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Committee on Legal Affairs and Human Rights

Judges in Poland and the Republic of Moldova must remain independent

Introductory memorandum

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1. Introduction

1. Following a motion for a resolution entitled “Judges in Poland and the Republic of Moldova must remain independent”,¹ tabled at its meeting in Paris on 4 March 2019, the Committee on Legal Affairs and Human Rights (the Committee) appointed me as rapporteur on this subject. According to the signatories of this motion, the “independence of the judiciary is being seriously undermined in the Republic of Moldova and Poland by their current governments” and “dismantling the independence of the judiciary and manipulating its rulings for political gains bears signs of usurpation of power by legislative and executive powers”. Accordingly, the Parliamentary Assembly was requested to examine this question and “make recommendations, in order to urge the governments of these two member States to restore the independence of the judiciary and constitutional order in line with their European and international obligations”.

2. It should be pointed out that the Assembly has dealt with the question of the independence of the judiciary in Council of Europe member states on several occasions, particularly in [Resolution 1594 \(2007\)](#) on the principle of the ‘Rule of Law’² and in [Resolution 2187 \(2017\)](#) on the Venice Commission’s Rule of Law Checklist.³ It has also adopted a series of resolutions and recommendations on strengthening the rule of law and reinforcing the independence of judges and prosecutors, particularly Resolutions [1685 \(2009\)](#) on allegations of politically motivated abuses of the criminal justice system in Council of Europe member states and [2040 \(2015\)](#) on “Threats to the rule of law in Council of Europe member States: asserting the Parliamentary Assembly’s authority”, [Resolution 1703 \(2010\)](#) and [Recommendation 1896 \(2010\)](#) on judicial corruption, [Resolution 1943 \(2013\)](#) and [Recommendation 2019 \(2013\)](#) on “Corruption as a threat to the rule of law” and [Resolution 2098 \(2016\)](#) and [Recommendation 2087 \(2016\)](#) on “Judicial corruption: urgent need to implement the Assembly’s proposals”.

3. In its most recent resolution on this issue – [Resolution 2188 \(2017\)](#)⁴ on “New threats to the rule of law in Council of Europe member States: selected examples” – the Assembly already expressed concern about certain developments “which put at risk the respect for the rule of law, and, in particular, the independence of

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¹ [Doc. 14650](#), reference 4416 of 21 January 2019.

² See the report by Mr Erik Jurgens (Netherlands, SOC), former member of our Committee, [Doc. 11343](#) of 6 July 2007.

³ See the report by Mr Philippe Mahoux (Belgium, SOC), former member of our Committee, [Doc. 14387](#), 17 July 2017.

⁴ Adopted on 11 October 2017 on the basis of a report by our committee (rapporteur: Mr Bernd Fabritius, Germany, EPP/CD), [Doc. 14405](#), 25 September 2017.

the judiciary and the principle of the separation of powers” in the Republic of Moldova and Poland.⁵ Having issued specific recommendations to the five states covered by this resolution, the Assembly called on all the Council of Europe member states to “promote a legal and political culture that is conducive to the implementation of the rule of law, in conformity with the underlying principles of all Council of Europe standards”.

4. The Assembly’s Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) also examines such questions. The Republic of Moldova is the subject of an Assembly monitoring procedure (see [Resolution 1955 \(2013\)](#) of 2 October 2013). On 10 September 2019, the Monitoring Committee adopted a new report on the functioning of democratic institutions in the Republic of Moldova.⁶ As to Poland, its most recent judicial reforms are currently being examined by the co-rapporteurs of the Monitoring Committee on the “Functioning of Democratic Institutions in Poland”, Ms Azadeh Rojhan Gustafsson (Sweden, SOC) and Mr Pieter Omtzigt (Netherlands, EPP/CD), who recently visited Warsaw (on 5 and 6 September 2019).⁷ Their report is expected in the months to come. Accordingly, I will attempt to avoid any duplication with the work of the Monitoring Committee. However, I do feel it is my duty to highlight a number of problems regarding the functioning and independence of the judiciary in both countries.

2. Relevant Council of Europe standards

2.1. *The concept of the rule of law*

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

6. Under Article 3 of the [Statute of the Council of Europe](#), every member state of the Council of Europe must accept the three closely linked principles of the rule of law, democracy and human rights. The rule of law (“*état de droit*” in French and “*Rechtsstaat*” in German)⁹ – is, or at least should be, one of the pillars of all national legal systems and all international organisations,¹⁰ although no binding text has been adopted which defines it. However, indicators making it possible to assess compliance with the rule of law in a given country were established by the European Commission for Democracy through Law (Venice Commission) in a document adopted in March 2016 entitled “[Rule of Law Checklist](#)”.¹¹ According to the Venice Commission, there is a consensus on both the formal and the substantive core elements of the concepts of “rule of law”, “*Rechtsstaat*” and “*état de droit*”.¹² These are: (1) legality; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law. The Venice Commission specifies nonetheless that while these “ingredients” are constant, the way in which they are applied may differ from one country to another depending on the local context.¹³ For its part, the European Union is still seeking

⁵ Paragraph 6 of the resolution.

⁶ Doc. 14963, adopted by the Monitoring Committee on 10 September 2019, co-rapporteurs : Mr Egidijus Vareikis (Lithuania, EPP/CD) and Ms Maryvonne Blondin (France, SOC).

⁷ See the press release of 4 September 2019.

⁸ See footnote 4 in section 2 of the report.

⁹ Following [Assembly Resolution 1594 \(2007\)](#) on the principle of the Rule of Law, the Venice Commission studied this concept and published a report on the subject in 2011 – see [CDL-AD\(2011\)003rev](#). “Report on the Rule of Law”, Study No. 512/2009, adopted by the Venice Commission at its 86th plenary session on 25 and 26 March 2011, paragraphs 15-16 and 33. The “rule of law” stems from the English legal culture, while the French and the German terms have a continental background.

¹⁰ See, in particular, the Preamble to the Statute of the Council of Europe and the Preamble to the European Convention on Human Rights.

¹¹ This document was approved by the Committee of Ministers, the Congress of Local and Regional Authorities and the Assembly; see the report by our former Committee colleague, Mr Philippe Mahoux, see footnote 3, and [Assembly Resolution 2187 \(2017\)](#).

¹² Paragraph 18 of the Rule of Law Checklist. See also paragraph 15 of this document, in which the Commission considers “that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures”.

¹³ Paragraph 34 of the Rule of Law Checklist.

to establish an effective and consistent mechanism to “discipline” states where the principle of the rule of law is at risk of being flouted.¹⁴

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

7. According to the European Court of Human Rights (the Court), the “rule of law” is “a concept inherent in all the Articles” of the European Convention on Human Rights (“the Convention” or “the ECHR”)¹⁵ and the Court has often referred to this notion in its case law.¹⁶ Furthermore, the right of access to an independent and impartial tribunal is specifically guaranteed by Article 6§1 of the Convention. This right is also enshrined in Article 47 of the [Charter of Fundamental Rights of the European Union](#) (“right to an effective remedy and to a fair trial”).

8. The Court has built up an abundant body of case-law on the subject of Article 6§1 of the Convention.¹⁷ In determining whether a body can be considered to be “independent” – notably of the executive and of the parties to the case –, the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.¹⁸

9. Recently, it has delivered several judgments in which it concluded that there had been violations of Article 6§1 of the Convention because of the dismissal of judges; their implementation is still being supervised by the Committee of Ministers (see, in particular, *Oleksandr Volkov v. Ukraine*,¹⁹ *Kulykov and Others v. Ukraine*,²⁰ *Báka v. Hungary*²¹ and *Mitrinovski v. “the former Yugoslav Republic of Macedonia”*).²² In addition, in March 2019, in the case of *Guðmundur Andr Ástráðsson v. Iceland*, the Court found that a breach of domestic law when appointing four judges to the new Court of Appeal of Iceland had resulted in a violation of Article 6§1 of the Convention. The Court emphasised among other things that pressure brought to bear in this procedure by the Minister of Justice, together with the failure of Parliament to vote separately on each of the candidates proposed, had meant that the balance between the executive and legislative branches had not been respected in this process.²³ This judgment is not yet final as the case was referred to the Grand Chamber of the Court on 9 September 2019.

10. Furthermore, the Committee of Ministers has issued Recommendation [CM/Rec\(2010\)12](#) on judges: independence, efficiency and responsibilities. This text points out that the independence of judges is “an inherent element of the rule of law, and indispensable to judges’ impartiality and to the functioning of the judicial system”, that it “secures for every person the right to a fair trial” and “therefore [that it] is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system”. It is applicable to all persons exercising judicial functions, including those dealing with constitutional matters, and contains detailed provisions on the external and internal independence of judges, their efficiency, resources, status, duties and responsibilities, and ethics along with councils for the judiciary. The recommendation reaffirms, in particular, that “the independence of the judge and of the judiciary should be enshrined in the constitution or at the highest possible legal level in member states, with more specific rules provided at the legislative level” (paragraph 7 of the Appendix), and that “where judges consider that their independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy” (paragraph 8 of the Appendix). The

¹⁴ European Commission, Communications of 11 March 2014, on [A new EU Framework to strengthen the Rule of Law](#), COM (2014) 158 final and 17 July 2019 on [Strengthening the rule of law within the Union, a blueprint for action](#), COM(2019)343 final. See also Assembly [Resolution 2273 \(2019\)](#), “Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights”, 9 April 2019.

¹⁵ *Stafford v. the United Kingdom*, application no. 46295/99, judgment of 28 May 2002, paragraph 63.

¹⁶ Through various expressions such as “the rule of law in a democratic society” or “the general requirement of respect for the rule of law”; see respectively, *Centro Europa 7 S.R.L. and di Stefano v. Italy*, application no. 38433/09, judgment of 7 June 2012, paragraph 156, and *Sylvester v. Austria*, applications no. 36812/97 and no. 40104/98, judgment of 24 April 2003, paragraph 63.

¹⁷ See, in particular, the case-law guides on Article 6 (civil and criminal limbs) at the following address: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> and the joint publication of the Council of Europe and the EU Agency for Fundamental Rights, [Handbook on European law relating to access to justice](#), 2016.

¹⁸ See, in particular, *Campbell and Fell v. the United Kingdom*, applications nos. 7819/77 and 7878/77, judgment of 28 June 2014, paragraph 78.

¹⁹ Application no. 21722/11, judgment of 9 January 2013.

²⁰ Application no. 5114/09, judgment of 19 January 2017.

²¹ Application no. 20261/12, judgment of 23 June 2016.

²² Application no. 6899/12, judgment of 30 April 2014.

²³ Application no. 26374/18, judgment of 12 March 2019 (not final), paragraph 123.

recommendation also deals with the role of “councils for the judiciary”, which “seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system” (paragraph 26 of the Appendix). It stipulates that “not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary” (paragraph 27 of the Appendix).

11. It should also be noted that the Venice Commission has issued several opinions on bills concerning judges and prosecutors submitted to it by member states²⁴ and published thematic studies on the criteria guaranteeing the independence of the judiciary (see, in particular, the Report on the Independence of the Judicial System Part I: The Independence of Judges²⁵ and the report on Judicial Appointments²⁶).

12. The question of the independence of the judiciary has also been addressed in the most recent reports by the Secretary General of the Council of Europe, Mr Thorbjørn Jagland. In the report which he prepared for the Ministerial Session in Helsinki on 16 and 17 May 2019 – [Ready for future challenges - Reinforcing the Council of Europe](#), he noted, without mentioning specific countries, that despite positive developments in some countries, “efforts to interfere with the work and composition of national judiciaries – including constitutional courts – have increased”²⁷ and “it appears that some political actors no longer see the separation of powers as inviolable”.²⁸

3. The judiciary in the Republic of Moldova

3.1. Introduction

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

14. In [Resolution 2188 \(2017\)](#), the Assembly noted that corruption, “which is a major challenge to the rule of law”, remains a widespread phenomenon in the Republic of Moldova²⁹ and called on the authorities to:

- “continue the reform of the Superior Council of Magistracy, the judiciary and the prosecution service in line with the recommendations of Council of Europe bodies”;
- “considerably strengthen its efforts to combat corruption and, in particular, ensure full independence of the major institutions that are competent in this field” and;
- “refrain from taking measures which would undermine the separation of powers”.³⁰

15. Mr Fabritius’s report, which formed the basis for this resolution, pointed out that corruption, including corruption of the judicial system, remained widespread and that the perception of the problem was high.³¹ The rapporteur was concerned about the “excessive politicisation of State institutions and close links between politics and business”³² and referred to the notion of a “captured state”, which was said to be due to the concentration of powers in the hands of one businessman Mr Vladimir Plahotniuc.³³ He also mentioned the cases of judges who had been prosecuted for their decisions, including the aforementioned judge Domnica Manole, who had annulled the decision of the Central Election Commission rejecting the plan for a referendum on amending the Constitution requested by a political party.³⁴ With reference to the findings of the Group of

²⁴ See, in particular, Republic of Moldova: draft Law on disciplinary liability of Judges of the Republic of Moldova, CDL-AD(2014)006; Law on professional integrity Testing No. 325 of 23 December 2013 (Lustration Law) CDL-REF(2014)041; Ukraine: Draft Law on the independence of judges CDL-AD(2013)034 and Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012 of 17/06/2013.

²⁵ [CDL-AD\(2010\)004](#), adopted at the 82nd plenary session, Venice, 12 and 13 March 2010.

²⁶ [CDL-AD\(2007\)028](#), adopted at the 70th plenary session, Venice, 16 and 17 March 2007.

²⁷ P. 17 of the report.

²⁸ P. 18 of the report.

²⁹ Paragraph 6 of the [resolution](#).

³⁰ Paragraph 8 of the [resolution](#).

³¹ See document referred to in footnote 4, paragraph 39.

³² *Ibid.*

³³ See document referred to in footnote 4, paragraph 41.

³⁴ See document referred to in footnote 4, paragraph 45.

States against Corruption (GRECO)³⁵, the rapporteur highlighted the need to review the composition and operation of the Higher Council for the Judiciary and the Higher Council of Prosecutors and to raise awareness among judges and prosecutors about rules on ethics and integrity.³⁶

16. According to Transparency International's [Corruption Perception Index](#), in 2018, the Republic of Moldova was ranked 117th out of 180 countries in the world and the perceived level of corruption was 33 on a scale of 100 (in which 0 is highly corrupt). It should also be pointed out that several of Moldova's senior civil servants were involved in the "Global Laundromat", which was recently the subject of a report by the Committee.³⁷ Fourteen judges and two prosecutors were accused of complicity in money laundering and deliberately issuing decisions contrary to the law.³⁸ In [Resolution 2279 \(2019\)](#), which is based on the report, the Assembly called on the Moldovan authorities to pursue its investigation on the subject and punish all those who have committed related offences and to "introduce provisions preventing persons charged or convicted of serious offences, including corruption and money laundering, from taking or exercising public office".³⁹

17. The Monitoring Committee has recently prepared a fresh report on the functioning of democratic institutions in the Republic of Moldova;⁴⁰ this text, which also investigates the situation of the judiciary to a certain extent, will be examined by the Assembly at the forthcoming October part-session.

3.2. Latest political events: the political and constitutional crisis of June 2019

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

19. The most recent parliamentary elections in the Republic of Moldova were held on 24 February and resulted in a hung parliament. This led to an unprecedented political and constitutional crisis in the country following the decision of the Constitutional Court to dissolve Parliament on 7 June 2019 as it considered that the time limit to form a parliamentary majority had expired. Although, on 8 June 2019, the Socialist Party and the ACUM Bloc reached a "temporary political agreement for the de-oligarchisation of Moldova", enabling the formation of a parliamentary majority, the election of a Speaker of the Parliament and the designation of a Government, on the same day, the Constitutional Court declared these decisions unconstitutional. Furthermore, on 9 June 2019, it decided to temporarily suspend the President of the Republic, who had refused to comply with the Constitutional Court's request to dissolve Parliament and call early parliamentary elections. This resulted in a state of legal and political confusion, with two blocks trying to hold onto power. As a result, on 8 June 2019, the Secretary General of the Council of Europe asked the Venice Commission to prepare an opinion on the subject.⁴¹

20. On 21 June 2019, the Venice Commission issued its opinion, in which it concluded that the Constitutional Court had not met the legal and constitutional conditions to order the dissolution of Parliament.⁴² Since then, the Government has resigned and Mr Plahotniuc (who was a member of Parliament and leader of the Democratic Party) has resigned from office and left the country. Subsequently, the Constitutional Court decided to annul the controversial decisions it had made. This crisis cast a shadow over the Constitutional Court, which had long been considered a highly politicised institution.⁴³ At the end of June, all six judges resigned, including the President. Calls for candidates were made and as a result, new judges were appointed (two by Parliament, two by the Government and two by the Higher Council for the Judiciary), though not without controversy.⁴⁴

³⁵ GRECO, [Evaluation Report on the Republic of Moldova, Fourth Evaluation Round, Corruption prevention in respect of members of Parliament, judges and prosecutors](#), published 5 July 2016.

³⁶ See document referred to in footnote 4, paragraphs 46 and 47.

³⁷ "Laundromats: responding to new challenges in the international fight against organised crime, corruption and money laundering", [Doc. 14874](#) of 25 March 2019, Committee on Legal Affairs and Human Rights, rapporteur: Mr Mart van de Ven (Netherlands, ALDE).

³⁸ *Ibid.*, paragraph 11.

³⁹ Paragraphs 7.2.1 and 7.2.2. of [Resolution 2279 \(2019\)](#), adopted on 11 April 2019.

⁴⁰ See document referred to in footnote 6.

⁴¹ [Statement](#) of the Secretary General on the situation in the Republic of Moldova and the Venice Commission, 9 June 2019.

⁴² "Opinion on the constitutional situation with particular reference to the possibility of dissolving parliament", adopted by the Venice Commission at its 119th plenary session (Venice, 21 and 22 June 2019), [CDL-AD\(2019\)012](#).

⁴³ See, in particular, the Monitoring Committee report referred to in footnote 6 above, paragraph 40.

⁴⁴ *Ibid.*, paragraph 44, and "Moldovan Constitutional Court's new composition formed", Interfax-Ukraine, 18 August 2019.

21. The new parliamentary coalition has agreed on an activity programme, whose aim is to arrive at the de-oligarchisation and restoration of the Republic of Moldova in accordance with the Constitution, one of whose priorities will be “releasing the state from captivity and strengthening the independence of the institutions, especially in the field of justice”.⁴⁵ Last August, the authorities announced a new reform of the justice system, which was to substantially alter the election of the principal state prosecutor, the composition of the Supreme Court of Justice, the Higher Council for the Judiciary and the Higher Council of Prosecutors and the appraisal system for judges and prosecutors.⁴⁶

3.3. *Issues related to the independence of the judiciary*

22. According to the International Commission of Jurists (ICJ), which published a report in March 2019 following a visit to the Republic of Moldova in November 2018, the Moldovan judiciary is not yet entirely independent despite the reforms which have been carried out. This is mainly the result of a lack of political will and the attitude of the judges themselves.⁴⁷ The history of the country, which was under the yoke of the Soviet Union, where the judiciary was subject to the executive, still has a major impact on the judicial system and culture, although they are in the process of changing.

23. Between 2011 and 2017, an ambitious reform, the Justice Sector Reform Strategy, was implemented on the basis of the [Association Agenda between the European Union and the Republic of Moldova](#) of 2014. Its aim is to strengthen the independence, responsibility, impartiality, efficiency and transparency of the judiciary and much progress has been made, particularly in areas such as increases in the salaries of judges and court officials, the recording of hearings and the random allocation of cases. However, the implementation of this reform has not been equally efficient in all fields and this can be put down in particular to a lack of commitment by the Moldovan authorities. Evidence of this is provided by the low number of acquittals.⁴⁸ Public trust in the judiciary is also still very low – in 2018, 81% of the population did not trust the judiciary and 75% believed it was corrupt.⁴⁹ The ICJ investigated many aspects linked to the independence of the judiciary and made several recommendations on various subjects (particularly the composition of the Higher Council for the Judiciary and the procedures to appoint judges and take disciplinary measures against them).⁵⁰

24. On 24 July 2019, GRECO made its compliance report on the Republic of Moldova adopted on 7 December 2018 public.⁵¹ It concluded that to date, 4 of the 18 recommendations it had made had been entirely implemented, 9 had been partly implemented and 5 had not been implemented at all (three of the latter related to parliamentarians and two to prosecutors) and stated that the Republic of Moldova needed to make “further significant progress ... to demonstrate an acceptable level of compliance” with its recommendations on the prevention of corruption.⁵²

25. As to judges, GRECO welcomed the publication and distribution of the Code of Professional Conduct and Ethics of judges and the adoption of the commentaries on this Code.⁵³ Training courses on this subject were held between 2016 and 2018.⁵⁴ A new law on conflicts of interest (Law No. 133 of 17 June 2016) has been adopted and brought into force, and training courses on this theme have been attended by a large number of judges.⁵⁵ GRECO also took note of the amendments of June 2018 to the law on judges’ disciplinary liability, which provides for a new procedure to examine complaints of disciplinary breaches by judges and increases the powers of the judicial inspectorate.⁵⁶

⁴⁵ <https://gov.md/en/advanced-page-type/government-activity-program>.

⁴⁶ See the Monitoring Committee report referred to in footnote 6, paragraph 69, and International Commission of Jurists (ICJ): “[Only an empty shell](#)” [The undelivered promise of an independent judiciary in Moldova](#), 13 March 2019, p. 18.

⁴⁷ ICJ, see document referred to in footnote 46, p. 3.

⁴⁸ In 2017, the acquittal rate was 1.65% in courts of first instance and 1.5% in appeal courts, and this was lower than the general figure for 2009, which was 2.1%; *ibid.*, p. 6.

⁴⁹ ICJ, see document referred to in footnote 46, p. 6.

⁵⁰ *Ibid.*, pp. 45-50.

⁵¹ GRECO, Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors, [GrecoRC4\(2018\)10](#).

⁵² *Ibid.*, paragraph 113.

⁵³ *Ibid.*, paragraph 111.

⁵⁴ *Ibid.*, paragraph 71.

⁵⁵ *Ibid.*, paragraphs 74-76.

⁵⁶ *Ibid.*, paragraphs 80-81.

26. However, GRECO did criticise the fact that the Minister of Justice and the principal state prosecutor are always *ex officio* members of the Higher Council for the Judiciary (CSM).⁵⁷ A bill amending the Constitution, particularly Article 122 on the composition of the CSM (aimed at excluding the Minister of Justice and the principal state prosecutor), was transmitted by the Government to Parliament in January 2018 (Bill no. 10/2018).⁵⁸ This bill was approved by the Venice Commission.⁵⁹ However, as it was not adopted by Parliament within a year, it is now considered to be null and void.⁶⁰ Nonetheless, GRECO welcomed the adoption of a new Law of June 2018 amending Law No. 947 of 1996 on the CSM, and providing that the *ex officio* members should be excluded from votes on judges' careers, disciplinary liability, sanctioning and dismissal.⁶¹ It also welcomed the fact that "following a Constitutional Court ruling and relevant legal amendments, the SCM's decisions can now be challenged both on the merits of the case and procedural grounds".⁶²

27. GRECO also noted that specific measures to prevent the appointment and promotion to judicial positions of candidates with integrity risks and to abolish the probationary period for judges (currently five years) appeared to be underway.⁶³ However, because of the expiry of the bill amending the Constitution (see above), these measures have not been adopted.⁶⁴

4. Reforms of the judiciary in Poland

4.1. Introduction

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

29. In [Resolution 2188 \(2017\)](#), the Assembly already expressed concerns about "tendencies to limit the independence of the judiciary through attempts to politicise the judicial councils and the courts" and mass attempts to dismiss judges and prosecutors.⁶⁵ It called on the Polish authorities to:

- "refrain from conducting any reform which would put at risk respect for the rule of law, and in particular the independence of the judiciary";
- "ensure that the justice reform which is now under way will be compliant with Council of Europe standards on the rule of law, democracy and human rights", and
- "fully co-operate with the Venice Commission and implement its recommendations, especially those with respect to the composition and the functioning of the Constitutional Court".⁶⁶

30. In his September 2017 report, our former colleague, Mr Fabritius, voiced concerns about the controversial reforms of the Polish judiciary threatening to compromise the existence of the rule of law and initiated by the Law and Justice (*Prawo i Sprawiedliwość*) Party, which had won an absolute majority in parliament (in the lower house, the *Sejm*, and in the Senate) at the parliamentary elections in October.⁶⁷ These reforms concerned the Constitutional Court, the Supreme Court, the ordinary courts and the National Council

⁵⁷ Ibid. Currently the CSM is made up of 12 members, three of whom are *ex officio* members (the President of the Supreme Court, the Minister of Justice and the principal state prosecutor), three law professors appointed by Parliament and six judges elected by the General Assembly of Judges.

⁵⁸ <http://www.parlament.md/ProcesulLegislativ/Proiectedeactele legislative/tabid/61/LegislativId/4057/language/ro-RO/Default.aspx>.

⁵⁹ [CDL-AD\(2018\)003](#), Opinion on the Law amending and supplementing the Constitution of the Republic of Moldova (judiciary) and [CDL-REF\(2018\)008](#), "Draft law on the modification and completion of the constitution and informative note".

⁶⁰ ICJ, see the document referred to in footnote 46, pp. 12 and 13.

⁶¹ GRECO, see the document referred to in footnote 51, paragraph 45.

⁶² Ibid, paragraph 51.

⁶³ Ibid, paragraphs 111 and 58-59.

⁶⁴ For this purpose, the bill proposed to remove Article 116.2 of the Constitution and amend Article 116.5. It also proposed that Supreme Court judges should be appointed by the President of the Republic rather than Parliament, that rules on immunities related to particular functions should be set out in the Constitution and that the CSM should be given an increased role in drawing up the budget of the judicial system. All of this was welcomed by the Venice Commission.

⁶⁵ Paragraph 6 of the resolution.

⁶⁶ Paragraph 9 of the resolution.

⁶⁷ See footnote 4 above, section 3.5 of report.

of the Judiciary. In [Resolution 2188 \(2017\)](#), the Assembly asked the Venice Commission for an opinion on the compatibility with the Council of Europe's standards of the Law of 12 July 2017 on the Ordinary Courts Organisation and of the two draft laws amending the laws on the National Council of the Judiciary and the Supreme Court. In December 2017, the Venice Commission concluded that "the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law."⁶⁸ It should be noted that in 2016 the Sejm passed a law on the public prosecutor's office,⁶⁹ which merged the function of Minister of Justice and that of Prosecutor General and increased the latter's powers in relation to the public prosecutor's office. This legislation was also criticised by the Venice Commission, which concluded that "this merger falls short of international standards as to the appointment of the Prosecutor General and to his/her qualifications" and "creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law".⁷⁰

31. The Monitoring Committee has also considered the reforms of the Polish judiciary.⁷¹ In addition, other Council of Europe bodies, including the Commissioner for Human Rights,⁷² GRECO⁷³ and the Consultative Council of European Judges,⁷⁴ as well as the UN Special Rapporteur⁷⁵ have voiced very strong criticism of the reforms. Moreover, as Poland is a member of the European Union, on 20 December 2017, the European Commission concluded that "there is a clear risk of a serious breach of the rule of law in Poland"⁷⁶ and asked the Council of the European Union to find the same on the basis of Article 7, paragraph 1, of the [Treaty on European Union](#). The European Commission has also initiated three infringement cases, two of which have already come before the Court of Justice of the European Union (CJEU). Below, I will seek briefly to present the main problems raised by the latest reforms of the Polish justice system.

4.2. *The Constitutional Court*

32. The problems concerning compliance with the rule of law in Poland began with the "constitutional crisis" in 2015.⁷⁷ In November 2015, following the parliamentary elections, the Law and Justice Party challenged the election of five (out of 15) Constitutional Court judges by the previous Sejm ("October judges") based on a new law on the Constitutional Court of 25 June 2015 passed by the former parliamentary majority led by the Civic Platform (*Platforma Obywatelska*, PO). Between November and December 2015, the Sejm amended the legislation on the Constitutional Court twice.⁷⁸ In March and October 2016, the Venice Commission issued opinions on the successive legislative amendments passed by the Sejm,⁷⁹ but its recommendations were not fully followed by the latter. A great deal is at stake here, and the Venice Commission noted that the legislation of 22 December 2015 on the Constitutional Court would have endangered "not only the rule of law, but also the functioning of the democratic system" and that "the effect of [the improvements brought about by the Act on the Constitutional Tribunal of 22 July 2016] is very limited, since numerous other provisions of the adopted Act would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning";⁸⁰ in also referring to other developments, the Venice Commission concluded that the parliament and government

⁶⁸ CDL-AD(2017)031, 11 December 2017, paragraph 129.

⁶⁹ Act of 28 January 2016 on the Public Prosecutor's Office (*Prawo o prokuraturze*).

⁷⁰ CDL-AD(2017)028, 11 December 2017, see in particular paragraphs 109-116.

⁷¹ Monitoring Committee, [Information note](#) by the co-rapporteurs on their fact-finding visit to Warsaw (3-5 April 2017), "The functioning of democratic institutions in Poland", 9 May 2017.

⁷² Report by the Commissioner on Poland following her visit to the country in March 2019, [CommDH\(2019\)17](#), 28 June 2019, and her Human Rights Comment, "[The independence of judges and the judiciary under threat](#)" of 3 September 2019.

⁷³ Ad hoc report on Poland (Article 34), [Greco-AdHoc\(2018\)1](#), published on 29 March 2018, and the Addendum to the Fourth Round Evaluation report on Poland (Article 34), [Greco-AdHocRep\(2018\)3](#), 22 June 2018, and the Fifth Round Evaluation Report.

⁷⁴ For the opinions and statements of its Bureau, see: <https://www.coe.int/en/web/ccje/status-and-situation-of-judges-in-member-states>.

⁷⁵ UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1, 5 April 2018.

⁷⁶ https://europa.eu/rapid/press-release_IP-17-5367_en.htm.

⁷⁷ For more details, see the information note by the Monitoring Committee's co-rapporteurs, footnote 71 above, Section III, and our committee's report on the "Venice Commission's 'Rule of Law Checklist'", see footnote 3 above, section 4.1.

⁷⁸ Amendments of 19 November and 22 December 2016.

⁷⁹ Venice Commission, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, adopted at its 106th Plenary Session, 11-12 March 2016), [CDL-AD\(2016\)001, paragraph 137](#).

⁸⁰ Venice Commission, *Poland – Opinion on the Act on the Constitutional Tribunal*, adopted at its 108th session, 14-15 October 2016, [CDL-AD\(2016\)026](#), paragraph 123.

had “obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights”.⁸¹

33. The election of the five “October judges” was invalidated by the Sejm and they were replaced by judges elected by the new Sejm (“December judges”). In spite of a ruling by the Constitutional Court annulling the election of only two “October judges”,⁸² the other three “October judges” were not allowed to take up their duties, in particular because the President of the Republic refused to take their oaths, and the three “December judges” elected to replace them were allowed to adjudicate in December 2016 by the new President of the Constitutional Court, Ms Julia Przyłębska (whose election had been boycotted by seven judges). In the meantime, in November and December 2016, the Sejm passed new legislation concerning the Constitutional Court⁸³ (which has not been assessed by the Venice Commission). At present, the Constitutional Court comprises five judges elected by the former Sejm and ten elected by the current Sejm, including three “December judges” and two judges elected following the death of two “December judges”.⁸⁴ This situation raises doubts about the validity of the Constitutional Court’s judgments and hence also legal certainty. A case on the matter has recently been communicated to the Polish government by the European Court of Human Rights under Article 6§1 of the Convention. In giving notice, the European Court put the following question to the government: “Was the bench of the Constitutional Court, which included Judge M.M. and dealt with the applicant company’s constitutional complaint a ‘tribunal established by law’ as required by Article 6 §1 of the Convention, having regard to the applicant company’s arguments regarding the validity of election of Judge M.M.?”⁸⁵ the judge in question being one of the “December judges” sitting on the post of “an October judge”, whose election was not ruled unconstitutional by the Constitutional Court.⁸⁶

34. It should be noted that the Polish Constitution of 1997⁸⁷ (Article 194, paragraph 1) provides that the judges of the Constitutional Court are elected by the Sejm by a simple majority, which may create a risk of politicisation of the elections. The Venice Commission has already noted this problem and recommended that the Constitution be amended.⁸⁸

4.3. National Council of the Judiciary

35. On 8 December 2017, the Sejm passed a law amending the law on the National Council of the Judiciary (the “2017 amendment act”),⁸⁹ which came into force on 17 January 2018.⁹⁰ It provided that the 15 judges on the National Council of the Judiciary would no longer be elected by judges but by the Sejm and that the newly elected members would immediately replace those elected under the old legislation. It was criticised nationally and internationally, as it was held to be in breach of the Constitution, Article 187§1 of which provides that the 15 members are chosen amongst the judges of the Supreme Court, ordinary courts, administrative courts and military courts.⁹¹ On 6 March 2018, the Sejm elected fifteen judges as new members of the National Council of the Judiciary.

36. In its opinion on the draft version of the law, the Venice Commission concluded that the election of the “judicial members” of the National Council of the Judiciary by parliament, in conjunction with the immediate replacement of the members currently sitting, would “lead to a far-reaching politicisation of this body”. It recommended that judicial members be elected by their peers, as provided for in the previous version of the law.⁹² In July 2019, the European Court of Human Rights gave notice to the Polish government of the case of

⁸¹ Ibid, paragraph 128.

⁸² Judgment of 3 December 2015, case no. K 34/15.

⁸³ Two laws of 30 November 2016 (on the status of the judges of the Constitutional Court and on the organisation of and procedure before the Constitutional Court) and a law of 13 December 2016 setting out transitional provisions.

⁸⁴ Two “December judges” – Lech Morawski and Henrych Cioch – have died. In the case of the three “December judges” currently sitting on the Constitutional Court, the election of two of them (the President, Ms Przyłębska, and Mr Piotr Pszczółkowski) was declared constitutional by judgments of the Constitutional Court in December 2015.

⁸⁵ *Xero Flor w Polsce Sp. z o.o. v. Poland*, Application No. 4907/18, communication of 11 September 2019.

⁸⁶ See footnote 82 above.

⁸⁷ See [The Constitution of the Republic of Poland](#), 2 April 1997.

⁸⁸ CDL-AD(2016)001, see footnote 79 above, paragraph 140.

⁸⁹ An initial version of the legislation was passed on 12 July 2017, but the President of the Republic vetoed it and presented a new bill in September 2017.

⁹⁰ It was subsequently amended in 2018 to align it with the amendments to the Law on Ordinary Courts Organisation.

⁹¹ Apart from the 15 judicial members, the National Council of the Judiciary comprises the First President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice, a member appointed by the President of the Republic and four members appointed by the Sejm and two by the Senate.

⁹² CDL-AD(2017)031, see footnote 68 above, paragraph 130.

Grzęda v. Poland, concerning the early termination of the mandate of a judge on the National Council of the Judiciary following the entry into force of the new law, referring to Articles 6§1 and 13 (right to an effective remedy) of the Convention.⁹³

4.4. *The Supreme Court*

37. On 8 December 2017, the Sejm passed a new law on the Supreme Court, which came into force in April and June 2018.⁹⁴ In particular, it lowered the retirement age for Supreme Court judges from 70 to 65 years, which would have led to the automatic departure of 27 judges (out of 74, or over a third), including the First President of the Supreme Court. The law provided that the judges could remain in post if they had made a declaration to that effect to the President of the Republic and on condition that he had accepted it. It also introduced two new chambers: a disciplinary chamber (whose members were to be elected by the National Council of the Judiciary and the lay judges by the Senate) and an Extraordinary Control and Public Affairs Chamber. These changes triggered various concerns at national and international level, including on the part of the Venice Commission, which concluded that “the early removal of a large number of justices of the Supreme Court [...] violates their individual rights and jeopardises the independence of the judiciary as a whole” and that “the President of the Republic as an elected politician should not have the discretionary power to extend the mandate of a Supreme Court judge beyond the retirement age”; it also found that the establishment of the new chambers was “regrettable”, stating that by introducing a system of extraordinary review not only of future but also of past judgments, the proposed Extraordinary Chamber was “even worse than its Soviet predecessor”.⁹⁵ In spite of the many concerns and criticisms voiced, in September 2018, the President of the Republic appointed 10 new judges to the Disciplinary Chamber and, in February 2019, the presidents of both new chambers.⁹⁶ In October 2018 and February 2019, he appointed the judges of the Extraordinary Control and Public Affairs Chamber (respectively 19 and one).

38. On 3 June 2018, the mandate of the judges who were to retire early expired. Three of them did not agree to leave and the Supreme Court subsequently applied to the CJEU for a preliminary ruling. On 24 September 2018, the European Commission also decided to refer the matter to the CJEU, on the grounds that the new legislation on the retirement of Supreme Court judges breached the principle of the irremovability and independence of judges and hence also EU law. It also asked the CJEU to order interim measures⁹⁷ (case C-619/18), in particular to suspend the application of the national provisions on the lowering of the retirement age. By order of 17 December 2018, the CJEU granted in full the application for interim measures until the delivery of its judgment in the case, in spite of fresh legislative amendments of 21 November 2018.⁹⁸ In line with the opinion of the Advocate General, Mr Tanchev, of 11 April 2019, the CJEU on 24 June 2019 delivered its judgment, in which it concluded that the application of the provisions concerning the lowering of the retirement age of judges of the Supreme Court was not justified by a legitimate objective and undermined the principle of the irremovability of judges, that principle being essential to their independence, and was therefore contrary to EU law.⁹⁹ In addition, following an application for a preliminary ruling lodged by Supreme Court judges, the CJEU is also considering the issue of whether the new Disciplinary Chamber of the Supreme Court affords sufficient guarantees of independence in the light of the fact that its members were selected by the new National Council of the Judiciary; in this connection, Advocate General Tanchev has already expressed doubts.¹⁰⁰

4.5. *Ordinary courts*

39. On 12 July 2017, the Sejm passed a law amending the Law on Ordinary Courts Organisation, which also met with much criticism at national and international level. It came into force on 12 August 2017¹⁰¹ and included provisions relating to the retirement of judges, disciplinary measures affecting them and the introduction of random allocation of cases. It also established the position of a disciplinary prosecutor for

⁹³ Application No. 43572/18, communicated on 9 July 2019.

⁹⁴ An initial version of the legislation was passed on 20 July 2017, but the President of the Republic vetoed it and presented a new bill in September 2017.

⁹⁵ See footnote 68 above, paragraphs 130 and 61.

⁹⁶ Amnesty International, [Poland: free courts, free people. Judges standing for independence](#), 2019, pp. 9 and 27-28.

⁹⁷ European Commission, Press release, [Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court](#), 24 September 2018.

⁹⁸ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf>.

⁹⁹ See CJEU press releases nos. 48/19 and 81/19 respectively.

¹⁰⁰ See his opinion of 27 June 2019, press release of the CJEU, cases C/585, C-624/18 and C-625/18.

¹⁰¹ Published on 28 July 2017, Official Journal (Dziennik Ustaw) of 2017, item 1452.

ordinary courts, appointed by the Minister of Justice, and allowed the latter, within six months after the law entered into force, to dismiss presidents and vice-presidents of courts without consulting the National Council of the Judiciary.¹⁰² Very recently, the European Court of Human Rights communicated to the Polish government two cases concerning the dismissal of vice-presidents of courts.¹⁰³

40. As the new law provides for a different retirement age for female judges (60 years) and male judges (65 years), on 29 July 2017, the European Commission launched infringement proceedings against Poland.¹⁰⁴ It maintained that the new rules allowed the Minister of Justice to exert influence on ordinary judges through, in particular, the vague criteria for the prolongation of their mandates, thereby undermining the principle of the irremovability of judges. While lowering the retirement age, the law allowed judges to have their mandate extended by the Minister of Justice for up to ten years for female judges and five years for male judges. In December 2017, the European Commission referred the matter to the CJEU, which held a hearing on 8 April 2019 (case C-192/18). In June 2019, Advocate General Tanchev presented his opinion, holding that the European Commission's complaints were well-founded.¹⁰⁵

41. On 3 April 2019, the European Commission initiated a third set of infringement proceedings against Poland regarding the new disciplinary regime for judges, alleging that it no longer offers them the necessary guarantees to protect them from political control. It stressed that Polish law allowed ordinary court judges to be subjected to disciplinary investigations and procedures and ultimately sanctions on account of the judgments they delivered. The new regime also did not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which was composed solely of judges selected by the National Council of the Judiciary, whose members were appointed by the Sejm. Moreover, Poland had failed to fulfil its obligations under Article 267 of the [Treaty on the Functioning of the European Union](#) (TFEU) – enshrining the right of courts to request preliminary rulings from the CJEU – because judges could be subject to disciplinary sanctions if they exercised the right. This had a chilling effect on use of the mechanism, which was the backbone of the EU's legal order.¹⁰⁶

42. According to several sources, the Minister of Justice has dismissed or replaced hundreds of judges and prosecutors in recent years. Disciplinary proceedings have been brought against judges and prosecutors who have spoken in public about the independence of the judiciary, taken part in training activities or submitted requests for preliminary rulings to the CJEU.¹⁰⁷ Several judges have been threatened because of their comments criticising the reforms of the judiciary or underlining the principle of its independence. For instance, Judge Waldemar Żurek, a well-known critic of the reform, has been receiving hate messages since 2016.¹⁰⁸ In August 2019, the media revealed that the Deputy Minister of Justice, Mr Łukasz Piebiak, had been behind a vast hate campaign orchestrated behind the scenes to discredit judges opposed to the reform of the judiciary, which had been conducted through hundreds of anonymous emails and letters. Following the revelations, Mr Piebiak was forced to resign on 20 August.¹⁰⁹

5. Conclusions

43. As stressed by the Commissioner for Human Rights in her latest [Human Rights Comment](#), “the independence of the judiciary underpins the rule of law and is essential to the functioning of democracy and the observance of human rights”. However, “we are now seeing increasing and worrying attempts by the executive and legislative to use their leverage to influence and instruct the judiciary and undermine judicial independence.” This point has also been made by the Secretary General of the Council of Europe, who has said that “some political actors no longer see the separation of powers as inviolable”.¹¹⁰ The cases presented above – the situation of the judiciary in the Republic of Moldova, which has been struggling with far-reaching

¹⁰² Article 17 of the Law amending the Law on Ordinary Courts Organisation.

¹⁰³ *Broda v. Poland*, application No. 26691/18, and *Bojara v. Poland*, application No. 27367/18, communicated on 17 September 2019.

¹⁰⁴ https://europa.eu/rapid/press-release_IP-17-2205_en.htm.

¹⁰⁵ See his [opinion](#) of 20 June 2019, case C-192/18.

¹⁰⁶ European Commission, Press release, [Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control](#), 3 April 2019.

¹⁰⁷ For example, the report on the visit to the country by the Council of Europe Commissioner for Human Rights, see footnote 72 above, and the report by Amnesty International, footnote 96 above.

¹⁰⁸ Amnesty International, [Poland: The judges who defend the rule of law](#), 12 February 2019, and Barbora Cernusakova, [When Polish judges become human rights defenders](#), 4 April 2019.

¹⁰⁹ https://www.lemonde.fr/international/article/2019/08/21/en-pologne-un-vice-ministre-harcelait-les-juges-en-coulisses_5501315_3210.html (in French).

¹¹⁰ Ready for future challenges – Reinforcing the Council of Europe, see p. 15 of the report.

reforms for two decades, and Poland, which has recently undertaken very controversial reforms that endanger the rule of law, starting with the fundamental principle of the separation of powers, – confirm these serious concerns and demand particular attention from our committee. In order to perform my task as rapporteur, I would therefore seek the committee's authorisation: 1) to hold a hearing with two or three experts at a future meeting of the committee and 2) to make a fact-finding visit to Poland. As the Republic of Moldova is under the Assembly's monitoring procedure, I will refrain, at least for now, from seeking authorisation to visit it. Given that the Monitoring Committee's co-rapporteurs are currently preparing a report on the functioning of democratic institutions in Poland, I will not present my findings on the situation in the country until their work has been finalised.