



2017/0360R(NLE)

13.5.2020

DRAFT INTERIM REPORT

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
(COM(2017)0835 – C9-0000/2020 – 2017/0360R(NLE))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Juan Fernando López Aguilar(Interim report – Rule 105(5) of the Rules of Procedure)

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**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
(COM(2017)0835 – C9-0000/2020 – 2017/0360R(NLE))**

The European Parliament,

- having regard to the proposal for a Council decision (COM(2017)0835),
- having regard to the Treaty on European Union, and in particular Article 2 and Article 7(1) thereof,
- having regard to the Charter of Fundamental Rights of the European Union,
- having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto,
- having regard to the Universal Declaration of Human Rights,
- having regard to the international human rights treaties of the United Nations, such as the International Covenant on Civil and Political Rights,
- having regard to its legislative resolution of 20 April 2004 on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based¹,
- having regard to Communication of 15 October 2003 from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based²,
- having regard to Communication of 11 March 2014 from the Commission to the European Parliament and the Council, ‘A new EU Framework to strengthen the Rule of Law’³,
- having regard to its resolution of 13 April 2016 on the situation in Poland⁴,
- having regard to its resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union⁵,

¹ OJ C 104 E, 30.4.2004, p. 408.

² COM(2003)0606.

³ COM(2014)0158.

⁴ Texts adopted, [P8_TA\(2016\)0123](#).

⁵ Texts adopted, [P8_TA\(2016\)0344](#).

- having regard to its resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland⁶,
- having regard to Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520⁷,
- having regard to its resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland⁸,
- having regard to its resolution of 14 November 2019 on the criminalisation of sexual education in Poland⁹,
- having regard to its resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones¹⁰,
- having regard to its resolution of 16 January 2019 on the situation of fundamental rights in the European Union in 2017¹¹,
- having regard to its resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary¹²,
- having regard to its resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences¹³,
- having regard to its resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights¹⁴,
- having regard to its legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States¹⁵,
- having regard to the four infringement procedures launched by the Commission against Poland in relation to the reform of the Polish judicial system, of which the first two resulted in judgments of the Court of Justice finding violations of the second subparagraph of Article 19(1) of the Treaty on European Union enshrining the principle of effective judicial protection, while the two other procedures are still pending,

⁶ Texts adopted, [P8_TA\(2017\)0442](#).

⁷ OJ L 17, 23.1.2018, p. 50.

⁸ Texts adopted, [P8_TA\(2018\)0055](#).

⁹ Texts adopted, [P9_TA\(2019\)0058](#).

¹⁰ Texts adopted, [P9_TA\(2019\)0101](#).

¹¹ Texts adopted, [P8_TA\(2019\)0032](#).

¹² Texts adopted, [P9_TA\(2020\)0014](#).

¹³ Texts adopted, [P9_TA\(2020\)0054](#).

¹⁴ Texts adopted, [P8_TA\(2016\)0409](#).

¹⁵ Texts adopted, [P8_TA\(2019\)0349](#).

- having regard to the three hearings of Poland held in 2018 by the General Affairs Council within the framework of the Article 7(1) TEU procedure,
 - having regard to the mission report of 3 December 2018, following the visit by the Committee on Civil Liberties and Justice and Home Affairs to Warsaw from 19 until 21 September 2018, and to the hearings on the rule of law situation in Poland held in that Committee on 20 November 2018 and 23 April 2020;
 - having regard to the annual reports of the European Union Agency for Fundamental Rights and the European Anti-Fraud Office,
 - having regard to Rules 89 and 105(5) of its Rules of Procedure,
 - having regard to the opinions of the Committee on Constitutional Affairs and the Committee on Women’s Rights and Gender Equality,
 - having regard to the interim report of the Committee on Civil Liberties, Justice and Home Affairs (A9-xxxx/2020),
- A. whereas the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as set out in Article 2 of the Treaty on European Union and as reflected in the Charter of Fundamental Rights of the European Union and embedded in international human rights treaties;
- B. whereas, in contrast to Article 258 of the Treaty on the Functioning of the European Union, the scope of Article 7 of the Treaty on European Union is not limited to the obligations under the Treaties, as indicated in the Commission Communication of 15 October 2003, and whereas the Union can assess the existence of a clear risk of a serious breach of the common values in areas falling under Member States’ competences;
- C. whereas any clear risk of a serious breach by a Member State of the values referred to in Article 2 of the Treaty on European Union does not concern solely the individual Member State where the risk materialises but has a negative impact on the other Member States, on mutual trust between Member States and on the very nature of the Union;
1. States that the concerns of Parliament relate to the following issues:
 - the functioning of the legislative and electoral system,
 - the independence of the judiciary and the rights of judges,
 - the protection of fundamental rights, including rights of persons belonging to minorities;
 2. Reiterates its position, expressed in several of its resolutions on the situation of the rule of law and democracy in Poland, that the facts and trends mentioned in this resolution taken together represent a systemic threat to the values of Article 2 of the Treaty on European Union (TEU) and constitute a clear risk of a serious breach thereof;
 3. Expresses its deep concern that, despite three hearings of Poland having been held in the Council, alarming reports by the United Nations, the Organisation for Security and

Cooperation in Europe (OSCE) and the Council of Europe, and four infringements procedures launched by the Commission, the rule of law situation in Poland has not only not been addressed but has seriously deteriorated since the triggering of Article 7(1) TEU;

4. Notes that the Commission's reasoned proposal of 20 December 2017 in accordance with Article 7(1) of the TEU regarding the rule of law in Poland: 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 law¹⁶ has a limited scope, namely the rule of law situation in Poland in the strict sense of independence of the judiciary; sees an urgent need to widen the scope of the reasoned proposal by including clear risks of serious breaches of other basic values of the Union, especially democracy and respect for human rights;
5. Takes the view that the latest developments in the ongoing hearings under Article 7(1) TEU once again underline the imminent need for a complementary and preventive Union mechanism on democracy, the rule of law and fundamental rights as put forward by Parliament in its resolution of 25 October 2016;
6. Reiterates its position on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, including the need to safeguard the rights of beneficiaries, and calls on the Council to start interinstitutional negotiations as soon as possible;

Functioning of the legislative and electoral system in Poland

Usurpation of powers of constitutional revision by the Polish parliament

7. Denounces that the Polish parliament assumed powers of constitutional revision which it did not have when it acted as the ordinary legislature in adopting the act of 22 December 2015 amending the act on the Constitutional Court and the act of 22 July 2016 on the Constitutional Tribunal, as found by the Constitutional Tribunal in its judgments of 9 March, 11 August and 7 November 2016¹⁷;
8. Regrets, furthermore, that many particularly sensitive legislative acts have been adopted by the Polish parliament at a time when independent constitutional review of laws can no longer be effectively guaranteed, such as the act of 30 December 2015 amending the act on Civil Service and certain other acts, the act of 15 January 2016 amending the act on the police and certain other acts, the act of 28 January 2016 on the public prosecution office and the act of 28 January 2016 - regulations implementing the act on the public prosecution office, the act of 18 March 2016 amending the act on the Ombudsman and certain other acts, the act of 22 June 2016 on the National Media Council, the act of 10

¹⁷ See Venice Commission Opinion of 14 October 2016 on the Law of 22 July 2016 on the Constitutional Tribunal, Opinion no. 860/2016, para. 127; Commission Reasoned Proposal of 20 December 2017, paras 91 and following.

June 2016 on anti-terrorist actions and several other acts fundamentally reorganising the judicial system¹⁸;

The use of expedited legislative procedures

9. Deplores the frequent use of expedited legislative procedures by the Polish parliament for the adoption of crucial legislation redesigning the organisation and functioning of the judiciary, without meaningful consultation with stakeholders, including the judicial community¹⁹;
10. Denounces that, during the COVID-19 outbreak, but not linked with the COVID-19 outbreak, legislation is being debated or even rushed through in Parliament in very sensitive areas such as abortion, sexual education, the organisation of elections or the term of office of the President, the latter even requiring a change to the Constitution; underlines that this could amount to abuse of the fact that citizens cannot organise or protest publicly, which would seriously undermine the legitimacy of the legislation adopted;

Electoral law and organisation of elections

11. Notes with concern that the OSCE concluded that media bias and intolerant rhetoric in the campaign were of significant concern²⁰ and that, while all candidates were able to campaign freely, senior state officials used publicly funded events for campaign messaging; notes, furthermore, that the dominance of the ruling party in public media further amplified its advantage²¹;
12. Is concerned that the new Chamber of Extraordinary Control and Public Matters of the Supreme Court (hereinafter the ‘Extraordinary Chamber’), which is composed in majority of judges nominated by the new National Council of the Judiciary (NCJ) and risks not to qualify as independent tribunal in the assessment of the CJEU, is to ascertain the validity of general and local elections and to examine electoral disputes; this raises serious concerns as regards the separation of powers and the functioning of Polish democracy, in that it makes judicial review of electoral disputes particularly vulnerable to political influence²²;
13. Is concerned, while recognising the extraordinary circumstances created by the COVID-19 health crisis, about the amendments to the electoral legislation being considered in the Polish parliament shortly before the presidential elections which change the practical organisation of the elections in order to proceed to a vote by postal services, which could impede the elections from taking a fair, secret and equal course, respectful of the right to

¹⁸ See Commission Reasoned Proposal of 20 December 2017, paras 112-113.

¹⁹ ENCJ, Warsaw Declaration of 3 June 2016.

²⁰ OSCE/ODIHR, Statement of Preliminary Findings and Conclusions after its Limited Election Observation Mission, 14 October 2019.

²¹ OSCE/ODIHR, Limited Election Observation Mission Final Report on the parliamentary elections of 13 October 2019, Warsaw, 14 February 2020.

²² Venice Commission, Opinion of 8-9 December 2017, CDL-AD(2017)031, para. 43; Third Commission Recommendation (EU) 2017/1520 of 26 July 2017, para. 135.

privacy and Regulation (EU) 2016/679 of the European Parliament and of the Council²³ and which moreover run counter to the case law of the Polish Constitutional Tribunal; stresses, moreover, that it is very difficult to organise a genuine election campaign giving an equal share of attention and equal opportunities to all candidates and programmes and allowing for real public debate in the midst of an epidemic²⁴;

Independence of the judiciary and of other institutions and the rights of judges in Poland

Reform of the justice system – general considerations

14. Recognises that the organisation of the justice system is a national competence; reiterates that, all the same, national judges are essentially also European judges, applying Union law, which is the reason why the Union, including the CJEU, has to watch over the independence of the judiciary in all the Member States as one of the exigencies of the rule of law and as laid down in Article 19 TEU and Article 47 of the Charter;

The composition and functioning of the Constitutional Tribunal

15. Recalls that the acts concerning the Constitutional Tribunal adopted on 22 December 2015 and 22 July 2016 seriously affected the Constitutional Tribunal's independence and legitimacy and were therefore declared unconstitutional by the Constitutional Tribunal on respectively 9 March 2016 and 11 August 2016; recalls that those judgments were not published at the time nor implemented by the Polish authorities; seriously deplores the lack of independent and effective constitutional review in Poland²⁵; invites the Commission to consider launching an infringement procedure in relation to the legislation on the Constitutional Tribunal;

The retirement, appointment and disciplinary regimes for judges of the Supreme Court

16. Recalls that, already in 2017, changes in the method of nomination of candidates to the position of the First President of the Supreme Court deprived the participation of the Supreme Court judges in the selection procedure of any meaningful effect and put the decision in the hands of the President of the Republic; denounces that recent amendments to the act on the Supreme Court even further reduce the participation of the judges in the process of selection of the First President of the Supreme Court by introducing a position of First President *ad interim* appointed by the President of the Republic and by reducing the quorum in the third round to 32 out of 120 judges only,

²³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

²⁴ OSCE/ODIHR, Opinion on the draft act on special rules for conducting the general election of the President of the Republic of Poland ordered in 2020 (Senate Paper No. 99), 27 April 2020.

²⁵ Venice Commission Opinion of 14-15 October 2016, para. 128; UN, Human Rights Committee, Concluding observations on the seventh periodic report of Poland, 31 October 2016, paras 7-8; Commission Recommendation (EU) 2017/1520.

thereby effectively abandoning the model of power-sharing between the President and the judicial community enshrined in Article 183(3) of the Polish Constitution²⁶;

17. Shares the Commission's concern that the power of the President of the Republic (and in some cases also the Minister of Justice) to exercise influence over disciplinary proceedings against Supreme Court judges by appointing a disciplinary officer who will investigate the case, excluding the disciplinary officer of the Supreme Court from an on-going proceeding, risks to run counter to the principle of separation of powers and may affect judicial independence²⁷;
18. Recalls that the CJEU found in its judgment of 24 June 2019²⁸ that lowering the retirement age of sitting judges of the Supreme Court is contrary to Union law and breaches the principle of the irremovability of judges and thus that of judicial independence, after it had earlier granted the Commission's request for interim measures on the matter by order of 17 December 2018²⁹; notes that the Polish authorities passed an amendment to the act on the Supreme Court in order to comply with the CJEU's Order, the only instance so far in which they undid a reform of the justice system following a decision by the CJEU;

The composition and functioning of the Disciplinary Chamber and Extraordinary Chamber of the Supreme Court

19. Recalls that, in 2017, two new chambers within the Supreme Court were created, namely the Disciplinary Chamber and the Extraordinary Chamber, which were staffed with newly appointed judges selected by the new NCJ and entrusted with special powers – including the power of the Extraordinary Chamber to quash final judgments taken by lower courts or by the Supreme Court itself by way of extraordinary review, and the power of the Disciplinary Chamber to discipline other (Supreme Court) judges, creating de facto a “Supreme Court within the Supreme Court”;³⁰
20. Recalls that, in its ruling of 19 November 2019,³¹ the CJEU, answering a request for preliminary ruling by the Supreme Court (Chamber of Labour Law and Social Insurance, hereinafter the ‘Labour Chamber’) concerning the Disciplinary Chamber of the Supreme Court, ruled that national courts have a duty to disregard provisions of

²⁶ Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, CDL-PI(2020)002, paras 51-55.

²⁷ See Commission Reasoned Proposal of 20 December 2017, COM(2017) 835, para. 133. See also OSCE-ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017), 13 November 2017, p. 33.

²⁸ Judgment of the Court of Justice of 24 June 2019, *Commission v Poland*, C-619/18, ECLI:EU:C:2019:531.

²⁹ Order of the Court of Justice of 17 December 2018, *Commission v Poland*, C-619/18 R, ECLI:EU:C:2018:1021.

³⁰ OSCE-ODIHR, Opinion of 13 November 2017, p. 7-20; Venice Commission, Opinion of 8-9 December 2017, para. 43; Recommendation (EU) 2018/103, para. 25; GRECO, Addendum to the Fourth Round Evaluation Report on Poland (Rule 34) of 18-22 June 2018, para. 31; Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, para. 8.

³¹ Judgment of the Court of Justice 19 November 2019, *A.K. and Others v Sąd Najwyższy*, C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

national law which reserve jurisdiction to hear a case where Union law may be applied to a body that does not meet the requirements of independence and impartiality;

21. Notes that the referring Supreme Court (Labour Chamber) subsequently concluded in its judgment of 5 December 2019 that the Disciplinary Chamber does not fulfil the requirements of an independent and impartial tribunal, and that the Supreme Court (Civil, Criminal and Labour Chambers) adopted a resolution on 23 January 2020 reiterating that the Disciplinary Chamber is not a court due to its lack of independence and therefore its decisions shall be considered null and void; notes with grave concern that the Polish authorities have declared that those decisions are of no legal significance when it comes to the continuing functioning of the Disciplinary Chamber and the NCJ, and that the Constitutional Tribunal has ‘suspended’ the resolution of 23 January 2020, creating a dangerous judiciary duality in Poland and moreover openly defying the primacy of Union law and the status granted to the CJEU by Article 19(1) TEU³²;
22. Takes note of the order of the CJEU of 8 April 2020³³ instructing the Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court and calls on the Polish authorities to swiftly implement the judgment; calls on the Commission to urgently start infringement proceedings in relation to the national provisions on the powers of the Extraordinary Chamber, since its composition suffers from the same flaws as the Disciplinary Chamber;

The composition and functioning of the new National Council of the Judiciary

23. Recalls that it is up to the Member States to establish a council for the judiciary, but that, where such council is established, its independence must be guaranteed in line with European standards and the constitution; recalls that, following the 2017-2018 reform of the NCJ, the body responsible for safeguarding the independence of the courts and judges in accordance with Article 186(1) of the Polish Constitution, the judicial community in Poland lost the power to delegate representatives to the NCJ, and hence its influence on recruitment and promotion of judges; recalls that before the 2017 reform, 15 out of 25 members of the NCJ were judges elected by their peers, while since the 2017 reform, those judges are elected by the Polish Sejm; strongly regrets that, taken in conjunction with the immediate replacement in early 2018 of all the members appointed under the old rules, this measure led to a far-reaching politicisation of the NCJ³⁴;
24. Recalls that the Supreme Court (Labour Chamber), implementing the criteria set out by the CJEU in its judgment of 19 November 2019, found in its judgment of 5 December

³² Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, para. 38.

³³ Order of the Court of Justice of 8 April 2020, *Commission v Poland*, C-791/19 R, ECLI:EU:C:2020:277.

³⁴ Consultative Council of European Judges, Opinions of the Bureau of 7 April 2017 and 12 October 2017; OSCE/ODIHR, Final Opinion on Draft Amendments to the Act of the NCJ, 5 May 2017; Venice Commission, Opinion of 8-9 December 2017, p. 5-7; GRECO, Ad hoc Report on Poland (Rule 34) of 19-23 March 2018 and Addendum of 18-22 June 2018; Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, paras 42 and 61.

2019 and in its decisions of 15 January 2020 that the decisive role of the new NCJ in the selection of the judges of the newly created Disciplinary Chamber undermines the latter's independence and impartiality;

25. Recalls that the European Network of Councils for the Judiciary (ENCJ) suspended the new NCJ on 17 September 2018 for reason of no longer fulfilling the requirements of being independent of the executive and legislature and is now considering expelling the new NCJ entirely³⁵;
26. Calls on the Commission to start infringement proceedings against the act of 12 May 2011 on the NCJ and to ask the CJEU to suspend the activities of the new NCJ by way of interim measures;

The rules governing the organisation of the ordinary courts and the appointment of courts presidents

27. Regrets that the Minister of Justice, who is, in the Polish system, also the Prosecutor General, obtained the power to appoint and dismiss court presidents of the lower courts at his discretion during a transitional period of six months, and that in 2017-2018 the Minister of Justice replaced over a hundred court presidents and vice-presidents; notes that, after this period, removal of court presidents remained in the hands of the Minister of Justice, with virtually no effective checks attached to this power; notes, furthermore, that the Minister of Justice also obtained other “disciplinary” powers vis-à-vis court presidents, and presidents of higher courts, who in turn, now have large administrative powers vis-à-vis presidents of lower courts³⁶; regrets this major setback for the rule of law and judicial independence in Poland³⁷;
28. Regrets that the act of 20 December 2019 amending the act on the common courts and certain other acts that entered into force on 14 February 2020 changed the composition of the assemblies of judges and moved some of the powers of those bodies of judicial self-government to the colleges of courts presidents appointed by the Minister of Justice³⁸;

The rights and independence of judges, including the new disciplinary regime for judges

29. Denounces the new provisions introducing further disciplinary offences and sanctions in respect of judges and court presidents, as they pose serious risk to judicial independence³⁹; denounces the new provisions prohibiting any political activity of

³⁵ ENCJ, Letter of 21 February 2020 by the ENCJ Executive Board. See as well the letter of 4 May 2020 by the European Association of Judges in support of the ENCJ.

³⁶ Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, para. 45.

³⁷ See also Council of Europe, Bureau of the Consultative Council of European Judges (CCJE-BU), CCJE-BU(2018)6REV, 18 June 2018.

³⁸ Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, paras 46 to 50.

³⁹ OSCE/ODIHR, 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

judges, obliging judges to disclose publicly their membership in associations and restricting substantively the deliberations of judicial self-governing bodies, which go beyond the principles of legal certainty, necessity and proportionality in restricting the judges' freedom of expression⁴⁰;

30. Calls on the Polish authorities to remove the new provisions (on disciplinary offences and other) that prevent the courts from examining questions of independence and impartiality of other judges from the standpoint of Union law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), hence depriving judges from exercising their duties under Union law to put aside national provisions conflicting with Union law⁴¹;
31. Welcomes the Commission's initiation of infringement proceedings in relation to the aforementioned new provisions; calls on the Commission to request the CJEU to use the expedited procedure and to grant interim measures, when it comes to a referral of the case to the CJEU;

The status of the Prosecutor General and the organisation of the prosecution services

32. Denounces the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (act of 27 July 2001 on the organisation of common courts) and the weak position of checks to these powers (National Council of Public Prosecutors), which result in the accumulation of too many powers for one person and have direct negative consequences for the independence of the prosecutorial system from the political sphere, as stated by the Venice Commission⁴²;

Systemic breach of the rule of law

33. Concurs with the Commission, the Parliamentary Assembly of the Council of Europe and the Group of States against Corruption that the aforementioned separate reforms to the judicial system, considering their interaction and overall impact, amount to a serious, sustained and systemic breach of the rule of law, enabling the legislative and executive powers to influence the functioning of the judiciary in a critical manner, thereby significantly weakening the independence of the judiciary in Poland⁴³;

2019), 14 January 2020, p. 23-26; Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, paras 44-45.

⁴⁰ OSCE/ODIHR, Urgent Interim Opinion, 14 January 2020, p. 18-21; Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, paras 24-30;

⁴¹ OSCE/ODIHR, Urgent Interim Opinion, 14 January 2020, p. 13-17; Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, paras 31-43.

⁴² Venice Commission Opinion of 8-9 December 2017 on the Act on the Public Prosecutor's office, as amended, CDL-AD(2017)028, para. 115.

⁴³ Recommendation (EU) 2018/103; GRECO, Follow-up to the Addendum to the Fourth Round Evaluation Report (rule 34) – Poland, 6 December 2019, para. 65; PACE, Resolution 2316 (2020) of 28 January 2020 on the functioning of democratic institutions in Poland, para. 4.

Protection of fundamental rights, including the rights of persons belonging to minorities, in Poland

The right to a fair trial

34. Is concerned about reports alleging undue delays in court proceedings, difficulties in accessing legal assistance during arrest, and instances of insufficient respect for the confidentiality of communication between counsel and client⁴⁴;
35. Is concerned that, since the entry into force on 14 February 2020 of the amendments to the act on the Supreme Court, only the Extraordinary Chamber can decide whether a judge or tribunal or court is independent and impartial, hence depriving citizens of an important element of judicial review at all other instances⁴⁵;

The right to information and freedom of expression, including academic freedom

36. Recalls that in its resolution of 14 September 2016, Parliament has expressed its concern about already adopted and newly suggested changes to Polish media law; repeats its call on the Commission to carry out an assessment of the legislation adopted as regards its compatibility with Union Law, in particular, regarding the legislation on public media;
37. Is deeply concerned by the excessive use of libel cases by some politicians against journalists, including by sentencing with criminal fines and suspension from exercising the profession of journalist; fears for a chilling effect on the profession and independence of journalists and media⁴⁶;
38. Calls on the Polish parliament to repeal Chapter 6c of the act of 18 December 1998 on the Institute of National Remembrance – Committee for the Prosecution of the Crimes against the Polish Nation, which jeopardises freedom of speech and independent research by rendering it a civil offense that is actionable before civil courts to cause harm to the reputation of Poland and its people, such as by making any accusation of complicity of Poland or Poles in the Holocaust⁴⁷;

Freedom of assembly

39. Reiterates its call on the Polish government to respect the right of freedom of assembly by removing from the current act of 24 July 2015 on public assemblies, as amended on 13 December 2016, the provisions prioritising government-approved ‘cyclical’ assemblies⁴⁸; urges the authorities to refrain from applying criminal sanctions to people

⁴⁴ UN Human Rights Committee (HRC), Concluding observations on the seventh periodic report of Poland, 23 November 2016, para. 33.

⁴⁵ Venice Commission and DGI of the Council of Europe, Urgent Joint Opinion of 16 January 2020, para 59.

⁴⁶ Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, 2020 Annual Report, March 2020, p. 42.

⁴⁷ See as well the Statement of 28 June 2018 by the OSCE Representative on Freedom of the Media.

⁴⁸ See as well the Communication of 23 April 2018 by UN Experts to urge Poland to ensure free and full participation at climate talks.

who participate in peaceful assemblies or counter-demonstrations and to drop criminal charges against peaceful protesters;

Freedom of association

40. Calls on the Polish authorities to modify the act of 15 September 2017 on the National Institute for Freedom - Centre for the Development of Civil Society⁴⁹, in order to ensure access to state funding for critical civil society groups, and a fair, impartial and transparent distribution of public funds to civil society, ensuring pluralistic representation;

Privacy and data protection

41. Reiterates its conclusion set out in its resolution of 14 September 2016 that the procedural safeguards and material conditions laid down in the act of 10 June 2016 on anti-terrorist actions and the act of 6 April 1990 on the police for the implementation of secret surveillance are not sufficient to prevent its excessive use or unjustified interference with the privacy and data protection of individuals, including of opposition and civil society leaders⁵⁰; repeats its call on the Commission to carry out an assessment of that legislation as regards its compatibility with Union Law, and urges Polish authorities to fully respect the privacy of all citizens;

Sexual education

42. Reiterates its deep concern expressed in its resolution of 14 November 2019, also shared by the Council of Europe Commissioner for Human Rights⁵¹, over the draft law amending Article 200b of the Polish Penal Code, submitted to the Sejm by the ‘Stop Paedophilia’ initiative, for its extremely vague, broad and disproportionate provisions, which de facto seeks to criminalise the dissemination of sexual education to minors and whose scope potentially threatens all persons, in particular parents, teachers and sex educators, with up to three years in prison for teaching about human sexuality, health and intimate relations; stresses the importance of health and sexual education;

Sexual and reproductive health and rights

43. Recalls that Parliament has strongly criticised, already in its resolutions of 14 September 2016 and 15 November 2017, any legislative proposal that would prohibit abortion in cases of severe or fatal foetal impairment, emphasizing that universal access

⁴⁹ OSCE/ODIHR, Opinion on the Draft Act of Poland on the National Freedom Institute - Centre for the Development of Civil Society, Warsaw, 22 August 2017.

⁵⁰ UN Human Rights Committee (HRC), Concluding observations on the seventh periodic report of Poland, 23 November 2016, paras 39-40. See as well Communication by UN Experts to urge Poland to ensure free and full participation at climate talks, 23 April 2018.

⁵¹ Council of Europe Commissioner for Human Rights, Statement of 14 April 2020.

to healthcare, including sexual and reproductive healthcare and the associated rights, is a fundamental human right⁵²;

44. Recalls that previous attempts to further limit the right to abortion, which in Poland is already among the most restricted in the Union, were halted in 2016 and 2018 as a result of mass opposition from Polish citizens as expressed in the ‘Black Marches’; calls for the law limiting women’s and girls’ access to the emergency contraceptive pill to be repealed;

Hate speech, public discrimination and intolerant behaviour against minorities and other vulnerable groups, including LGBTI people

45. Reiterates its call on the Polish government to take appropriate action on and strongly condemn any xenophobic and fascist hate crime or hate speech⁵³;
46. Recalls its stance expressed in its resolution of 18 December 2019, when it strongly denounced any discrimination against LGBTI people and the violation of their fundamental rights by public authorities, including hate speech by public authorities and elected officials, in the context of elections, as well as the declarations of zones in Poland free from so-called ‘LGBT ideology’, and called on the Commission to strongly condemn such public discrimination;

47. Notes that the lack of independence of the judiciary in Poland has already started affecting mutual trust between Poland and other Member States, especially in the field of judicial cooperation in criminal matters; points out that mutual trust between the Member States can be restored only once respect for the values enshrined in Article 2 TEU is ensured;
48. Calls on the Polish government to comply with all provisions relating to the rule of law and fundamental rights enshrined in the Treaties, the Charter of Fundamental Rights, the ECHR and international human rights standards, and to engage directly in dialogue with the Commission; calls on the Polish government to swiftly implement the rulings of the CJEU and to respect the primacy of Union law;
49. Calls upon the Council to resume the formal hearings - the last one of which was held as long ago as December 2018 - as soon as possible and to include in those hearings all the latest and major negative developments in the areas of rule of law, democracy and fundamental rights; urges the Council to finally act under the Article 7(1) TEU procedure by finding that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU, in the light of overwhelming evidence thereof as displayed in this resolution and in so many reports of international and European

⁵² See as well Statement of 22 March 2018 by UN Experts advising the UN Working Group on discrimination against women, and Statement of 14 April 2020 by the Council of Europe Commissioner for Human Rights.

⁵³ EP Resolution of 15 November 2017, para. 18; PACE, Resolution 2316 (2020) of 28 January 2020 on the functioning of democratic institutions in Poland, para. 14; UN Human Rights Committee (HRC), Concluding observations on the seventh periodic report of Poland, 23 November 2016, CCPR/C/POL/CO/7, paras 15-18.

organisations, the case-law of the CJEU and the European Court of Human Rights and reports by civil society organisations; strongly recommends that the Council address concrete recommendations to Poland, as provided for in Article 7(1) TEU, as a follow-up to the hearings, and that it indicate deadlines for the implementation of those recommendations; calls on the Council to keep Parliament regularly informed and closely involved;

50. Calls on the Commission to make full use of the tools available to it, to address a clear risk of a serious breach by Poland of the values on which the Union is founded, in particular expedited infringement procedures and applications for interim measures before the CJEU, as well as budgetary tools; calls on the Commission to continue to keep Parliament regularly informed and closely involved;
51. Instructs its President to forward this resolution to the Council and the Commission and to the President, government and parliament of the Republic of Poland, the governments and parliaments of the Member States, the Council of Europe and the Organisation for Security and Cooperation in Europe.

EXPLANATORY STATEMENT

1. Institutional background

The European Union is founded and guided by the values of respect for human dignity, freedom, democracy, the rule of law and respect for human rights. The European Parliament must defend without reservation the rule of law, including the principles of legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; separation of powers; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.

It must be borne in mind that the Parliament has repeatedly discussed the “Copenhagen dilemma”: it cannot be consistent with Union law and values that candidate states are examined on the grounds of respect of rule of law, democracy and fundamental rights on their way into the Union, but that there is no further test as to the respect for those values once they have entered the Union. The values on which the Union is founded (Article 2 TEU) are not only requirements for accession to the Union, but are also binding once the country achieved full membership of the Union. Therefore, it is of utmost importance to have a comprehensive rule of law toolbox to ensure the mandatory fulfilment of the above-mentioned values.

On 20 December 2017, the European Commission issued its reasoned proposal based on Article 7(1) TEU 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. The Article 7(1) TEU procedure constitutes a preventive phase endowing the Union with the capacity to intervene in the event of a clear risk of a serious breach of the common values. So far, the General Affairs Council has held three hearings of Poland, all concentrated in 2018. Since then, the Commission has provided updates on the rule of law situation in Poland within the Council, but no further hearings were organised.

In parallel to the triggering of the Article 7(1) TEU procedure in relation to Poland, the Commission has launched four infringement procedures against Poland in relation to the judicial reforms, two of which have led to a judgments of the CJEU finding violations of the principle of effective judicial protection as laid down in Article 19(1) TEU.

The European Parliament expressed its concerns regarding the rule of law situation in Poland in several resolutions adopted during the past years. Those concerns relate 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, including rights of persons belonging to minorities.

Since the situation of the rule of law in Poland has not only not been addressed but has seriously deteriorated since the triggering of the Article 7(1) TEU, the Rapporteur emphasizes the importance of this interim report, which aims to

- take stock of the developments as regards the rule of law, democracy and fundamental rights in Poland since 2015;

- urge the Commission and the Council to widen the scope of the Article 7(1) TEU procedure to include clear risks of serious breaches of democracy and fundamental rights, including the rights of persons belonging to minorities;
- call on the Polish authorities, the Council and the Commission to each act swiftly within their own competences to tackle this severe rule of law crisis.

The Rapporteur took the task of conducting an in-depth analysis and took into consideration the opinions issued by European and international organisations, such as the bodies of the Council of Europe, the OSCE/ODIHR, and the United Nations, and judgments by national, European and international courts. The Rapporteur wants this report to be based on facts as analysed by trustful institutions and organisations, to which Poland is a party and/or of which it accepted the standards and ways of working.

The LIBE Committee also organised a mission to Warsaw in September 2018, where the delegation met with representatives of the Polish Government, the Sejm and the Senate, political parties, judicial institutions, representatives of the OSCE/ODIHR, legal practitioners, journalists and representatives of civil society, and held two hearings, in 2018 and 2020, to assess the rule of law situation in Poland. The Rapporteur wants to conduct further meetings with different stakeholders (NGOs, scholars, journalists, judges, ...) in order to hear directly from those who are facing the situation on the ground.

2. Taking stock of the developments as regards the rule of law, democracy and fundamental rights in Poland since 2015

- The independence of the judiciary and the rights of judges

As regards the rule of law in the strict sense of independence of the judiciary, the situation in Poland is far from improving and concerns remain or increase in every aspect exposed in this report: the politicization of the Polish Constitutional Court as early as in 2015; the composition and behaviour of the new National Council of the Judiciary; the tight grip of the Minister of Justice, who is also the Prosecutor-General, on the prosecution services; the creation of the disciplinary chamber and the chamber of extraordinary appeal inside the Supreme Court; the systematic intimidation of judges and disciplinary proceedings against judges who speak out on these reforms.

Recently, on 29 April 2020, the European Commission launched an infringement procedure on the so called ‘muzzle law’. This new law on the judiciary entered into force on 14 February 2020 is clearly incompatible with the primacy of EU law in that it deprives judges from exercising their duties under Union law to put aside national provisions conflicting with Union law. Major concerns to this law also include the introduction of further disciplinary offences and sanctions against judges and court presidencies, which risk to undermine the principle of judicial independence and moreover their freedom of expression and association by prohibiting any political activity and obliging to disclose publicly their membership in associations.

During the LIBE mission and an exchange of views with the Polish Minister of Justice the Polish Government cited as reasons for the profound reorganisation of its justice system since 2015 citizens’ dissatisfaction with the speed and efficiency of the administration of justice,

alleged corruption and crimes or misdemeanours of individual judges that were left unpunished, and the need to decommunize the judiciary.¹ The Rapporteur insists that the reasons cited do not justify the firm grip of the executive on the judiciary as a result of the reforms. Alleged cases of corruption or crime are to be prosecuted on an individual basis and the European Court of Human Rights has clearly underlined that also a lustration process must be individualised and may moreover be less justified if taking place long after the end of the communist regime.²

- The functioning of the legislative and electoral system

Furthermore, the Rapporteur is concerned with the fact that during the Covid-19 outbreak legislation has been debated or even rushed through in Parliament in very sensitive areas such as abortion or sexual education. Another serious concern needs to be raised on the organisation of presidential elections during this specific time of an epidemic. There is a clear risk that equal, direct and secret elections as enshrined in the Polish Constitution could not be fulfilled, based on a fair election campaign with equal access to the media. Other options such as changing the duration of the term of office of the President would require changes to the Polish Constitution, which so close from the days of elections goes against all international and European standards, and decisions by the Polish Constitutional Court.

- The protection of fundamental rights, including rights of persons belonging to minorities

The proposed ban on the termination of pregnancy due to severe or fatal foetal anomalies would further tighten an already restrictive abortion law and therefore would result in a nearly complete ban on abortion. In addition, the draft bill to criminalise sexual education to minors has raised serious concerns within the European Parliament as well as with other international bodies and civil society organizations.

Furthermore, the level of protection of minorities is seriously worrisome, as well as of women's rights and rights of people identifying as LGBTI, while Member States have the duty to protect the moral and physical integrity of all citizens. The Rapporteur strongly deplores to see some areas in the European Union declaring themselves free from ideologies which do not even exist.

Several more fundamental rights concerns are being addressed in the report, including regarding the right to a fair trial, media and academic freedom, freedom of assembly and association and the right to privacy protection.

3. Widening of the scope of the Article 7(1) TEU procedure

The Rapporteur wants this interim report to give a new impulse in the Article 7(1) TEU procedure, by including not only the most recent controversial changes to the Polish judicial

¹ LIBE Committee, Mission Report of 3 December 2018 following the ad hoc delegation to Poland on the situation of the Rule of Law, 19 - 21 September 2018.

² ECtHR Case *Sõro v. Estonia*, 3 September 2015, para 60-62; Fourth Commission Recommendation (EU) 2018/103 of 20 December 2017, para. 9; Parliamentary Assembly of the Council of Europe, Resolution 2316 (2020) on the functioning of democratic institutions in Poland, adopted on 28 January 2020, para. 13.

system, but by including an analysis of the situation of democracy and fundamental rights in Poland, which require specific attention.

4. Call for action by the Polish authorities, the Council and the Commission

The Rapporteur calls on the Polish Government to comply with all provisions relating to the rule of law and fundamental rights enshrined in the Treaties, the Charter of Fundamental Rights, the ECHR and international human rights standards, to swiftly implement the rulings of the Court of Justice of the European Union and to respect the primacy of Union law and to engage directly in dialogue with the Commission.

The Rapporteur is concerned with the passiveness of the Council in addressing the situation of the Rule of Law in Poland, and calls upon the Member States to resume the formal hearings as soon as possible in order to include all the latest and major negative developments in the areas of rule of law, democracy and fundamental rights. More importantly, the Rapporteur calls upon the Council to finally act under the Article 7(1) TEU procedure by finding that there is a clear risk of a serious breach by the Republic of Poland of the rule of law, in the light of overwhelming evidence thereof as displayed in this resolution and in so many reports of international and European organisations, the case-law of the CJEU and the ECtHR and reports by civil society organisations, and to address recommendations to Poland under the Article 7(1) TEU procedure.

Finally, the Commission is called upon to make full use of the tools available to address a clear risk of a serious breach by Poland of the values on which the Union is founded, in particular expedited infringement procedures and applications for interim measures before the Court of Justice.