resolutions criticising their changes in the legal system. Ostatnie zdanie z przypisu zamienić na: See also section 4d in M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

13 L. Pech, *From “Nuclear Option” to Damp Squib? – A Critical Assessment of the Four Article 7(1) TEU Hearings to Date*, RECONNECT, <https://reconnect-europe.eu/blog/blog-fourart71teuhearings-pech/>.

14 European Parliament resolution of 13 April 2016 on the situation in Poland; European Parliament resolution of 14 September 2016 on the recent developments in Poland and their

welcomed the activation of Article 7(1) TEU calling on the Council “to take swift action”¹⁵. However, the lack of regular hearings organised in a structural manner and, as a result, no significant progress under this procedure with regard to both Poland and Hungary prompted the European Parliament to express its regrets over the Council in a resolution of early 2020¹⁶.

The lack of concrete measures from the Council has led to more robust actions within the European Parliament, in particular in the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). A growing number of hearings and conferences held by the LIBE Committee, as well as a valuable contribution from stakeholders resulted in the resolution of 17 September 2020 regarding the Article 7(1) procedure against Poland¹⁷.

The document contains the most up-to-date and specific information about the state of play in Poland and relates to the functioning of the legislative and electoral system, the independence of the judiciary and the rights of judges, and the protection of fundamental rights. **For the first time the EU institution has so firmly called on the Commission to make use of an expedited infringement procedure, including applications for interim measures, with regard to the Constitutional Tribunal, the Extraordinary Chamber and the National Council of the Judiciary, which was welcomed by eminent EU-law scholars**¹⁸.

2d. Infringement procedures

Apart from political measures, the Commission is empowered to refer a member state to the Court of Justice for failing to fulfil its duties stemming from EU law.

The infringement procedure, referred to in Article 258 TFEU, consists of two steps. In the first one, the Commission sends a letter of formal notice to the member state concerned in which it expresses its doubts as to the compliance with EU law and asks the member state to respond. Should the response not dispel the Commission’s doubts, it formally delivers a reasoned opinion giving the member state the opportunity to submit its observations. The lack of compliance with the opinion within the time period allows the Commission to move to the second step and refer the member state to the Court of Justice.

impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union; European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland.

15 European Parliament resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland.

16 European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary.

17 European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

18 L. Pech, K. L. Scheppele, W. Sadurski, *Before It’s Too Late Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland*, *Verfassungsblog*, <https://verfassungsblog.de/before-its-too-late/>.

In the judicial phase, the Commission is allowed to submit an application for expedited proceedings and for interim measures which, if granted, may immediately halt the activities of the member state so as to prevent irreparable damage.

CASE C-192/18, COMMISSION V POLAND (INDEPENDENCE OF ORDINARY COURTS)

Since the beginning of the crisis, the Commission has initiated four infringement procedures from which three have reached the Court of Justice. The first one was started in tandem with the activation of Article 7(1) and the last recommendation under the Rule of Law Framework in December 2017. In this action, concerning amendments to ordinary courts' legislation of June 2017, the Commission requested the CJEU to declare that in establishing a different retirement age for men and women who are judges in the ordinary courts and the Supreme Court or are public prosecutors, Poland failed to comply with requirements of the equal treatment of men and women in matters of employment and occupation. Moreover, the Commission, for the first time ever, invoked the second subparagraph of Article 19(1) TEU concerning member states' duty to provide effective legal protection in the fields covered by EU law and asked the CJEU to declare its violation by both lowering the retirement age of ordinary court judges and granting the Minister of Justice the right to extend their active service.

Despite the cautious approach adopted by the Commission, invoking "classical" arguments of equality between men and women in working life rather than the questions of judicial independence (similarly to the Hungarian case concerning early retirement of judges¹⁹), in its judgment of 5 November 2019²⁰ the CJEU confirmed the findings from the landmark "Portuguese judges' case"²¹ that the mere fact that Polish ordinary courts are called upon to rule on issues relating to the interpretation and application of EU law (potentially in any case) requires the observance of the second subparagraph of Article 19(1) TEU.

According to the CJEU, should the member state decide to extend the period of judicial activity beyond the normal retirement age, it must ensure that it does not undermine the principle of judicial independence, in particular it protects judges from any influence liable to have an effect on the decisions of the judges concerned. The Court of Justice found Poland in breach of both complaints underlining in particular that conditions and the detailed procedural rules in relation to the possibility of judges continuing their duties beyond the new retirement age do not satisfy the principle of judicial independence. The Polish authorities complied with the judgment even before it was pronounced, and abandoned the contested retirement scheme.

19 See judgment of the CJEU of 6 November 2012, *Commission v Hungary*, C-286/12, EU:C:2012:687.

20 Judgment of the CJEU of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924.

21 Judgment of the CJEU of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117.

CASE C-619/18, COMMISSION V POLAND (INDEPENDENCE OF THE SUPREME COURT)

The second infringement procedure brought by the Commission concerns the early retirement of the Supreme Court judges, and was initiated in August 2018 following the entry into force of the new Law on the Supreme Court. Contrary to the first action, in this case the Commission relied only on the second subparagraph of Article 19(1) TEU and of Article 47 of the Charter of Fundamental Rights both requiring member states to comply with the principle of judicial independence. The scope of the action was similar to the previous one: the Commission required the CJEU to declare the lack of compliance with the mentioned provisions as Poland lowered the retirement age of active Supreme Court judges and granted the President of the Republic the discretion to extend their mandate, which also resulted in early termination of the term of office of the First President of the Supreme Court which was constitutionally guaranteed.

However, in order to prevent the imminent purge in the Supreme Court, the Commission also applied for interim measures pending the judgment in the main action. In its two rulings – first issued provisionally by the CJEU’s Vice-President²² and the second confirmed by the grand chamber²³ – the CJEU ordered Poland to suspend the application of the contested provisions, to adopt all necessary measures to ensure that the Supreme Court judges affected by those provisions may still carry out their duties and to refrain from appointing new judges and the new First President of the Supreme Court in the place of judges concerned. The Commission also made use of expedited procedure.

It must be underlined that Polish authorities did comply with the interim measure by adopting new legislation which entered into force on 1 January 2019 and which repealed the contested provisions.

In its judgment of 24 June 2019 the CJEU found the measures in question contrary to EU law²⁴. More precisely, according to the CJEU the application of the new retirement age to judges in active service was not justified by a legitimate objective and undermined the essential part of the principle of judicial independence which is irremovability. What is more, the CJEU concluded that the power to extend judicial mandate gave rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them. The reasoning employed by the CJEU in this judgment was reiterated in the mentioned ruling concerning ordinary courts.

22 Order of the Vice-President of the CJEU of 19 October 2018, *Commission v Poland (Independence of the Supreme Court)*, C-619/18 R, EU:C:2018:852.

23 Order of the CJEU of 17 December 2018, *Commission v Poland (Independence of the Supreme Court)*, C-619/18 R, EU:C:2018:1021.

24 Judgment of the CJEU of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531.

CASE C-791/19, COMMISSION V POLAND (PENDING BEFORE THE CJEU)

The third infringement procedure was launched by the Commission in April 2019 by sending a letter of formal notice to the Polish authorities regarding the new disciplinary regime for judges.

The action eventually reached the CJEU in October 2019 and concerns the non-compliance with the second subparagraph of Article 19(1) TEU and Article 267 TFEU which lays down a preliminary ruling procedure. With respect to the first provision, the Commission requested the CJEU to declare that Poland failed to fulfil its obligations by allowing the content of judicial decisions to be treated as a disciplinary offence, by failing to guarantee the independence and impartiality of the Disciplinary Chamber, by conferring on the President of the Disciplinary Chamber the discretionary power to designate the competent disciplinary court of first instance in cases concerning judges, and by failing to guarantee a fair trial under the new disciplinary regime. With regard to Article 267 TFEU, the Commission's doubts concern the right of courts to refer questions for a preliminary ruling to the CJEU that may be limited by the possibility of the initiation of disciplinary proceedings.

To date, the case is still pending before the CJEU, however the Commission – similarly as in the Supreme Court judges' case – applied for interim measures. In its order of 8 April 2020²⁵, the CJEU required Poland to suspend the application of certain provisions of the new Law on the Supreme Court which concern the jurisdiction of the Disciplinary Chamber to consider disciplinary cases against judges. Moreover, the CJEU ordered to refrain from referring cases pending before the Disciplinary Chamber to be heard by a panel which does not meet the requirements laid down in the landmark *A.K. and Others* judgment of November 2019 relating to the independence of the chamber in question²⁶.

Despite the imminent effect of the order and the fact that Poland previously complied with interim measures and final judgments of the CJEU, the Polish authorities have not fully implemented the ruling of April 2020. The day after it was rendered, the Disciplinary Chamber asked the Constitutional Tribunal whether the CJEU power to grant interim measures which suspend the operation of the chamber are in line with the Constitution. The case before the CT is still pending. What is more, in spite of the general requirement not to refer cases to a panel which does not meet the standard of judicial independence, the Disciplinary Chamber hears public prosecutors' requests to waive judicial immunities for criminal proceedings. In particular, the examples of judge Igor Tuleya and judge Beata Morawiec received special attention from leading EU law scholars²⁷. In this respect, although the Commission is entitled to

25 Order of the CJEU of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277.

26 See judgment of the CJEU of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

27 M. Mycielski, *World's leading legal scholars in defence of judge Tuleya – ODF's follow-up letter to the European Commission*, the Open Dialogue Foundation, <https://en.odfoundation.eu/a/27888,worlds-leading-legal-scholars-in-defence-of-judge-tuleya-odfs-follow-up-letter-to-the-european-commission/>; L. Pech, K. L. Scheppele, W. Sadurski, *supra* note 18.

apply for further provisional measures which can be secured with daily penalty payments, to date no such action was requested.

INFRINGEMENT PROCEDURE CONCERNING THE “MUZZLE LAW” (PRE-LITIGATION PHASE)

The most recent infringement procedure concerns the so-called “Muzzle Law” that came into force on 14 April 2020 and was supposed to limit the effects of the CJEU’s *A.K. and Others* ruling. As it was described by academics, the law “has legalised the structural violation of most fundamental principles underlying the whole EU legal order”²⁸.

On 29 April 2020 the Commission formally launched the procedure²⁹ noting that the new law broadens the notion of “disciplinary offence” what increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence and that it grants the new Extraordinary Chamber of the Supreme Court the sole competence to rule on issues regarding judicial independence thus preventing other courts from applying EU law or requesting for preliminary rulings from the CJEU. Moreover, the Commission claims that it is against EU law to prevent Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges and to require judges to disclose specific information about their non-professional activities. On 30 October 2020, the Commission decided to take the next step in the procedure and sent a reasoned opinion to the Polish government expecting a response within 2 months³⁰.

Apart from laws targeted against individual judges that were subject to the CJEU’s examination, the “Muzzle Law” aims at consolidating the structural deficiencies of the justice system in Poland and making the part of EU law practically inapplicable. This is why the Commission has once again been requested to speed up their infringement procedure³¹.

28 L. Pech, K. L. Scheppele, W. Sadurski, *supra* note 18.

29 European Commission, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772.

30 European Commission, *October infringements package: key decisions*, https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687.

31 L. Pech, K. L. Scheppele, W. Sadurski, *supra* note 18.

3. COUNCIL OF EUROPE

Comparing to the wide array of tools available at EU level, measures at the Council of Europe's disposal are limited despite its crucial importance in upholding human rights, democracy and the rule of law in Europe. Since all EU member states are also members of the CoE – which means that the ECHR, among other things, forms part of “common constitutional traditions” and inspires the Charter of Fundamental Rights³² – it is practically easier to enforce the rule of law through EU institutions, in particular the CJEU with its broad jurisdiction rather than through the CoE mechanisms. Nevertheless, both political and legal measures adopted by the CoE significantly contributed to the overall toolbox.

As far as the political tools are concerned, one must focus on the activities of the CoE Commissioner for Human Rights. Following the February 2016 visit in Warsaw, commissioner Nils Muižnieks issued a report in which, among other things, he expressed his doubts as to the paralysis of the Constitutional Tribunal and new surveillance legislation³³. These concerns were further reiterated in July 2016 when another bill on the Constitutional Tribunal was adopted³⁴, and in January 2018 following the entry into force of the new laws on the Supreme Court and the National Council of the Judiciary³⁵.

Under the term of office as the new CoE Commissioner for Human Rights, Dunja Mijatović issued a report after she visited Warsaw in March 2019 underlining deep concerns about legislation affecting the Constitutional Tribunal, the Supreme Court and the National Council of the Judiciary³⁶. Furthermore, she focused on the deterioration of standards of disciplinary proceedings against judges³⁷ and the “Muzzle Law” that “further curtails judges’ and prosecutors’ independence and freedom of expression”³⁸.

32 See in particular Article 52(3) of the Charter of Fundamental Rights under which the meaning and scope of rights guaranteed by both the Charter and the ECHR shall be the same as those laid down in the latter but it does not prevent Union law providing more extensive protection.

33 Council of Europe, Commissioner for Human Rights, *Erosion of rule of law threatens human rights protection in Poland*, <https://www.coe.int/en/web/commissioner/-/erosion-of-rule-of-law-threatens-human-rights-protection-in-poland>.

34 Council of Europe, Commissioner for Human Rights, *Poland: Commissioner concerned about bill on the Constitutional Tribunal*, <https://www.coe.int/en/web/commissioner/-/poland-commissioner-concerned-about-bill-on-the-constitutional-tribunal>.

35 Council of Europe, Commissioner for Human Rights, *Commissioner concerned about human rights backsliding in Poland*, <https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-human-rights-backsliding-in-poland>.

36 Council of Europe, Commissioner for Human Rights, *Poland's authorities should shield judges from pressure, actively protect women's rights and step up policies for gender equality*, <https://www.coe.int/en/web/commissioner/-/poland-s-authorities-should-shield-judges-from-pressure-actively-protect-women-s-rights-and-step-up-policies-for-gender-equality>.

37 Council of Europe, Commissioner for Human Rights, *Poland should restore necessary guarantees for independence of judges and prosecutors, prevent regression on women's rights and combat gender stereotypes*, <https://www.coe.int/en/web/commissioner/-/poland-should-restore-necessary-guarantees-for-independence-of-judges-and-prosecutors-prevent-regression-on-women-s-rights-and-combat-gender-stereotyp>.

38 Council of Europe Commissioner for Human Rights, *The Commissioner calls on the Polish Senate to reject bill which further curtails judges' and prosecutors' independence and freedom of expression*, <https://www.coe.int/en/web/commissioner/-/the-commissioner-calls-on-the-polish-senate-to-reject-bill-which-further-curtails-judges-and-prosecutors-independence-and-freedom-of-expression>.

Apart from that, the Parliamentary Assembly of the CoE (PACE) firstly expressed its concerns over the independence of the judiciary in the resolution of October 2017³⁹ in which it called on Poland, among other things, to refrain from amending the law on the National Council of the Judiciary and the Supreme Court. It also requested that the Polish authorities comply with the Venice Commission recommendations concerning the Constitutional Tribunal, and asked for further opinions about the draft bills on ordinary courts, the Supreme Court and the National Council of the Judiciary.

In January 2020, the PACE Monitoring Committee published a long report⁴⁰ about the functioning of democratic institutions in Poland in which it stated that numerous aspects of the justice system run counter to European norms and standards, resulting in severe damage to the independence of the judiciary and the rule of law. According to the rapporteurs, these changes “should be revisited to bring them into line with Council of Europe recommendations”. The report was adopted by 140 votes to 37, with 1 abstention.

Following the report, the PACE decided to open a full monitoring procedure for Poland for the first time with regard to an EU member state⁴¹. This involves regular visits by the PACE rapporteurs, ongoing dialogue with the Polish authorities and the periodic assessment of compliance with CoE commitments.

With regard to legal tools, one must pay attention to the Venice Commission⁴² and its opinions regarding various aspects of the rule of law in Poland. The first one, adopted in March 2016⁴³ concerned amendments to the law on the Constitutional Tribunal and was requested, surprisingly, by the then Minister of Foreign Affairs. In the opinion, the commission called on all political powers to resolve the conflict over the composition of the Constitutional Tribunal while finding that the amendments affect its efficiency and, as a result, three basic principles of the CoE: democracy (absence of checks and balances), human rights (denial of constitutional justice) and the rule of law (as the Constitutional Tribunal would become ineffective).

In July and October 2016, the Venice Commission adopted subsequent opinions regarding changes in the Police Act⁴⁴ and the Constitutional

39 PACE, 11 October 2017, Resolution 2188 (2017), New threats to the rule of law in Council of Europe member States: selected examples.

40 PACE, 6 January 2020, Report 15025 (2020), The functioning of democratic institutions in Poland.

41 PACE, *PACE decides to open monitoring of Poland over rule of law*, <https://pace.coe.int/en/news/7766/pace-decides-to-open-monitoring-of-poland-over-rule-of-law/>.

42 The Venice Commission (officially European Commission for Democracy through Law) is an advisory body of the CoE which provides legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.

43 Venice Commission, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, CDL-AD(2016)001-e.

44 Venice Commission, *Poland - Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)*, CDL-AD(2016)012-e.

Tribunal⁴⁵. In both of them the commission expressed further doubts as to the right to privacy and the independence of the judiciary, and the separation of powers.

More than a year later, in December 2017, the Venice Commission presented two additional opinions regarding the new act on the Public Prosecutor's Office⁴⁶ as well as amendments to law on the National Council of the Judiciary, ordinary courts, and new law on the Supreme Court⁴⁷. In this documents the commission called to de-politicise the prosecutorial system underlining the risk of abuse of power by the Minister of Justice who is at the same time the Prosecutor General. Moreover, it noticed, among other things, that the new composition of the National Council of the Judiciary and the establishment of two new chambers in the Supreme Court, accompanied with a lower retirement age for its judges, pose a serious risk as to the independence of the judiciary.

As it was noted, despite the limited array of tools at the CoE's disposal, the activities of the Venice Commission and PACE must be assessed as positive. They contribute to the EU's Article 7(1) procedure since they allow the European and international community to familiarise itself with Poland's non-compliance with common standards. Moreover, the opinions of the Venice Commission frequently form the basis of legal reasoning of the ECtHR and CJEU. Contrary to the EU, the CoE must be seen to use all its available measures in an appropriate way.

45 Venice Commission, *Poland - Opinion on the Act on the Constitutional Tribunal*, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), CDL-AD(2016)026-e.

46 Venice Commission, *Poland - Opinion on the Act on the Public Prosecutor's office, as amended*, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017), CDL-AD(2017)028-e.

47 Venice Commission, *Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), CDL-AD(2017)031-e.

4. UNITED NATIONS

Poland has been in the spotlight of numerous United Nations delegates' fact-finding missions since the beginning of the rule of law crisis. Seeing as a visit could only have been conducted once acceptance was granted by the government, it would seem that recommendations stated at its end would be enforced and respected. However, that continued to not be the case.

Following his 2017 visit to Poland, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán, presented his preliminary observations on 27 October 2017⁴⁸. Amongst his many findings he highlighted the following issues:

- the legislative acts related to the reform of the judiciary were seen as posing “a serious threat to the independence of the Polish judiciary and the separation of powers”,
- the Constitutional Tribunal was called to be the first victim of the reform and although still in place, its independence and legitimacy had been seriously undermined,
- the new law on ordinary courts, allowing the Minister of Justice to dismiss presidents of the courts and appoint a new president of his choice, was seen as a serious concern in relation to the principles of independence of the judiciary and separation of powers,
- concern was raised at the amendments to the Act on the Prosecution Service, which merged the positions of the Minister of Justice and Prosecutor General and attributed new powers to the latter,
- the Special Rapporteur also claimed that the then draft law on the Supreme Court was questionable due to “the very fact that the text of such an important law is being discussed behind closed doors”.

However, following his visit, the Special Rapporteur had to conclude in 2018 that although appreciative of the willingness of the Polish government to listen to the concerns that he – along with several other international and regional institutions – has raised in relation to its judicial reform, “the amendments introduced by the governing majority were of a cosmetic nature, at best, and absolutely insufficient to address the serious concerns” expressed in his report. The amendments to the Act on the National Council of the Judiciary did not address any of the issues raised in his final report⁴⁹.

In September 2017 the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein protested against the Polish government's reforms that

48 United Nations Special Rapporteur on the independence of judges and lawyers, *Preliminary observations on the official visit to Poland (23-27 October 2017)*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E>.

49 United Nations Special Rapporteur on the independence of judges and lawyers, *Poland: Reforms a serious blow to judicial independence, says UN rights expert*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23258&LangID=E>.

“aimed to dismantle the basics of an independent judiciary,” and supported the activists that protested against them⁵⁰.

In December 2019 a press briefing was held at the office of High Commissioner for Human Rights Rupert Colville, where deep concern was expressed due to a new draft legislation “submitted to the Polish parliament on 12 December, which [risked] further jeopardizing the independence of the judiciary in Poland and would place constraints on judges in exercising their freedom of association and freedom of expression. It could even result in judges being dismissed if they question the government’s judicial reform. The draft act which amends the existing law on the structure of common courts, the law on the Supreme Court and a number of other acts, may also prevent judges from fulfilling their legal obligation, under EU treaties, to apply EU law. In general, it risks further undermining the already heavily challenged independence of the judiciary in Poland”⁵¹. Yet again, these concerns were not seen as such by the Polish government and the law was adopted in its entirety.

All in all, the activities of the UN and its agendas, regardless of their limited legal impact on the state of play in Poland, must also be assessed as positive. Opinions issued by the Special Rapporteur, along with those of the Venice Commission, are widely cited by the CJEU’s advocate generals in cases concerning Poland and further employed by CJEU judges, what confirms their universal importance.

50 Human Rights House Foundation, *Poland: Acceptance must lead to implementation*, <https://humanrightshouse.org/articles/poland-acceptance-must-lead-to-implementation/>.

51 Spokesperson for the UN High Commissioner for Human Rights, *Press briefing on Poland*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25447&LangID=E>.

5. OTHER (NGOs, JUDICIAL ORGANISATIONS, STATES)

In November 2018 a report was released by the International Federation for Human Rights concerning the degradation of the rule of law in Poland and how the rule of law crisis impacted other human rights and freedoms⁵². As stated in the official press release, “the growing control of the Polish executive over the judiciary has gone hand-in-hand with public and political attacks against the right to abortion, reproductive health, and the rights of LGBT+ persons. Certain categories of persons, who were already stigmatised, are both subjected to reactionary and vehement public discourse and to courts increasingly controlled by the executive. In parallel, human rights organisations and remaining independent institutions, such as the Supreme Court or the Polish Ombudsman, are subject to slander, verbal attacks or obstacles in their work.”

Poland has also been under the scrutiny of both the CCBE (Council of Bars and Law Societies of Europe) and the FBE (Federation of European Bars) which communicated in 2017 to the President of the Republic “that violating or threatening the autonomy and independence of courts is not only an internal problem for Poland. It has consequences for the international legal community, as well as directly impacting the application of European Union law”.

Following the denial of the Irish High Court to return a person with the European arrest warrant to Poland due to concerns about the state of the independence of the judiciary, the CCBE and FBE renewed their communication and underlined that independent justice systems are essential in upholding the rule of law and ensuring confidence and trust in judicial systems. Without this confidence and trust the principle of mutual recognition as the basis for judicial cooperation will no longer function⁵³.

Human Rights Watch has also been keeping close tabs on Poland’s downhill spiral during the rule of law crisis. It has continuously issued press releases and letters to numerous actors, including the EU General Affairs Council in February 2020, “concerning the rapidly deteriorating rule of law in Poland and in particular the legal and institutional crises that recent actions by the Polish government have triggered”⁵⁴.

Furthermore, the European Network of Councils of the Judiciary (ENCJ) has decided to suspend the NCJ in its rights as a member of the network, due to concerns that the requirement of a member council to be inde-

52 International Federation for Human Rights, *All downhill from here: The rapid degradation of the rule of law in Poland: what it means for women’s sexual and reproductive rights, and LGBT+ persons’ rights*, https://www.fidh.org/IMG/pdf/pologne_fidh_web_v4.pdf.

53 CCBE and FBE joint Statement on the Rule of Law and the principle of mutual recognition, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EN_NA_20180518_CCBE-and-FBE-Joint-Statement-on-the-Rule-of-Law-and-the-principle-of-mutual-recognition.pdf.

54 Human Rights Watch, *NGOs Letter to EU General Affairs Council Concerning Rule of Law in Poland and Hungary*, <https://www.hrw.org/news/2020/02/14/ngos-letter-eu-general-affairs-council-concerning-rule-law-poland-and-hungary>.

pendent was no longer met in this case⁵⁵. On 22 April 2020 the ENCJ Board has sent a draft Position Paper to the NCJ, setting out the proposed expulsion of the NCJ from the ENCJ⁵⁶. To date, this procedure is still pending before the ENCJ.

The OSCE was also not ignorant of the fact that the rule of law crisis in Poland has not yet ceased. On 14 January 2020 an Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019) was released, stating it has been written due to a request made by the Polish Ombudsman⁵⁷.

As stated in the report, several provisions of those reviewed are inherently incompatible with international standards and OSCE commitments on judicial independence. A number of the breaches of these standards are so fundamental that they may put into question the very legitimacy of the bill, which should be reconsidered in its entirety and should not be adopted as it is. Again, this was ignored by the Polish government and the law was adopted as previously proposed.

As far as European responses are concerned, one may note actions taken by the Netherlands and Norway. In September 2020, as a result of two referrals to the CJEU concerning the execution of European arrest warrants issued by Polish courts after the “Muzzle law”⁵⁸, the District Court of Amsterdam announced that it has suspended judicial cooperation with its Polish counterparts pending judgment of the Luxembourg court⁵⁹. The main reason to halt the execution of all European arrest warrants from Poland stems from doubts as to the independence of the entire judicial system. That means, according to the Dutch court, that every individual before Polish courts is at real risk of breach of his fundamental right to an independent court. The judgment in the said cases, i.e. the decision whether to execute European arrest warrants from Poland, is expected in early 2021.

The example of Norway’s response to the crisis seems to be the most meaningful. In February 2020, due to the lack of trust in the independence of the Polish judiciary, Norway blocked €65 million of funds for facilitating the administration of the courts and the correctional system. Later, in September 2020, it suspended the payment of €100 million from “Norway Grants” due to the new developments in Poland’s judicial system and anti-LGBT campaign⁶⁰.

55 European Network of Councils for the Judiciary, *ENCJ Suspends Polish National Judicial Council – KRS*, <https://www.encj.eu/node/495>.

56 European Network of Councils for the Judiciary, *ENCJ Board Sends Position Paper on Proposed Expulsion to KRS*, <https://www.encj.eu/node/554>.

57 OSCE Office for Democratic Institutions and Human Rights, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019)*, JUD-POL/365/2019 [AIC], https://www.osce.org/files/f/documents/c/c/443731_2.pdf.

58 See joined cases *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, pending before the CJEU.

59 See in Dutch: *IRK legt alle overleveringen naar Polen voorlopig stil*, <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/IRK-legt-alle-overleveringen-naar-Polen-voorlopig-stil.aspx>.

60 C. Duxbury, *As EU debates rule of law, Norway’s already making offenders pay*, Politico,

Violations of the rule of law in Poland were also noticed by the United States' administration, politicians and institutions. In 2016 three US senators – Ben Cardin, John McCain and Richard J. Durbin – wrote to Poland's then prime minister, Beata Szydło, that they “urge [the] government to recommit to the core principles of the OSCE and the EU, including the respect for democracy, human rights, and rule of law.”⁶¹ In July 2017 the US Department of State issued a statement saying that “the Polish government has continued to pursue legislation that appears to undermine judicial independence and weaken the rule of law in Poland. We urge all sides to ensure that any judicial reform does not violate Poland's constitution or international legal obligations and respects the principles of judicial independence and separation of powers.”⁶² Also in 2017 the Commission on Security and Cooperation in Europe (known as the U.S. Helsinki Commission) organised a hearing on democracy in Central and Eastern Europe during which an assessment of the situation in Poland was presented by Marek Tatała from the Civil Development Forum⁶³. Many critical assessments of violations of the rule of law were published by the American Bar Association⁶⁴.

Finally, the unprecedented attacks on the rule of law in Poland have been reflected in the leading indices, published by various organisations, concerning not only the rule of law but also the quality of democracy and individual freedoms. Regardless of the methodology employed, a continuing decline in Poland's position is observed in measures like the Rule of Law Index (World Justice Project), Worldwide Governance Indicators (World Bank), Judicial Framework and Democracy Score (Freedom House) and many others. This topic was discussed in details in the previous report by the Civil Development Forum from these series⁶⁵.

<https://www.politico.eu/article/eu-rule-of-law-norway-makes-offenders-pay/>.

61 Reuters Staff, *U.S. senators urge Poland to respect democracy, rule of law*, <https://www.reuters.com/article/us-poland-usa-idUSKCN0VN0ZG>.

62 U.S. Department of State, *Poland: Independence of the Judiciary*, <https://www.state.gov/r/pa/prs/ps/2017/07/272791.htm>.

63 U.S. Helsinki Commission, *Renewing the Promise of Democratic Transitions*, <https://www.csce.gov/international-impact/events/democracy-central-eastern-europe>.

64 See for example: American Bar Association, *Poland: Erosion of Judicial Independence Continues*, https://www.americanbar.org/groups/human_rights/reports/poland--erosion-of-judicial-independence-continues/.

65 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

ASSESSMENT AND RECOMMENDATIONS

As it was presented, the availability of tools to combat the rule of law crisis varies among organisations and is mostly determined by the scope of integration, the impact the crisis in one member state may have on the whole structure and formal measures that can be deployed against it. As the ruling majority in Poland may now benefit from relatively weak constraints preventing them from making things worse, time is of the essence. This is why a decisive approach must be considered as the first choice since it was partially proven to work when compared to toothless measures and dialogues that could backfire and consolidate the government's efforts.

In this respect judicial tools must be considered in the first place with special attention to the CJEU. Finding the Polish authorities to be in breach of the EU law (which also covers ECHR standards) or at least granting interim measures, is the most efficient step to make them comply with the rule of law. Eventually, should the Polish government refuse to recognise the CJEU ruling, the Commission is legally entitled to apply for a daily penalty payment which should efficiently motivate the authorities to fulfil their commitments.

Despite the lack of decisive steps from the Commission regarding the pending infringement procedures as well as new ones, other EU member states should consider whether to bring Polish matters before the CJEU under Article 259 TFEU. It may be diplomatically difficult but the growing number of member states which intervene in Polish cases before the CJEU, on the Commission's side, may one day result in self-standing actions. Similarly, inter-state applications could be brought before the ECtHR.

The above does not mean that other instruments are less important. Constant scrutiny under the Article 7(1) TEU procedure and PACE's full monitoring procedure will contribute to judicial tools by gathering new evidence and by allowing the Polish authorities to exchange their views with international partners. In this respect, taking into account the lack of compliance with the CJEU ruling as well as the situation concerning disciplinary proceedings and the functioning of the prosecution service, the Commission or the European Parliament should be encouraged to broaden the scope of Article 7(1) TEU to allow the public to have a clearer view on the state of play in Poland.

All in all, we recommend the following international and European actions to slow down or overcome the rule of law crisis in Poland:

1. The European Parliament or the Commission should broaden the scope of Article 7(1) TEU in order to take a more holistic view of the current situation by including the matters concerning: (1) the lack of compliance to the CJEU's rulings regarding the Polish judiciary, (2) the disciplinary regime against judges, prosecutors and other

legal professions, and (3) the functioning of the prosecution service under the command of the Minister of Justice. Moreover, the procedure must be continued in order to gather further evidence and should be made more transparent to citizens and civil society organisations.

2. The Commission should initiate infringement procedures with regard to the composition and the functioning of the Constitutional Tribunal and the National Council of the Judiciary as well as the lack of independence of the new Extraordinary Chamber.
3. Under the judicial phase of infringement procedures the Commission should make use of applications for interim measures and expedited proceedings.
4. Other member states of the EU or the CoE should consider bringing cases to the CJEU or ECtHR, respectfully with regard to issues covered by Article 7(1) TEU and the above recommendations, or at least intervene before these courts so as to show their support to applicants and have an opportunity to present their submissions.
5. Other institutions, namely the European Parliament, the PACE, the CoE Commissioner for Human Rights and the agendas of the United Nations should closely monitor the recent developments in Poland and gather more evidence to be shared with international courts and the public.

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Civil Development Forum (FOR Foundation) is a non-governmental think tank based in Poland promoting and defending economic freedom, the rule of law, individual liberties, private property, entrepreneurial activities, and ideas of limited government. Our activities are based on our vision of a society with favourable conditions for growth and productive activities, combining labour, entrepreneurship, innovation, saving, investment and obtaining knowledge. FOR aims to achieve its goals through fact-based reports and analysis, efficient communication and civil society mobilization.

Civil Development Forum was founded in 2007 by Professor Leszek Balcerowicz, former Deputy Prime Minister and Minister of Finance in the first non-communist government of Poland after the Second World War. FOR Foundation is a member of various networks of pro-liberty think tanks and NGOs – 4Liberty Network, Epicenter Network and Atlas Network. Our experts frequently appear in Polish and international media.

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