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COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE

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**REPORT FOLLOWING HER VISIT TO POLAND
FROM 11 TO 15 MARCH 2019**

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SUMMARY

Commissioner Dunja Mijatović and her team visited Poland from 11 to 15 March 2019. During the visit, the Commissioner held discussions on the independence of the judiciary and the prosecution service as well as issues pertaining to the rights of women, gender equality and domestic violence. The present report focuses on the following key issues:

Independence of the judiciary and the prosecution service

Poland's wide-ranging judicial reform, carried out in several stages and still on-going, has had a major impact on the functioning and independence of practically all key building blocks of the country's justice system, fundamentally affecting the Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court, the common courts, individual judges, and the prosecution service. Various aspects of the reform, as well as the antagonistic and polarising manner in which it has been conducted thus far, have met with serious concern expressed by a host of domestic stakeholders and Poland's international partners, and have led to recurring protests by judges, prosecutors and defence attorneys. The Commissioner considers that the stated goals of the reform, such as improving accountability or efficiency, may not be pursued at the expense of judicial independence. She is not persuaded that the reform has brought about a discernible improvement in either the efficiency or the independence of the courts or of individual judges, or that it is likely to produce such improvement in the future. Noting that the reform has been accompanied by a publicly-financed campaign to discredit judges as well as negative statements made by high-ranking officials, the Commissioner recalls that members of the executive and the legislature have a duty to avoid criticism that would undermine the independence of or public confidence in the judiciary, and urges the Polish authorities to exercise responsibility and to lead by example in their public discourse. The Commissioner is also concerned by the accelerated pace and lack of meaningful public consultation in the process of adopting legislation relating to the judicial reform, and recommends that the authorities ensure that all draft legislation of systemic importance be carefully considered through a regular parliamentary procedure, in thorough consultation with the members of the judicial community and other relevant actors.

Recalling that enjoyment by judges of security of tenure and their protection from undue early removal from office are indispensable conditions for an independent judiciary, the Commissioner welcomed the steps taken by Poland in response to the order of the Court of Justice of the European Union which restored to their posts all forcibly retired judges of the Supreme Court and of the Supreme Administrative Court. However, she deeply regrets that despite the recommendations by many international and domestic actors mandated to foster the observance of international standards in the area of judicial independence, the Polish authorities have not yet found a solution to the prolonged deadlock affecting the functioning of the Constitutional Tribunal. She considers that the Tribunal's independence and credibility have been seriously compromised by the persisting controversy surrounding the election and the status of its new President and several of its new judges. The Commissioner urges the Polish authorities to take urgent steps to resolve that deadlock, including by recognising the legitimacy of the election of the three judges by the previous Sejm and by re-establishing dialogue and cooperation between the Constitutional Tribunal and other constitutional bodies.

The Commissioner further considers that serious concerns remain as regards the composition and independence of the National Council for the Judiciary, whose judicial members were removed and replaced by new ones, elected by Poland's legislature. She regrets the pre-term shortening of the constitutional terms of duty of the body's members and urges the authorities to bring the legislation governing the composition and the process of selecting the judicial members of the National Council for the Judiciary in line with the Council of Europe standards and the Polish Constitution.

The Commissioner observes that legislative changes adopted since her predecessor's last report on Poland have expanded even further the already vast powers of the combined functions of Minister of Justice and Prosecutor-General. Recalling that the Venice Commission has previously highlighted the negative consequences of combining the extensive powers vested in those two functions in a single person, the Commissioner invites the Polish authorities to separate these functions in order to restore the independence of the prosecution service, and to limit their respective powers vis-à-vis judges and prosecutors by establishing adequate further procedural safeguards specified by the Venice Commission.

The Commissioner was struck by the dismissal and replacement of more than a hundred-and-fifty court presidents and vice-presidents by the Minister of Justice during a special six-month period. In line with the recommendations of the Venice Commission, the Commissioner considers that all decisions to appoint or dismiss court presidents and vice-presidents should be subject to the approval by the general assembly of judges of the respective court. Moreover, any person concerned by such dismissal should be able to appeal against that decision to a court. Noting that the independence and autonomy of the prosecution service is closely linked to the independence of the judiciary, the Commissioner invites the Polish authorities to provide an explanation for the very high number of dismissals and demotions among the Polish prosecutors. The Commissioner was also concerned by the numerous cases of disciplinary proceedings being instituted against judges and prosecutors and observes that the manner in which some such proceedings are being conducted has been perceived as intimidating, causing a chilling effect on others. Recalling that judges and prosecutors have the right to express their views on matters of public interest, the Commissioner urges the authorities to ensure that disciplinary proceedings are not instrumentalised and to secure the right to a fair trial of any person subjected to them.

Women's sexual and reproductive rights

The Commissioner shares the concern of the Council of Europe's Committee of Ministers that six years after the adoption by the European Court of Human Rights of the most recent key judgment against Poland on access to abortion and the related care, no measures have been taken to ensure access to lawful abortion throughout Poland. The Commissioner is not persuaded that the means of recourse available in Polish law against refusals to provide abortion and the related care allow women to effectively access the requisite care to which they are entitled in good time, while inaction or delay may in some cases create a very real and grave risk to a woman's life and health. The Commissioner was concerned to learn that many Polish women reportedly resort to clandestine abortions or travel abroad to get help, and that in some areas in Poland abortion is either completely unavailable or very seriously limited. She encourages the authorities to urgently adopt the necessary legislation to ensure the accessibility and availability of legal abortion services in practice, in line with the recommendations of the Committee of Ministers.

The Commissioner was concerned by the repeated attempts to further restrict Poland's already very restrictive legislation governing access to abortion, including a bill currently pending in the Polish Parliament. She calls on the Parliament to reject this and any other legislative proposal that seeks to roll back women's access to their sexual and reproductive rights. Noting the shifting public attitudes to the question of abortion, the Commissioner invites Poland to consider guaranteeing access to safe and legal abortion care by ensuring that abortion is legal on a woman's request in early pregnancy, and thereafter throughout pregnancy to protect women's health and lives and ensure freedom from ill-treatment.

The Commissioner considers that the introduction of the requirement of a prescription for emergency contraception imposes an additional barrier upon access to contraception for women in Poland, especially when seen against the backdrop of the refusal by some medical professionals to prescribe or deliver contraception on the grounds of conscience. She encourages the authorities to make this type of contraception available again for over the counter sale. Moreover, she invites the authorities to consider allowing girls to seek gynaecological consultations without prior authorisation of their legal guardian.

Gender equality

Poland has a solid legal framework protecting equality between men and women. However, its policy framework should be brought up to date, in particular through the finalisation, as a matter of priority, of a new national action plan on gender equality, in close consultation with all relevant actors including experienced women's rights organisations. During her visit to Gdańsk, the Commissioner was positively impressed with that city's "Model for Equal Treatment". She considers the participatory and consultative way in which that policy has been developed to exemplify best practices which would be well worth applying by other authorities, both at the central and the local level. The Commissioner moreover invites the Polish authorities to take measures to prevent and combat sexism and its manifestations in the public and private spheres, drawing on the recent Recommendation CM/Rec(2019)1 of the Committee of Ministers.

The Commissioner notes with satisfaction the fact that Poland's average gender pay gap is among the lowest in the European Union and encourages the authorities to take steps towards its full elimination. She invites the authorities to consider adopting dedicated programmes to further the advancement of women, which should be reflected in their representation at senior and mid-level positions in the public sector, as well as to facilitate

women's access to, or reintegration in, the labour market. The Commissioner particularly welcomes the significant increases in government funding for public childcare in recent years, as well as in the number of places available in public childcare facilities. She encourages the authorities at central and local level to pursue this approach while promoting the use of parental leave by fathers. In terms of women's political participation, the Commissioner invites the Polish authorities to consider introducing a system of alternating women and men on electoral lists, or to supplement the current gender quota with regulations providing incentives to political parties to accord higher places on party candidate lists to female candidates, for all elections. The Commissioner also invites the authorities to promote female candidates in elections to the Senate.

Violence against women and domestic violence

The Commissioner welcomes the Polish authorities' stated commitment to combatting domestic violence and encourages them to take steps towards the practical and effective application of the Istanbul Convention. In particular, this should include ensuring the coherent application of the existing legislation on counteracting domestic violence across the entire country, as well as the provision of a sufficient number and quality of shelter places specifically designed to house women victims of violence and their children. Welcoming the rising number of restraining orders imposed by the prosecution service on alleged perpetrators of domestic violence in recent years, the Commissioner encourages the authorities to ensure the prompt examination by courts of the victims' requests for such orders, and to introduce in law and in practice the possibility for the police to issue immediately enforceable injunctions on the alleged perpetrators of domestic violence.

The Commissioner is concerned that the abrupt and/or unexplained interruption of access to central government funding which affected several well-established and reputable women's rights organisations in recent years has led these to limit the scope of their activities, negatively affecting their ability to help victims. She is also concerned by the stigmatising effect of the police searches carried out in the premises of some of these organisations in late 2017. Stressing that civil society organisations are often the main providers of assistance to victims of domestic violence, the Commissioner pays tribute to their commitment and dedication and calls on the Polish authorities to create and maintain safe and favourable conditions for the activities of such organisations, including through their unhindered and stable access to public funding.

The Commissioner recalls that domestic violence is a phenomenon that affects people of all walks of life. She invites the authorities to take steps to increase public awareness about domestic violence and to do more to identify and promote champions of women's rights and gender equality. She also encourages all politicians and opinion-makers to give vocal support to the advancement of women's rights, gender equality, and the fight against domestic violence.

INTRODUCTION

1. The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović (the Commissioner), carried out a visit to Poland from 11 to 15 March 2019.¹ The visit focused on two sets of issues: the independence of the judiciary and the prosecution service (section I of the present report), and women's rights, gender equality and domestic violence (section II).
2. In Warsaw, the Commissioner met with the Minister of Foreign Affairs, Jacek Czaputowicz; the Minister of Health, Łukasz Szumowski, and Deputy Minister of Health, Zbigniew J. Król; the Government Plenipotentiary for the Civil Society and Equal Treatment, Adam Lipiński; the Undersecretary of State in the Ministry of Family, Labour and Social Policy, Kazimierz Kuberski; the Undersecretary of State in the Ministry of Justice, Marcin Warchoń; and the Police Commander-in-Chief, General Jarosław Szymczyk. At the Chancellery of the President of the Republic, the Commissioner met with the Head of the Chancellery, Halina Szymańska, and the Undersecretary of State, Anna Surówka-Pasek. From the judiciary, she met the First President of the Supreme Court, Małgorzata Gersdorf, and several judges of the Supreme Court. In addition, the Commissioner met with the Ombudsman, Adam Bodnar, and his Deputy, Hanna Machińska, as well as with representatives of civil society and associations representing judges and prosecutors. The Commissioner also met the newly elected Ombudsman for Children's Rights, Mikołaj Pawlak, and visited a shelter for women, operated in Warsaw by a non-governmental organisation.
3. The Commissioner visited Gdańsk in northern Poland, where she met with the city's newly elected Mayor, Aleksandra Dulkiewicz, together with representatives of the municipal authorities in charge of equality, anti-discrimination, education, integration, and social services. She visited the local counselling service of an NGO helping women who had experienced domestic violence. The Commissioner also visited Gdańsk's Basilica of St. Mary to pay respects to the memory of the late Mayor, Paweł Adamowicz, who had been fatally stabbed at a charity event on 13 January 2019.
4. The Commissioner would like to thank the Polish authorities in Strasbourg, Warsaw and Gdańsk for their assistance in organising and facilitating her visit and for providing her with additional information following the visit. She expresses her gratitude to all her interlocutors in Poland for sharing with her their positions, knowledge and insights.²

¹ The Commissioner was accompanied by Bojana Urumova, Deputy to the Director of her Office, and Andrzej Mancewicz, Adviser.

² This report was finalised on 5 June 2019.

1 INDEPENDENCE OF THE JUDICIARY AND THE PROSECUTION SERVICE

5. The present section analyses developments in the judiciary and the prosecution service which have taken place since the publication in June 2016 of the [report](#) of the Commissioner's predecessor on his February 2016 visit to Poland.³

1.1 THE SITUATION OF THE CONSTITUTIONAL TRIBUNAL

6. In March 2016, the European Commission for Democracy through Law (the Venice Commission) adopted an [opinion](#) which concluded that recent legislative amendments related to the Constitutional Tribunal in Poland constrained its ability to carry out its work in an efficient manner, endangering the rule of law, democracy and human rights. Subsequently, in July 2016, the Sejm (the lower house of the Polish Parliament) adopted a further set of amendments to the Law on the Constitutional Tribunal, which purported to address some of the Venice Commission's concerns. The following month (August 2016), the Constitutional Tribunal delivered a judgment in which it found the majority of the new changes to be unconstitutional, despite certain improvements. The then-Prime Minister refused to publish the Constitutional Tribunal's judgment, which she regarded as legally ineffective. Both the legislative amendments and the Prime Minister's repeated refusal to publish the Constitutional Tribunal's judgments were criticised by the Venice Commission in a further [opinion](#) adopted in October 2016 which found inter alia that the new changes 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*". The Venice Commission concluded that the Polish Parliament and government "*continue[d] to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute[d] this authority to themselves [...], created new obstacles to [the Tribunal's] effective functioning [...] instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments*" and that by "*prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights*".
7. The above-mentioned constitutional crisis continued throughout the rest of 2016, with the government refusing to recognise the three judges who had been lawfully elected to the Constitutional Tribunal in October 2015 and the President of the Republic refusing to swear them in, and the President of the Constitutional Tribunal refusing to admit the three judges unlawfully elected in December 2015 ("December judges") to the bench. One week before the expiry on 20 December 2016 of the constitutional term of the Tribunal's President – who had been appointed in 2007 – the Parliament rapidly adopted a new law which gave the President of the Republic the power to unilaterally nominate one of the Tribunal's sitting judges to serve as its "acting President", a hitherto unknown function. On the day of entry of the law, 20 December, the President of the Republic nominated one of the Tribunal's new judges, elected by the current parliamentary majority, as the Tribunal's "acting President". The new "acting President" immediately admitted the three "December judges" to the Tribunal's bench and, on the same day, was officially confirmed as the Tribunal's new President through the sole votes of the six new judges – including the three unlawfully-elected ones – while all remaining judges abstained from the vote (and one resigned in protest). The President of the Republic swore in the new President of the Tribunal on the following day.⁴ The Commissioner notes that the validity of the election and the status of the newly elected President of the Constitutional Tribunal remains unrecognised by many members of the Polish judiciary.
8. In the months that followed, the Sejm's ruling majority continued to elect new judges to the Tribunal (in December 2016, February, June, and September 2017, and January 2018), including to replace two "December judges" who had passed away in the meantime. In January 2017, the Minister of Justice (Prosecutor-General) petitioned the Constitutional Tribunal to rule whether the appointment in 2010 of three of its older judges had been constitutional. Although the Tribunal has so far refrained from pronouncing itself on the matter, the Minister's request has led to the *de facto* exclusion of the three judges concerned from hearing and adjudicating cases. In October 2017, the Tribunal dismissed the Polish Ombudsman's constitutional complaint challenging the legality of appointment of the "December judges"; two of the

³ The 2016 country visit report covered the developments until 17 May 2016.

⁴ For a detailed analysis of the process of the election of the Tribunal's new President, see "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding", Sadurski, Wojciech, January 17, 2018. Sydney Law School Research Paper No. 18/01. Available at SSRN: <https://ssrn.com/abstract=3103491> or <http://dx.doi.org/10.2139/ssrn.3103491>

“December judges” directly concerned by that ruling sat on the bench, despite calls from the Polish Ombudsman⁵ and the wider judicial community for their recusal.

9. Statistical data on the activity of the Constitutional Tribunal shows a noticeable decrease in the number of pending cases and legal requests filed before it by courts and other institutions.⁶ In 2017, the number of new applications filed with the Tribunal was the lowest that had been registered since 1999, amounting to roughly half of the 500–600 cases filed annually in the years prior to 2015. The Tribunal also issued fewer rulings, with 89 decisions delivered in 2017 as compared to 173 in 2015. From all the rulings issued in 2017 there were 36 judgments, which corresponds to approximately half of the annual number of judgments handed down in the years pre-2015. The Commissioner notes that both the Supreme Court and the Polish Ombudsman gradually withdrew pending constitutional complaints to the Tribunal and have refrained from filing new ones, citing lack of trust in the Tribunal’s independence and impartiality. In the conclusions to the report published following his October 2017 country mission to Poland, the UN Special Rapporteur on the Independence of Judges and Lawyers, found that although the Tribunal was “*still in place and its functions (...) have not been formally changed[,] [i]ts legitimacy and independence, however, have been seriously undermined and the Tribunal cannot ensure, at present, an independent and effective review of the constitutionality of legislative acts*”.⁷

1.1.1 CONCLUSIONS AND RECOMMENDATIONS

10. The Constitutional Tribunal has a fundamental role as the main control mechanism allowing for a review of the compliance of legislation with the Polish Constitution and Poland’s international human rights obligations. The Commissioner deeply regrets that despite the recommendations by her predecessor, the Venice Commission, and other international and domestic actors mandated to foster the observance of international standards in the area of judicial independence, the Polish authorities have not yet found a solution to the prolonged deadlock affecting the functioning of this essential institution. In the Commissioner’s view, the independence and credibility of the Constitutional Tribunal have been seriously compromised. In particular, the Commissioner regrets the persisting controversy surrounding the election and the status of the Tribunal’s new President and several of its new judges. She urges the Polish authorities to take urgent steps to resolve the deadlock regarding the composition and functioning of the Constitutional Tribunal, in line with the recommendations of the Venice Commission’s opinions adopted in March and October 2016. This should include recognition of the legitimacy of the election of the three judges in October 2015 by the previous Sejm and their swearing into office, and re-establishing dialogue and cooperation between the Constitutional Tribunal and other constitutional bodies, including the Supreme Court and the Ombudsman.

1.2 CHANGES AFFECTING THE NATIONAL COUNCIL FOR THE JUDICIARY

11. Poland’s Constitution designates the National Council for the Judiciary as the guardian of the independence and impartiality of courts and judges. This body has specific competences in the screening, assessment and recommendation of candidates in the process of judicial appointments and promotions.
12. In April 2017, the Polish Parliament examined a set of amendments to the Act on the National Council for the Judiciary, which stipulated inter alia the early termination of the constitutional four-year term of the Council’s serving members, a new procedure for electing its judicial members, and changes to the body’s internal structure. Despite protests from the National Council of the Judiciary itself as well as by the Polish Ombudsman, the European Network of Councils for the Judiciary (ENCJ), the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE/ODIHR), as well as the concerns raised in the previous Commissioner’s [letter](#), the amendments were adopted. However, they were vetoed by the President of the Republic following the large-scale public protests held across Poland in defence of independent courts in July 2017.

⁵ See the Polish Ombudsman’s letter of 12 October 2017 (in Polish), available at <https://www.rpo.gov.pl/sites/default/files/Pismo%20RPO%20dotyczące%20ustaw%20regulujących%20procedure%20postępowania%20przed%20TK%20oraz%20status%20sędziego%20TK.pdf>

⁶ Gazeta Wyborcza. 14 February 2019, available (in Polish) at <http://wyborcza.pl/7,75398,24460219,raport-z-upadku-trybunalu-statystyki-najgorsze-od-10-lat.html>

⁷ Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, report, 5 April 2018, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/38/38/Add.1&Lang=E>

13. After conducting private consultations with the major political parties – though not with members of the judiciary, the legal professions, or the general public – the President of the Republic tabled his own draft amendments to the laws on the National Council for the Judiciary and the Supreme Court. While no longer proposing to change the Council’s internal organisation, the President’s bill still foresaw the early termination of the constitutional terms of all sitting members. The 15 judicial members of the Council would no longer be elected by their peers but instead by the Parliament’s lower house, from candidates recommended by at least 25 other judges. For their election, the bill proposed the increased higher majority of three-fifths which, however, would be reduced to an absolute majority in case the three-fifths majority could not be reached. On 9 December 2017, the Venice Commission examined the bills put forward by the President and, in its [opinion](#), concluded that, especially taken together, they “*enable[d] the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose[d] a grave threat to the judicial independence as a key element of the rule of law*”. However, without waiting for the publication of the Venice Commission’s opinion, the Polish Sejm adopted both bills even earlier on that day. The Commissioner’s predecessor criticised the adoption of the laws concerned in a [statement](#) as well as in a subsequent [letter](#) addressed to the new Polish Prime Minister. Despite the concerns raised, both bills swiftly passed the Senate and were signed into law by the President of the Republic.
14. In March 2018, in a vote boycotted by the parliamentary opposition, the Sejm elected the new judicial members of the National Council for the Judiciary, thereby terminating the mandate of the sitting members of the Council. Thirteen of the newly elected members were judges from district (first-instance) courts, and one each from a regional (circuit) court and a regional administrative court. Three of them had been previously seconded to the Ministry of Justice, while seven had previously been appointed by the Minister of Justice as presidents or vice-presidents of common courts (cf. paragraph 40 of section 1.5 below).⁸ An informal survey conducted in December 2018 showed that about 3,000 Polish judges considered that the newly constituted Council was not performing its statutory tasks, while 87% of those who participated believed the body’s new members should all be made to resign.⁹ In September 2018, the General Assembly of the ENCJ made the unprecedented decision to suspend the membership of the Poland’s National Council for the Judiciary and stripped it of its voting rights, finding that it no longer fulfilled the requirement of independence from the executive and the legislature.¹⁰
15. In a closed-door session held on 25 March 2019, the Constitutional Tribunal, petitioned by several newly-appointed members of the National Council for the Judiciary as well as senators from the ruling majority, found the new rules on the election of the members of the National Council for the Judiciary to be constitutional. The case was heard exclusively by the Tribunal’s judges elected by the current parliamentary majority, including a judge elected to replace one of the “December judges”, and presided over by the Tribunal’s controversially-elected new President. The Commissioner notes that the Court of Justice of the European Union, separately seized of the matter, has yet to issue a ruling on the question of compliance of the rules of election of members of the Polish National Council for the Judiciary with the law of the European Union.
16. On her part, the Commissioner regrets the retroactive shortening of the constitutional terms of duty of all serving members of the National Council for the Judiciary, a move which was [found](#) by the Consultative Council of European Judges of the Council of Europe (CCJE) to be “*not in accordance with European standards for judicial independence*”, and was criticised in the same vein by the above-mentioned UN Special Rapporteur. She considers that the former members of the Council should have been allowed to serve out their full mandates according to their constitutional duration. According to the 2016 [joint report](#) by the CCJE and the Consultative Council of European Prosecutors of the Council of Europe (CCPE), “*the independence of judges and prosecutors can be infringed by weakening the competences of the Council for the Judiciary, (...) or by changing its composition*” (paragraph 12). In addition, [Resolution 2188 \(2017\)](#) of the Parliamentary

⁸ ENCJ. “Position Paper of the Board of the ENCJ on the membership of the KRS of Poland”, 16 August 2018, pp. 4-5, available at <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf>

⁹ OKO.press. “3,000 Polish judges want the dismissal of the National Council of the Judiciary”, 28 January 2019 (in Polish), available at <https://oko.press/3000-polish-judges-want-the-dismissal-of-the-national-council-of-the-judiciary/> and <https://www.iustitia.pl/79-informacje/2773-juz-ponad-3300-sedziow-ze-139-sadow-wzielo-udzial-w-referendum-fws> (in Polish).

¹⁰ ENCJ. “ENCJ suspends Polish National Judicial Council – KRS”, 17 September 2018, <https://www.encj.eu/node/495>

Assembly of the Council of Europe (PACE), adopted on 11 October 2017, called on the Polish authorities to “refrain from modifying the procedure for appointing member judges of the council [in a manner that] would establish political control over the appointment process of member judges (...)”, as well as “to refrain from implementing any legal provisions that would terminate the term of office of member judges of the Polish National Council of the Judiciary”.

17. The [Recommendation](#) of the Committee of Ministers of the Council of Europe CM/Rec(2010)12 requires that the composition of a council for the judiciary should ensure that it is independent of the executive and legislative powers, and that - with a view to guaranteeing such independence - at least half of the members of the authority should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary (paragraphs 27 and 46). Similarly, the recommendations of the above-mentioned UN Special Rapporteur’s 2018 report on the independence of judges and lawyers,¹¹ the Council of Europe’s 1998 European [Charter](#) on the Statute for Judges, and the 2010 [Magna Carta of Judges](#) (“Fundamental Principles”) adopted by the Consultative Council of European Judges, all provide that councils for the judiciary should be composed either of judges exclusively or of a substantial majority of judges elected by their peers. Principles developed by the ENCJ stipulate that the mechanism for appointing judicial members of a council for the judiciary must exclude any executive or legislative interference, and that the election of the judicial members of such bodies should be done solely by their peers.¹²

1.2.1 CONCLUSIONS AND RECOMMENDATIONS

18. The Commissioner recalls that councils for the judiciary are independent bodies that 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 aforementioned [recommendation](#) of the Committee of Ministers CM/Rec(2010)12). She considers that the collective and individual independence of the members of such bodies is directly linked, and complementary to, the independence of the judiciary as a whole, which is a key pillar of any democracy and essential to the protection of individual rights and freedoms.
19. The Commissioner considers that serious concerns remain with regard to the composition and independence of the newly constituted National Council for the Judiciary. She observes that under the new rules, 21 out of the 25 members of the body have been elected by Poland’s legislative and executive powers; this number includes the body’s 15 judicial members, who have been elected by the Sejm.
20. The Commissioner considers that entrusting the legislature with the task of electing the judicial members to the National Council for the Judiciary infringes on the independence of this body, which should be the constitutional guarantor of judicial independence in Poland. She considers that the selection of members of the judiciary should be a decision process independent of the executive or the legislature, in order to preserve the principles of separation of powers and the independence of the judiciary, and to avoid the risk of undue political influence.
21. For these reasons, the Commissioner encourages the Polish authorities to bring the legislation governing the composition and the process of selecting the judicial members of the National Council for the Judiciary in line with the above-mentioned Council of Europe standards and the Polish Constitution, in particular by ensuring that the fifteen judicial members of the body are duly elected by a wide representation of their peers and not by the legislative branch.

1.3 THE SUPREME COURT

1.3.1 THE EARLY RETIREMENT OF THE SUPREME COURT’S JUDGES

22. Pursuant to the amendments to the Act on the Supreme Court, prepared by the President of the Republic and adopted in December 2017, judges of the Supreme Court and the Supreme Administrative Court older than 65 were required to leave within 3 months of the new legislation’s entry into force in April 2018. This

¹¹ Special Rapporteur on the independence of judges and lawyers, report, 2 May 2018, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/122/81/PDF/G1812281.pdf>

¹² Distillation of ENCJ Principles, Recommendations and Guidelines 2004-2017, European Network of Councils for the Judiciary, report, section 12, available at https://www.ency.eu/images/stories/pdf/workinggroups/encj_distillation_report_2004_2017.pdf

measure affected about 40% of the Supreme Court's serving judges, including its First President. The judges were given the possibility to request the President of the Republic to grant them discretionary leave to continue their service. However, very few judges availed themselves of that opportunity and, in July 2018, the First President of the Supreme Court refused to leave her post, citing non-violability of her six-year mandate expiring in 2020, anchored in Article 183 of the Polish Constitution.

23. In early October 2018, the European Commission referred Poland to the Court of Justice of the European Union (CJEU), alleging violations of the principle of judicial independence by the new legislation on the Supreme Court (case no. C-619/18). The same month, an interim order of the CJEU gave the Polish authorities one month to restore the state of affairs prior to the entry into force of the contested legislation, on pain of financial penalties. In response to the order, the forcibly retired judges of the Supreme Court and the Supreme Administrative Court were called by their respective institutions to report back to work. In November 2018, in just several hours, the Sejm adopted a new law which reinstated all judges concerned by the previous legislation, while retaining the lower retirement age for new appointments only. It also removed the presidential prerogative of granting discretionary leave, referred to in the preceding paragraph. The President of the Republic signed the adopted bill into law on 17 December 2018. It is noteworthy that the new provisions introduced a voluntary retirement scheme equal to 100% of previous pay for those of the forcibly retired judges who decided to stay in retirement, higher than the standard 75% equivalent. However, the Commissioner was informed that only one judge chose to make use of this opportunity, while two others retired with lower pensions under the standard rules after reaching their normal retirement age following the adoption of the new law.
24. An opinion issued on 11 April 2019 by the CJEU Advocate General in the case C-619/18 against Poland concludes that the contested measures violated the principles of irremovability of judges and of judicial independence.¹³ Notably, the Advocate General found that: the protection against removal from office of the members of the body concerned is one of the guarantees essential to judicial independence; any changes to the obligatory retirement age must not have retroactive effect; the sudden and unforeseen removal of a large number of judges inevitably creates difficulties in terms of public confidence; and that the contested measures violated the requirements of judicial independence, as they were liable to expose the Supreme Court and its judges to external intervention and pressure. The ruling of the CJEU, for which the Advocate General's opinion provides a basis, is expected to be handed down in late June 2019.

1.3.2 THE SUPREME COURT'S COMPOSITION AND NEW CHAMBERS

25. The new legislation referred to in paragraph 22 above created two new special chambers of the Supreme Court: a Disciplinary Chamber, to adjudicate cases of judicial misconduct, and a Chamber of Extraordinary Control and Public Affairs, tasked with hearing cases concerning the validity of general elections or disputes regarding television and radio licensing. The latter chamber is also called upon to examine applications made under the newly created "extraordinary appeal" procedure, which can be introduced by members of parliament and by representatives of certain institutions, including the Minister of Justice (Prosecutor-General) and the Ombudsman, to petition the Supreme Court to review final court judgments. For the first 3 years after the entry into force of the above-mentioned legislation, this can be done in respect of any final ruling issued by a common court in the previous 20 years (i.e., after 17 October 1997); beyond that period (as from 3 April 2021), only the final court judgments issued in the preceding 5 years can be challenged.
26. Despite being nominally positioned within the organisational structure of the Supreme Court, the Disciplinary Chamber, unlike that Court's other chambers, is virtually exempt from the oversight of the Supreme Court's First President. It notably has a separate chancellery and budget; moreover, the earnings of judges sitting on the Disciplinary Chamber are 40% higher than those of their fellow judges in other chambers of the Supreme Court.
27. The Commissioner was further informed that the Supreme Court's new internal rules had been unilaterally determined by the President of the Republic, pursuant to the presidential regulation of 29 March 2018 amended on 11 February 2019, without consultation with the Court's judges. Members of the Supreme Court

¹³ Opinion of Advocate General Tanchev, 11 April 2019 in the case C 619/18, European Commission v Republic of Poland, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=212921&pageIndex=0&doclang=en>

indicated to the Commissioner that they had difficulties applying the new rules, which had apparently been modelled on common court rules, and were not considered to be suitable for regulating the functioning of a cassation court.

28. Of the Supreme Court's currently serving 101 judges, 38 have been appointed under the new procedure conducted before the newly constituted National Council for the Judiciary. Whereas a number of unsuccessful candidates had appealed to the Supreme Administrative Court against the decisions of the National Council for the Judiciary, the President of the Republic swore in the successful candidates in several groups without awaiting the result of the appeals procedure. In a resolution voted on 10 April 2019, all newly elected judges of the Disciplinary Chamber ruled that the process of their own election had been lawful.
29. The Commissioner was informed that similarly to the newly composed National Council for the Judiciary, many of the newly appointed members of the Disciplinary Chamber were former prosecutors or persons with links to the Minister of Justice (Prosecutor-General).¹⁴ Apparently, some of the new appointees have experienced a very rapid career progression, made possible by new rules governing judicial promotions; one had reportedly been a district court judge merely three years prior to his appointment to the Supreme Court.
30. Following the Commissioner's visit, in late April 2019 the Sejm was poised to deal with yet another, ninth draft set of amendments concerning the Supreme Court, once again introduced through a fast-track legislative procedure. The new bill, among other things, proposed to increase the powers of the President of the Republic in the appointment process of the Supreme Court's First President and Chamber Presidents. However, the new provisions were eventually withdrawn from the bill, which was adopted under a new name and essentially limited to provisions declaring all pending appeals filed by unsuccessful candidates to the Supreme Court (referred to in paragraph 28 above) to be discontinued *ex lege*.

1.3.3 CONCLUSIONS AND RECOMMENDATIONS

31. The Commissioner considers that the enjoyment by judges of security of tenure, and their protection from undue early removal from office, constitutes a necessary condition of an independent judiciary. She therefore welcomes the steps taken by Poland last year in response to the interim order issued by the Court of Justice of the European Union which restored to their posts all forcibly retired judges of the Supreme Court, including its First President, and all forcibly retired judges of the Supreme Administrative Court.
32. The Commissioner is struck by the consistent resort to the fast-track parliamentary procedure – allowing the members of parliament representing the ruling majority to dispense with the standard legislative requirement of public consultation – when it comes to amending legislation relating to the Supreme Court. Since the initial promulgation of amendments to the Act on the Supreme Court in December 2017, this legislation was amended eight times in the course of 14 months, and again made the subject of the above-mentioned parliamentary debate in April 2019. Despite their considerable complexity, the bills were adopted by the Sejm in a rapid succession of readings and votes – at times, within several hours – which does not allow for proper debate or deeper scrutiny of the draft texts. On occasions, votes have taken place late at night and in the absence of representatives of the Supreme Court or of other relevant stakeholders.
33. Having regard to the complexity, scale and systemic importance of the legislation affecting the composition and work of the Supreme Court, any future legislative changes should be carefully considered, ensuring full transparency of the process, and be undertaken in thorough consultation with representatives of the Supreme Court, members of the judicial community, the Polish Ombudsman, and other relevant actors.

1.4 ROLE OF THE COMBINED FUNCTIONS OF MINISTER OF JUSTICE AND PROSECUTOR-GENERAL

34. As summarised in paragraphs 94 to 103 of the Commissioner predecessor's last [report](#) on Poland, pursuant to the Law on the Public Prosecution Service adopted in January 2016 - which entered in force in March that

¹⁴ See also, "The New National Council of the Judiciary and its Impact on the Supreme Court in the Light of the Principle of Judicial Independence", Filipek, Paweł. *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2018. Available at https://www.academia.edu/38045461/The_new_National_Council_of_the_Judiciary_and_its_Impact_on_the_Supreme_Court_in_the_Light_of_the_Principle_of_Judicial_Independence, on p. 189.

year - the functions of Minister of Justice and Prosecutor-General were once again unified, after having been split in 2009 to reinforce the latter function's independence from political pressure. Since the adoption of the 2016 law, the function of Prosecutor-General has been carried out by the Minister of Justice, an active politician who is a key member of the ruling coalition. The Commissioner's 2016 report noted that the amendments to the Law on the Public Prosecution Service lowered the requirements for serving as Prosecutor-General, while increasing the office-holder's powers to appoint and dismiss prosecutors, issue instructions in individual cases, and communicate information to the media, effectively bestowing him with extensive authority over the work of the prosecution service and the conduct of investigative proceedings. The Commissioner cautioned about the consequences of the attribution of such extensive powers to a political figure without the establishment of corresponding sufficient safeguards for the fairness of criminal law procedures, including the right to a fair trial, the presumption of innocence and the right to defence.

35. The Law on the Public Prosecution Service was later made the object of several amendments. However, none of them addressed the concerns raised by the Commissioner's predecessor. On the contrary, an amendment introduced in November 2016 granted the Minister of Justice (Prosecutor-General), the State Prosecutor (*Prokurator Krajowy*) or any other authorised prosecutor the additional prerogative to give out information about specific cases to other public officials, and – in “particularly justified cases” – also to any other person. Another law adopted in March 2017, which entered into force in May that year, further empowered the Minister of Justice (Prosecutor-General) to unilaterally decide about the appointment or dismissal of common court directors, who exercise considerable administrative control over the functioning of common courts and who had been previously selected in competitions organised by court presidents. Moreover, the amendments to the Supreme Court Act adopted in December 2017 introduced a new model for disciplinary proceedings against prosecutors, giving the Minister of Justice (Prosecutor-General) a prominent role in the oversight over their conduct. More detail on this, as well as an overview of the specific prerogatives of the Minister of Justice (Prosecutor-General) with regard to the conduct of disciplinary proceedings against judges, is provided in section 1.5 below.
36. Yet another law of May 2017 which entered into force in June 2017, made certain amendments to the institution of junior, or “trainee”, judges (*asesorzy*), re-established in Poland in 2015 after being abolished in 2009 as a result of a 2007 ruling of the Constitutional Tribunal declaring the regulations on junior judges to be incompatible with the Polish Constitution. The junior judges' lack of requisite independence was also reviewed by the European Court of Human Rights and found to be in violation of Article 6 § 1 (right to a fair trial by an independent and impartial tribunal) of the European Convention on Human Rights.¹⁵ Although the regulations introduced in 2015 had initially provided for the appointment of junior judges by the President of the Republic, the 2017 law gave the right to appoint them to the Minister of Justice (Prosecutor-General) and entitled him to receive their oath. Unlike judges sworn in by the President of the Republic, junior judges serve under an initial probation period of four years. In September 2017, the Minister of Justice (Prosecutor-General) appointed a first group of 265 junior judges to the adjudication of cases, followed by further appointments. By mid-2018, the number of serving junior judges rose to 309. However, another set of amendments adopted in May 2018 transferred the prerogative of the Minister of Justice to appoint junior judges to the President of the Republic.
37. The Venice Commission examined the amendments to the Law on the Public Prosecution Service in its [opinion](#) adopted in December 2017, finding that they created “*insurmountable problems as to the separation of the prosecution system from the political sphere*” and that “*taken together, [the changes] result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.*”

1.4.1 CONCLUSIONS AND RECOMMENDATIONS

38. The Commissioner regrets to conclude that the recommendations in her predecessor's 2016 report on Poland relating to the changes affecting the prosecution service – in particular the recommendation to review Poland's legislation on prosecution service in light of European standards and best practice – have not been followed. On the contrary, subsequent legislative changes have expanded even further the already vast powers of the combined functions of Minister of Justice and Prosecutor-General. Recalling the

¹⁵ [Henryk Urban and Ryszard Urban v. Poland](#), no. 23614/08, Judgment, 30 November 2010.

recommendations of the Venice Commission, the Commissioner invites the Polish authorities to separate the offices of the Prosecutor-General and that of the Minister of Justice in order to restore the independence of the prosecution service, and to limit their respective powers vis-à-vis judges and prosecutors by establishing adequate procedural safeguards specified by the Venice Commission's [opinion](#).

1.5 MASS DISMISSALS AND DISCIPLINARY PROCEEDINGS AFFECTING JUDGES AND PROSECUTORS

39. Amendments to the Act on Common Courts adopted in July 2017, which entered into force in August 2017, bestowed on the Minister of Justice (Prosecutor-General) the special power to dismiss single-handedly common court presidents (chairs) and vice-presidents (vice-chairs) over a six-month transitional period ending on 12 February 2018, without any conditions attached and - specifically - without any requirement of prior consultation with the National Council for the Judiciary or the general assembly of judges of the court concerned.
40. During that six-month window, a total of 158 court presidents and vice-presidents were dismissed, often by fax, e-mail or letter signed by Deputy Minister of Justice, providing little to no justification. The dismissals, which affected about 21% of the Polish courts' 730 presidents, took place in about one-sixth of all courts, while about a quarter of all courts received new appointees. Subsequently, the Minister of Justice (Prosecutor-General) appointed 229 new court presidents and vice-presidents, in some cases filling existing vacancies. The Commissioner was told by representatives of the judicial professions that some of the new appointees had personal or professional links to the Minister of Justice (Prosecutor-General), or were judges and prosecutors previously seconded to the Ministry of Justice, or to the Office of the State Prosecutor. The new law also allowed newly appointed court presidents to carry out a review of various subordinate positions within courts, such as heads of departments or sections, within a further six months following their nomination.
41. Meanwhile, the amendments of the Act on the Supreme Court adopted in December 2017 also introduced a new model of disciplinary proceedings against judges. Under the new regulations, it is the Minister of Justice (Prosecutor-General), and no longer the National Council for the Judiciary, that appoints the chief disciplinary attorney and his two deputies, who act as public prosecutors in disciplinary proceedings; these officials, in turn, appoint disciplinary attorneys in lower courts. The new model has empowered the Minister of Justice (Prosecutor-General) to request disciplinary attorneys to open proceedings, override their decision to discontinue them, or to appoint a special disciplinary attorney to supervise a specific case. Moreover, under the new rules, in a non-binding consultation with the National Council for the Judiciary, the Minister of Justice (Prosecutor-General) appoints the 134 presidents and all vice-presidents of first-instance disciplinary courts, as well as selects judges for disciplinary panels in disciplinary courts of the first instance. The final instance in disciplinary proceedings is the Supreme Court's Disciplinary Chamber.¹⁶
42. Disciplinary proceedings can be either directed *in personam* against a concrete judge or conducted *in rem*, i.e. in connection with a specific event or development. In the latter case, the judge concerned is summoned to submit comments and later questioned as a witness, with false testimony being subject to criminal liability. The Commissioner was informed that at least fifteen sets of disciplinary or pre-disciplinary "clarificatory" proceedings have been opened in respect of a number of judges. The clarificatory proceedings have been in connection with, for example: publicly expressing views on the government's reform of the judiciary; participating in educational activities such as moot courts or school debates; the judge's past rulings; or for filing requests for preliminary rulings to the CJEU. Several sets of proceedings have targeted the same persons; for instance, two judges face five different sets of disciplinary proceedings each, while a third one is concerned by three sets of proceedings. The Commissioner was informed that judges facing disciplinary proceedings may at times enjoy a lesser standard of protection than that which governs the situation of the

¹⁶ For a detailed analysis of the changes affecting the regime of disciplinary proceedings against judges and a list of pending cases, see "A Country That Punishes. Pressure and Repression of Polish Judges and Prosecutors", Komitet Obrony Sprawiedliwości ("Justice Defence Committee") report, February 2019, available at http://citizensobservatory.pl/wp-content/uploads/2019/03/Raport-KOS_eng.pdf. See also, "The disciplinary system for judges in Poland. The case for infringement proceedings", European Stability Initiative (ESI) and the Batory Foundation, opinion, available at <https://www.esiweb.org/pdf/ESI-Batory%20Polands%20courts%20under%20siege%20-%20Annex%2022%20March%202019.pdf>

defendant in regular criminal proceedings. Such proceedings may in some cases be conducted in the absence of the person concerned or of their defence attorney; in certain, specific cases, defendants convicted in the first instance of the disciplinary proceedings may not be entitled to an appeal. Some judges complained to the Commissioner that, during the disciplinary hearings, a bright light had been aimed at them, or that they had been filmed, or questioned in the absence of defence attorneys. While preliminary hearings do not necessarily lead to the opening of formal disciplinary proceedings against the persons concerned, they may nevertheless exert a chilling effect on them and on their peers, especially if they are conducted in a heavy-handed or intimidating manner.

43. The Polish authorities have emphasised the necessity to create effective instruments for disciplining judges who contribute to the excessive length of judicial proceedings, engage in conduct incompatible with their profession or with ethical rules, or otherwise undermine citizens' confidence in the judiciary. Moreover, certain officials, including the Minister of Justice (Prosecutor-General), have publicly remarked that judicial circles have become "politicised". In August 2018, one of the newly elected judicial members of the National Council for the Judiciary publicly spoke out in favour of instituting disciplinary proceedings for the judges filing requests for preliminary rulings before the Court of Justice of the European Union.¹⁷ In contrast, representatives of judges' associations and civil society complained to the Commissioner that the disciplinary proceedings constituted a deliberate attempt to silence the most outspoken internal critics and dissuade others from following suit. In a report published in early 2019, Amnesty International found that the new mechanism for disciplinary proceedings has been "*weaponized for use against those judges who are critical of the government's reform of the judiciary*".¹⁸ In early April 2019, the European Commission triggered infringement proceedings against Poland before the CJEU under Article 258 of the Treaty on the Functioning of the European Union, in connection with the new rules governing disciplinary proceedings concerning Polish judges as well as the manner in which they are being conducted.
44. As regards the situation of prosecutors, pursuant to the amendments on the Law on the Public Prosecution Service, in March and April 2016 the Minister of Justice (Prosecutor-General) demoted 113 of the highest-ranking prosecutors.¹⁹ This measure was later followed by the replacement of the heads of all eleven regional prosecutor's offices, 44 out of 45 heads and deputies of circuit prosecutor's offices, and 307 out of 342 heads of district prosecutor's offices. According to one detailed report prepared on the basis of data provided by an association of prosecutors, by the end of 2016, as many as 500 out of the total number of approximately 6,100 prosecutors had either been demoted, transferred to another duty station, or forced into retirement.²⁰ In parallel, by mid-2018, between 789 and 1,102 prosecutors of lower ranks were reportedly delegated to higher functions.
45. Representatives of one prosecutors' association told the Commissioner that the Disciplinary Prosecutor in the office of the Prosecutor-General had initiated disciplinary proceedings against a number of members of that association. The prosecutors' association qualified the aforementioned proceedings as attempts to stifle legitimate criticism and an unlawful interference in the functioning of a legally operating association. In particular, eight disciplinary charges had been brought against the association's chairman in four different sets of proceedings, and at least seven other members of the association were facing disciplinary proceedings, in most cases for taking public positions on the situation in the prosecution service or the government's reform of the justice system. Some prosecutors had been subjected to or threatened with disciplinary proceedings for publicly criticising the opening of criminal proceedings against a judge presiding over a criminal case in connection with alleged medical malpractice involving a close relative of the Minister of Justice (Prosecutor-General). The association of prosecutors further complained to the Commissioner about having been publicly accused by the Minister of Justice (Prosecutor-General) and the State Prosecutor, in an official press conference, of being lenient towards criminal organisations.

¹⁷ Rzeczpospolita. 29 August 2018, available (in Polish) at <https://www.rp.pl/Sedziowie-i-sady/308299974-Czlonek-KRS-chce-dyscyplinarek-dla-sedziow-za-pytania-do-TSUE.html>

¹⁸ Amnesty International. "Poland: The Judges Who Defend the Rule of Law", report, 2019, available at <https://www.amnesty.org/download/Documents/EUR3798002019ENGLISH.PDF>

¹⁹ "A Country That Punishes...", quoted above, on p. 23.

²⁰ Forum Rozwoju Obywatelskiego. Available (in Polish) at <https://for.org.pl/pl/a/6413,raport-prokuratura-pod-specjalnym-nadzorem-kadry-i-postepowanie-dobrej-zmiany>

46. The Ministry of Justice officials met by the Commissioner categorically denied that disciplinary proceedings had been designed or used to produce a “chilling effect” on either judges or prosecutors, or that such proceedings would serve any purpose other than that prescribed by the law; moreover, they underlined that procedural guarantees applied in this context. Although they indicated that they were aware of critical media reports, they denied that there had been any irregularities. Moreover, they maintained that anyone subject to disciplinary proceedings could appeal to the Supreme Court’s Disciplinary Chamber, insisting that there was no cause to question the proper functioning of the proceedings which are currently pending before disciplinary attorneys (referred to in paragraph 41 above). In addition, the Ministry of Justice officials dismissed claims that any of the disciplinary proceedings would be in connection with a judge’s rulings or the lawful exercise of judicial prerogatives and affirmed that the Minister of Justice had no legal possibility to influence the actions of independent disciplinary attorneys.

1.5.1 CONCLUSIONS AND RECOMMENDATIONS

47. The Commissioner finds it striking that hundreds of court presidents, vice-presidents and prosecutors have been either dismissed or replaced by the Minister of Justice in recent years. She recalls the opinions adopted by the Venice Commission in 2016 and 2017, which highlighted the negative consequences of the extensive and unchecked powers concentrated in the combined functions of Minister of Justice and of Prosecutor-General. Notably, the Venice Commission found that empowering the Minister of Justice (Prosecutor-General) to dismiss court presidents *en masse*, without proper justification or right to appeal, left the latter inadequately protected from arbitrary dismissal. In line with the recommendations of the Venice Commission, the Commissioner considers that all decisions to appoint or dismiss a court president or vice-president should be adequately justified and subject to approval by the general assembly of judges of the respective court. Moreover, any person concerned by such dismissal should be able to appeal that decision to a court.
48. The Commissioner was also concerned by the numerous reports she received of disciplinary proceedings being instituted against judges and prosecutors for matters such as: speaking out in public on the topic of the government’s reform of the justice system; requesting preliminary rulings by the Court of Justice of the European Union; taking part in educational activities at public events or in schools; organising moot courts; or – in one case – for accepting an equality award from the municipal council and mayor of Gdańsk.
49. The Commissioner recalls that judges and prosecutors have the right to express their views on matters of public interest, including on reforms of the judiciary and the prosecution service, in a proportionate way, and their freedom to do so must be safeguarded. The case-law of the European Court of Human Rights specifically requires that any interference with the freedom of expression of a judge be given close scrutiny on account of the growing importance attached to the separation of powers and safeguarding judicial independence.²¹ The Court also found that judges, in their capacity as legal experts, may express their views, including criticism, about governmental reforms,²² as well as that questions concerning the functioning of the justice system fall within matters of the public interest whose debate generally enjoys a high degree of protection under the Convention, and – in the context of an academic lecture – that “*even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter*”.²³ Moreover, in its 2015 [report](#) on the freedom of expression of judges, the Venice Commission has pointed out that the domestic political background of the debate in which judges take part is also an important factor to be taken into consideration when assessing the permissible scope of the freedom of judges. The case-law of the Court of Justice of the European Union, for its part, specifies that “*not being exposed to disciplinary sanctions for exercising a choice, such as sending a request for a preliminary ruling to the Court (...), constitutes a guarantee essential to judicial independence*”.²⁴
50. The Commissioner considers that, beyond the persons directly affected, disciplinary proceedings are likely to have a chilling effect on other judges and prosecutors who wish to participate in the public debate on issues related to the administration of justice and the judiciary, which according to the European Court of Human

²¹ [Baka v. Hungary \[GC\]](#), no. 20261/12, Grand Chamber Judgment, 23 June 2016, § 165.

²² [Previti v Italy](#) (dec.), no. 45291/06, Decision, 8 December 2009, § 253.

²³ [Wille v. Liechtenstein \[GC\]](#), no. 28396/95, Grand Chamber Judgment, 28 October 1999, § 67.

²⁴ Order of the Court (First Chamber) in case C 8/19 PPU, 12 February 2019, in paragraph 47, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=210780&pageIndex=0&doclang=EN>

Rights works to the detriment of society as a whole.²⁵ She observes that members of the judiciary and the prosecution service in Poland who publicly express their views on the reform relating to their professions incur a very real risk to their careers. The manner in which some disciplinary proceedings are being conducted, as relayed to the Commissioner by various interlocutors in Poland – including from the judicial and prosecutorial professions – and as described in media reports, has understandably been perceived as intimidating and/or as an attempt to silence outspoken or critical judges and prosecutors. The Commissioner urges the authorities to ensure that disciplinary proceedings are not instrumentalised and to secure the right to a fair trial of any person subjected to them.

51. The Commissioner invites the Polish authorities to provide an explanation for the very high number of dismissals and demotions among prosecutors of all levels, which reportedly took place in the course of 2016. She recalls that, according to the 2014 [Rome Charter](#) of the Consultative Council of European Prosecutors of the Council of Europe, “[t]he independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary”, “[p]rosecutors should be autonomous in their decision-making” and, in the specific context of the aforementioned disciplinary proceedings, “[p]rosecutors enjoy the right to freedom of expression and of association (...) in the same manner as other members of the society”. She further notes that the European Court of Human Rights has found that “in a democratic society the investigation authorities must remain free from political pressure”.²⁶

1.6 EFFECTS OF THE REFORM OF THE JUDICIARY ON JUDICIAL INDEPENDENCE AND EFFICIENCY IN GENERAL

52. In tandem with the sweeping changes described in the previous sections, government officials in Poland have openly assailed the judiciary in order to justify the reforms being undertaken. In a speech delivered in July 2017, the former Prime Minister called Poland’s judiciary the “judicial corporation”, claiming that “in everybody’s immediate surrounding there is someone who has been injured by the judicial system”. In an op-ed²⁷ published in the *Washington Examiner* in December 2017, the current Prime Minister argued that the Polish judiciary was a legacy of Communist system, characterised by “nepotism and corruption”; that judges demanded “[b]ribes (...) in some of the most lucrative-looking cases”; and that the courts generally worked to benefit the wealthy and the influential. The Prime Minister later made similar statements in other contexts, including in a speech given at a US university in April 2019. Other members of the ruling party called judges “a caste” or “a group of cronies”. The current head of the political cabinet in the chancellery of the Prime Minister publicly implied that former judge-members of the National Council of the Judiciary “were hiding gold in their gardens and it is unclear where the money came from”. In support of the government’s reform of the judiciary, in September 2017 the government-controlled “Polish National Foundation” initiated a two-month campaign called “Fair Courts”. The campaign’s cost, estimated to amount to EUR 2.8 million, was co-sponsored by a dozen or so of the largest state-owned companies. Using large black-and-white billboards, television commercials and a website, the campaign conveyed a negative image of judges, labelling them as “a special caste”, and portraying them as incompetent or indulging in unseemly or illegal behaviour, such as drunkenness, corruption, or petty theft.
53. The Commissioner notes that the overall efficiency of the Polish judiciary has reportedly decreased noticeably in recent years. According to European Commission data, the average time needed to examine civil, commercial and administrative cases in the first instance went up from 49 to 73 days from 2010 to 2017, while the overall examination time for such cases rose from 180 to 232 days in the same period.²⁸ Official data of the Ministry of Justice show that the average examination time for a case before district courts has increased to 5.5 months in 2017, compared with 4.7 months in 2016 and 4.2 months in 2015.²⁹

²⁵ *Kudeshkina v. Russia*, no. 29492/05, Judgment, 26 February 2009, §§ 99-100.

²⁶ See *Guja v. Moldova*, no. 14277/04, Grand Chamber Judgment, 12 February 2008, § 86.

²⁷ *Washington Examiner*. “Prime Minister Mateusz Morawiecki: Why my government is reforming Poland’s judiciary”, 13 December 2017, available at <https://www.washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary>

²⁸ See the European Commission’s 2019 “Justice scoreboard”, 26 April 2019, available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf and its quantitative data, available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_quantitative_data_factsheet_en.pdf

²⁹ See <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/poland/>

54. Many of the court presidents and vice-presidents summarily dismissed by the Minister of Justice in 2017 and 2018 have reportedly attributed their dismissal in part to the decreased efficiency of their courts, resulting from the high number of judicial vacancies, as formal announcements for open positions had not been published for some time. In 2016, there were 9,920 serving judges in Poland; according to official figures, this number fell by 465 to 9,455 in June 2018. By other accounts, already by end of 2017 there were 700 empty judicial positions in the Polish justice system.³⁰ However, the gap was eventually partly filled with junior (trainee) judges appointed by the Minister of Justice (Prosecutor-General). The issue of court understaffing has been compounded further by the secondment of judges to the Ministry of Justice and by the lower retirement age (60 for women and 65 for men) for all common court judges, introduced in 2017 (but later amended again to 65, for both women and men).
55. Officials of the Ministry of Justice told the Commissioner that the wide-ranging reform of the justice system was aimed, among other things, at its professionalisation, strengthening the independence and impartiality of Polish judges, improving the speed and efficiency of proceedings before the courts and of the Public Prosecution Service, as well as improving the organisation of the work of the courts. In addition, the 94-page “White Paper on the Reform of the Polish Judiciary” presented by the Polish Prime Minister to the President of the European Commission in March 2018 cited low public trust in the judiciary, inefficiency of proceedings, the Communist past, excessive formalism, as well as the need to tackle “*cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism*”.³¹ The Commissioner notes that many of the arguments in the White Paper have been countered in a response prepared by Polish judicial associations.³²
56. In a [statement](#) issued in June 2018, the Bureau of the CCJE referred to the various elements of legislation on the National Council for the Judiciary, Supreme Court and common courts as “*a major step back as regards judicial independence, separation of powers and the rule of law in Poland*” and found them to be “*extremely worrying in terms of the message [they send] about the value of judges in the society, their place in the constitutional order and their ability to provide a key public function in a meaningful way*”. The Bureau called on the authorities in Poland to “*immediately restore a meaningful dialogue with the judicial community and (...) start the process of the replacement of the adopted Acts (...) with [-] legislation which is to be expected in any Council of Europe member State respecting human rights, the rule of law and a pluralist democracy.*” Furthermore, the Council of Europe’s Group of States against Corruption (GRECO) concluded in the [Addendum](#) to its Fourth Round Evaluation Report on Poland (adopted in June 2018) that the cumulative effect of the various elements of Poland’s reform of the judiciary enabled the legislative and executive powers to influence the functioning of the judiciary in Poland, thereby significantly weakening the independence of the judiciary and resulting in Poland’s no longer being in compliance with the Council of Europe’s anti-corruption standards.
57. Courts and law enforcement authorities in several European countries, including Ireland,³³ the Netherlands³⁴ and Spain, have recently blocked transfers to Poland under the EU’s European Arrest Warrant (EAW) procedure of several individuals concerned by criminal proceedings before Polish courts, citing “*general or systemic deficiencies*”³⁵ in the protection offered by the issuing State and a “*real risk*”³⁶ of a flagrant denial of justice. The Irish case, which involved a referral for preliminary ruling, has prompted the Court of Justice of

³⁰ See Bureau of the CCJE. “Report on judicial independence and impartiality in the Council of Europe member States in 2017”, 7 February 2018, in paragraph 165, available at <https://rm.coe.int/2017-report-situation-of-judges-in-member-states/1680786ae1>; also (in Polish)

<https://www.rpo.gov.pl/sites/default/files/Wystapienie%20do%20MS%20w%20sprawie%20obsadzenia%20stanowisk%20s%20edziowskich%20.pdf>

³¹ https://www.premier.gov.pl/static/files/files/white_paper_en_full.pdf

³² See <https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compedium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>; see also <https://www.iustitia.pl/in-english/2066-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements-at-the-meeting-with-foreign-journalists-on-january-10th-2018>. Also, see [statement](#) by the Polish Supreme Court’s Spokesman of 23 January 2018 and the [opinion](#) of the Supreme Court of 16 March 2018.

³³ See e.g. “EU court rebukes Poland in landmark extradition ruling”, The Financial Times, 25 July 2018, available at <https://www.ft.com/content/338dc348-8ff0-11e8-bb8f-a6a2f7bca546>

³⁴ See “Dutch refuse Polish arrest warrant over judicial fears”, EU Observer, 5 October 2018, available at <https://euobserver.com/justice/143034>

³⁵ See <http://www.bailii.org/ie/cases/IEHC/2018/H153.html>

³⁶ *Idem*.

the European Union to issue a judgment on 25 July 2018 which found that the judicial authority called upon to execute a European Arrest Warrant must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.³⁷

58. During her visit, the Commissioner noted media reports and received information from several interlocutors concerning further government plans to change the structure of the judicial system in Poland, in particular through the ‘flattening’ of the court structure and the creation of the institution of “justices of the peace”. In this regard, the Undersecretary of State in the Ministry of Justice informed the Commissioner that this stage of the reform was still in a conceptual phase and assured her that the judiciary would be duly consulted on any concrete proposal. The Commissioner would appreciate receiving more information on this topic and invites the Polish authorities to consult the Venice Commission on any new elements of judicial reform.

1.6.1 CONCLUSIONS AND RECOMMENDATIONS

59. The Commissioner notes that the various aspects of Poland’s wide-ranging judicial reforms have met with serious concern, expressed by a host of domestic stakeholders as well as by Poland’s international partners. The reforms, carried out in several stages since late 2015 and still on-going, have had a major impact on the functioning and independence of practically all key building blocks of Poland’s justice system, fundamentally affecting the Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court, the common courts, individual judges, and the prosecution service.
60. The Commissioner considers that the goals of the reform as articulated by the Polish authorities – improving accountability and efficiency of the justice system, establishing a balance of powers and enforcing democratic control over the judiciary – may not be pursued at the expense of judicial independence. In particular, the Commissioner is not persuaded that the Polish government’s reform of the judiciary has brought about a discernible improvement in either the efficiency or the independence of the courts or of individual judges. The recurring protests by judges, prosecutors and defence attorneys against the reform of the judiciary, against the dismissal or replacement of their colleagues, and in defence of judges and prosecutors targeted by disciplinary proceedings, are a symptom of the deep polarisation corroding the system. The Commissioner is also deeply concerned that several hundred positions in the judiciary have remained vacant over an extended period. Considering the reform’s short-term results, as well as the antagonistic manner in which it has been conducted thus far, it appears unlikely that its desired objectives in terms of efficiency will be reached in the medium- or longer term.
61. The Commissioner regrets that the reform of the judiciary was accompanied by a publicly-financed campaign to discredit judges, as well as by a series of negative statements regarding the Polish judiciary made by high-ranking Polish officials. She recalls that members of the executive and the legislature have a duty to avoid criticism of the courts, judges and judgments that would undermine the independence of or public confidence in the judiciary, in accordance with paragraph 18 of the Committee of Ministers’ [recommendation CM/Rec\(2010\)12](#). In view of the highly stigmatising and harmful effect of statements such as the ones quoted above (in paragraph 52), the Commissioner urges the Polish authorities to exercise responsibility and lead by example in their public discourse, rather than using their powerful platform to tarnish the judiciary as a whole or to unduly attack the reputation of individual judges.
62. The Commissioner is concerned by the accelerated pace and lack of meaningful public consultation in the process of adopting legislation relating to the judicial reform. She recommends that the Polish authorities ensure that all draft legislation of systemic importance be carefully considered through a regular parliamentary procedure.

³⁷ See the Court of Justice of the European Union (Grand Chamber), Judgment in Case C-216/18 PPU *Minister for Justice and Equality v LM* (Deficiencies in the system of justice), available at <http://curia.europa.eu/juris/document/document.jsf?text&docid=204384&pageIndex=0&doclang=EN>

2 WOMEN'S RIGHTS, GENDER EQUALITY AND DOMESTIC VIOLENCE

63. This section will examine the developments in the area of women's sexual and reproductive health and rights, gender equality and the fight against domestic violence, revisiting topics previously examined by the Commissioner's predecessors, most recently in the 2016 country visit [report](#).³⁸

2.1 WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

2.1.1 ACCESS TO SAFE AND LEGAL ABORTION CARE

64. The very restrictive access to women's sexual and reproductive health and rights in Poland has repeatedly featured in the work of all three of the Commissioner's predecessors (e.g. in [2002 visit report](#); [2007 memorandum](#); [2016 visit report](#)). As early as in 2002, the then [Commissioner](#) criticised the restrictive legislation resulting in many women risking their health when they resort to clandestine abortions. The report further noted cases of abortions being refused even when legal, as well as denials to carry out pre-natal examinations when interpreted as a first step to getting an abortion.

65. Poland's legislation on pregnancy termination, which has not changed since the publication of the previous Commissioner's report in 2016, remains one of the most restrictive in Europe. Abortion is permitted in three circumstances only: if the pregnancy constitutes a risk to the life or health of the pregnant woman; if there is a high probability of severe and irreversible damage to the foetus or an incurable life-threatening ailment; and if there is a justified suspicion that the pregnancy is the result of a criminal act, such as rape. While any person assisting the unlawful termination of a woman's pregnancy incurs criminal penalty of up to 3 years imprisonment, unlawful abortions do not imply criminal liability for the woman herself.

66. According to figures collected by the Ministry of Health, there were 1,040 terminations of pregnancy legally carried out in Poland in 2015, 1,098 in 2016, and 1,061 in 2017. About 95% of all legal abortions that are carried out in Poland today are based on the legal ground of high probability of severe and irreversible foetal damage or incurable illness of the foetus.³⁹

67. The data given on the subject by Polish and international women's rights NGOs and institutions paint a rather different picture from official statistics. Whereas those groups claim that anywhere between 80,000 and 150,000 abortions are carried out each year outside of Poland's public health system, the annual number of clandestine abortions was estimated by the Ministry of Health at ca. 10,000 per year in 2007. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health estimated clandestine abortions to number anywhere between 80,000 and 180,000 per year in 2010.⁴⁰ Non-governmental organisations referred to the widespread invoking of the so-called "conscience clause" by gynaecologists and the limited availability of medical professionals who agree to perform legal abortions or carry out prenatal testing. In addition, they alleged that women entitled to abortion continue to face problems in obtaining formal and written refusal of service and are instead subjected to undue delays or artificially prolonged procedures, such as referrals for unnecessary blood tests, psychological examinations, or attempts to influence their decision. The Commissioner also heard reports that certain practitioners attempt to dissuade patients from carrying out prenatal testing, endangering their health and exposing them to the risk of miscarriage.

68. The Commissioner notes that the above reports appear to echo the factual circumstances of three landmark cases against Poland concerning access to abortion, in which the European Court of Human Rights found multiple violations of the Convention.⁴¹ Each of those cases relates to one of the three different situations where a legal abortion is possible under Polish law. The Commissioner notes that none of the three judgments

³⁸ See paragraphs 129 to 135 on gender stereotypes; 136 to 140 on the national machinery for the advancement of women; 141 to 166 on violence against women and domestic violence; 167 to 173 on discrimination based on gender and sex; and 174 to 196 on sexual and reproductive health and rights.

³⁹ E.g. The New York Times. "Polish Women Protest Proposed Abortion Ban (Again)", 23 March 2018, available at <https://www.nytimes.com/2018/03/23/world/europe/poland-abortion-women-protest.html>

⁴⁰ See <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/14/20/Add.3&Lang=E>

⁴¹ *Tysiąc v. Poland*, no. 5410/03, Judgment, 20 March 2007; *R.R. v. Poland*, no. 27617/04, Judgment, 26 May 2011; and *P. and S. v. Poland*, no. 57375/08, Judgment, 30 October 2012. The three judgments have been described in more detail in paragraph 181 of the Commissioner's previous country [report](#).

have been fully executed to date. In its session held from 12 to 14 March 2019, the Committee of Ministers of the Council of Europe once more decided to continue its examination under “enhanced supervision” of the *P. and S.* case.⁴²

69. The 1996 Law on Doctors and Dentists allows doctors to refuse to perform any medical act which they deem incompatible with their personal or religious convictions, but it obliges them to perform such an act in “urgent cases” and to help patients find alternative options. However, the law’s provisions defining these obligations have been found unconstitutional by Poland’s Constitutional Tribunal in October 2015. As found by the UN Human Rights Committee⁴³ in 2016, as a result of that judgment, there is currently no reliable referral mechanism for access to abortion, and women are often unable to find a health care provider willing to perform a legal abortion. One Polish women’s rights NGO estimates that only 10% of hospitals currently perform abortions and provide the related care services.⁴⁴ The Human Rights Committee also concluded that that access to legal abortion was altogether unavailable in certain institutions and throughout one entire administrative entity (the Podkarpackie voivodship, Poland’s southeasternmost region).⁴⁵ An official government report to the Parliament noted that out of the 1,057 legal abortions performed in Poland in 2017 none at all were carried out in the region of Podkarpackie,⁴⁶ and only 2 such procedures were performed there in 2016.
70. As noted in the 2016 visit [report](#) on Poland,⁴⁷ almost four thousand Polish doctors, including the current Minister of Health, have signed a “Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility”, in which they expressed their commitment to follow “divine law” in their professional work and to reject abortion, contraception and in vitro fertilisation. The Commissioner was informed that the Ministry of Health does not collect information on the identity of the medical practitioners having signed the “Declaration”. The Ministry’s officials have indicated to the Commissioner that they consider the collection of such information to be neither practicable nor relevant, in light of the Constitutional Tribunal’s 2015 ruling and - in their view – the fully functional system of referral. The Commissioner notes, however, that unofficial lists of signatories of the declaration have been circulated on the internet and can be consulted by patients seeking reproductive health care (so that they are informed where it would be futile to seek such services).
71. In the last decade, there have been several – for the time being, unsuccessful – initiatives to further restrict the existing legislation, notably in 2011 and in 2013. In October 2016, the introduction of a bill in the Sejm proposing a total ban on abortion except in cases of danger to the woman’s life made hundreds of thousands of demonstrators take to the streets in protest; the bill was eventually abandoned. In late 2017, two opposing legislative bills were submitted to the Polish Sejm by groups of citizens, each supported by a minimum of 100,000 signatures: a bill labelled “Stop Abortion”, drafted by the conservative institute “Ordo Iuris”, proposing to restrict access to abortion; as well as a counter-proposal aimed at liberalising it. Whereas the latter proposal was swiftly voted down, the “Stop Abortion” bill was allowed to proceed and remains pending in the lower house of the Parliament.
72. In January 2017, the Polish government introduced a one-time benefit of PLN 4,000 (ca. EUR 930) for women who give birth to a seriously disabled or seriously ill child. In 2017, 4,126 women reportedly received this benefit.
73. According to the Minister of Health, attempts to change the law are society-driven and follow a bottom-up approach, without any involvement or support by the Ministry of Health. The Minister indicated to the Commissioner that he found the current state of the legislation to be adequate, stressing that it was the result

⁴² The notes of the 1340th meeting and the decisions taken can be consulted at <http://hudoc.exec.coe.int/eng?i=004-20614>

⁴³ Human Rights Committee (International Covenant on Civil and Political Rights), Concluding observations on the seventh periodic report of Poland, adopted by the Committee at its 118th session (17 October-4 November 2016), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/POL/CO/7&Lang=En, in paragraph 23.

⁴⁴ Foreign Policy. “Poland Is Trying to Make Abortion Dangerous, Illegal, and Impossible”, 8 January 2019, available at <https://foreignpolicy.com/2019/01/08/poland-is-trying-to-make-abortion-dangerous-illegal-and-impossible/>

⁴⁵ Human Rights Committee, Concluding observations, 2016, quoted above, in paragraph 23.

⁴⁶ See <http://orka.sejm.gov.pl/Druki8ka.nsf/0/6F82FBB36BAA945CC125839200434FC7/%24File/3185.pdf> (in Polish), on p. 106.

⁴⁷ In paragraph 182.

of a “delicate compromise”, and that women in Poland had effective access to abortion under the applicable provisions of the law. In the Minister’s view, the “conscience clause” is firmly embedded in Polish law, not least in the Polish Constitution as interpreted by the Constitutional Tribunal in its October 2015 ruling. The Minister, however, clarified that the scope of the conscience clause was very precise and did not encompass situations where the refusal of service would endanger the life or health of the patient, nor could the conscience clause be invoked by professionals (e.g. pharmacists) other than those performing the actual pregnancy termination service. While the Minister recognised that in some of the ca. 800 hospitals in Poland abortions and related care services could not be obtained, the decision to rely on the conscience clause was always the personal decision of the individual professional and not of an entire institution. The Minister further confirmed that the authorities had an obligation to inform the patients about their rights.

74. Health Ministry officials did not consider the reports of the high number of women from Poland traveling abroad to obtain abortion services to reflect reality. However, the Deputy Minister of Health informed the Commissioner that in 2018 not a single request for the termination of pregnancy resulting from rape had been registered in Poland, and only one such request had been recorded in 2017. The Ministry of Health was in the process of centralising information on the availability of various healthcare services, including reproductive services, through the National Health Fund. According to the Deputy Minister, information on the availability of various such services could be obtained via a call centre. As from 2008, each hospital has been assigned a representative (*pełnomocnik*) of the Ombudsman for Patients’ Rights, tasked with assisting the patients in defending their rights. In cases where all doctors in a given hospital refuse to perform pregnancy termination, it is the role of the hospital to refer the patient to another facility via the in-house representative of the Ombudsman for Patients’ Rights. However, Ministry officials acknowledged the limited availability of abortion services in the Podkarpackie region.
75. Officials from the Chancellery of the President of the Republic indicated to the Commissioner that the current legislation was the result of a “very good” compromise reached in the 1990s, which according to them adequately balanced the rights of patients with the need to protect the rights of the unborn. In addition, they underlined that women were not criminalised in Poland for undergoing unlawful abortions, nor were they penalised for seeking abortion services abroad.
76. As noted above (in paragraph 65), assistance to unlawful abortions is a criminal offence in Poland. In October 2017, the Head of Office of the State Prosecutor disseminated among all appellate prosecutors a short legal opinion prepared by the conservative institute “Ordo Iuris”, instructing them to circulate the opinion among all subordinate prosecutors and to make use of it. The opinion regretted the rare reliance by courts on the criminal law provision providing for up to 3 years imprisonment for assistance to illegal abortion – from 2001 to 2014, the average number of convictions per year reportedly amounted to ca. 13 – and observed that illegal abortions were often facilitated by the pregnant woman’s close friends or family. The opinion called on all prosecutors to prosecute anyone helping pregnant women in carrying out abortions outside of the Polish legal regime e.g. by providing abortion medication; financing or facilitating travel to have an abortion abroad; assisting in contact with abortion clinics; or providing any information in this regard. NGO representatives informed the Commissioner that the circulation of the instruction was followed by an increase in the number of investigations opened; however, the allegation does not lend itself to verification in so far as the Commissioner was informed by the Ministry of Justice that the State Prosecution Service did not collect statistical data on the number of investigation proceedings conducted in this regard.
77. An opinion poll commissioned by the Federation for Women and Family Planning (a Polish NGO) in September 2018 shows evolving public attitudes to abortion in Poland. According to that poll’s results, 69% of respondents expressed support for a woman’s right to have an abortion up to 12 weeks into her pregnancy.⁴⁸ Another poll conducted in April 2019 on behalf of the daily newspaper *Gazeta Wyborcza* placed this level of support at 58%,⁴⁹ and a survey by Kantar Millward Brown in March 2018 found that 75% of Poles opposed further restrictions of the abortion law.

⁴⁸ The results of the survey are available at <http://en.federa.org.pl/28sept2018/>. Of note, the survey recorded little difference between men and women (respectively 71% and 66%) and found that 92% of respondents were strongly opposed to state’s interference in women’s reproductive choices.

⁴⁹ *Gazeta Wyborcza*, 17 April 2019, available (in Polish) at <http://wyborcza.pl/7,75398,24670637,sondaz-wyborczej-rekordowe-poparcie-dla-prawa-do-aborcji.html>.

2.1.2 ACCESS TO CONTRACEPTION, INCLUDING EMERGENCY CONTRACEPTION

78. The 2016 visit [report](#) on Poland gave an account of the hindrances in access to contraception, including the conscience clause invoked by medical practitioners refusing to prescribe and pharmacists refusing to deliver contraceptives. Ministry of Health officials informed the Commissioner that several types of contraceptives were reimbursed by the public healthcare plan (at 30%). However, the Commissioner was informed by some women's rights organisations that most modern contraceptives are not covered by public healthcare reimbursement. NGO representatives also alleged that many doctors continued to refuse to prescribe contraception relying on the "conscience clause".
79. Regarding access to emergency contraception, the Commissioner notes that the morning-after pill has been cleared in 2015 for over the counter sale across the European Union by the EU's European Medicines Agency and made available in almost all EU countries. In November 2016 the then-Minister of Health announced plans to reinstate the requirement of a prescription for that pill, whereas previously (since April 2015) it had been sold over the counter in pharmacies to women and girls older than 15. The Minister justified the proposed amendments, among other things, by the need to curb the pill's alleged misuse by teenage girls, despite surveys pointing out that not more than 2% of buyers of the morning-after pill in Poland were younger than 18.⁵⁰ In May 2017, the Parliament adopted a new law subjecting the sale of the pill to a medical prescription, relying on the opt-out clause provided by the EU directive 2001/83/UE of 6 November 2001;⁵¹ the new law entered into force in July 2017. In his meeting with the Commissioner, the Deputy Minister of Health stated that there were currently no plans to make emergency contraception available for over-the-counter sale, although no data had been collected regarding the sale of the morning-after pill or its effects on the health of its users during the 2-year period of its over-the-counter sale, and no concrete adverse health effects emerging from the use of the emergency pill had been recorded.
80. Media reports and NGO sources refer to a number of hurdles that need to be overcome to obtain a prescription for emergency contraception, including outright refusal by the health care practitioner, difficulties in obtaining timely gynaecological appointments through the public healthcare system, requirements for extensive medical examinations, and the high cost of a private gynaecological consultation. According to a 2015 survey by one Polish NGO, the average waiting time for a publicly-funded gynaecological consultation in Poland amounted to 18 days, and at most was 7 months; while in a half of all clinics the waiting time was less than 7 days, in a quarter of them it was longer than one month.⁵² An informal [network](#) of volunteer physicians, "Lekarze Kobietom" ("Doctors Help Women"), was established in 2017 to help women in urgent need of emergency contraception by putting them in contact with doctors willing and available to provide prescriptions in good time. However, in some regions in Poland very few doctors volunteer for that network.

2.1.3 CONCLUSIONS AND RECOMMENDATIONS

81. The Commissioner shares the concern of the Council of Europe's Committee of Ministers' that twelve years after the first of the three key judgments of the European Court of Human Rights against Poland in cases concerning access to legal abortion and the related care became final (in 2007), and more than six years after the last of them was handed down, they remain unimplemented and no measures have been taken to ensure access to lawful abortion throughout Poland.
82. The Commissioner notes that the legislation currently in place does not impose an explicit obligation upon medical professionals invoking the "conscience clause" to refer a patient to another provider of medical

⁵⁰ Gazeta Prawna. 19 November 2016, <https://serwisy.gazetaprawna.pl/zdrowie/artykuly/994558,pigulki-dzien-po-180-tys-sprzedanych-komu.html> (in Polish), based on the results of a survey carried out in November 2016 by Millward Brown research firm in cooperation with an academic of the Women's Health Faculty of the Medical University of Silesia.

⁵¹ Article 4 section 4, which provides that the directive "*shall not affect the application of national legislation prohibiting or restricting the sale, supply or use of medicinal products as contraceptives or abortifacients*". Available at https://ec.europa.eu/health/sites/health/files/files/eudralex/vol-1/dir_2001_83_consol_2012/dir_2001_83_cons_2012_en.pdf

⁵² The results of the survey are available (in Polish) at http://www.rodzicpolutzku.pl/images/rzecznictwo/Raport_FRpL.pdf, on p. 8.

services or to provide any information in this regard, although the authorities consider that health care institutions (such as hospitals) are under such an obligation.

83. The Commissioner welcomes the Polish authorities' reassurance that the "conscience clause" does not cover emergency situations threatening the life or health of the patient, that it can only be invoked by individual practitioners and not entire institutions, and that it is not available to professionals other than those involved in the direct provision of the pregnancy termination. However, the Commissioner is not persuaded that the means of recourse available to the patients, such as complaints to the Ombudsman for Patients' Rights,⁵³ or to the National Health Fund, can in reality allow women to effectively challenge individual practitioners' decisions and access the requisite care to which they are entitled in good time.
84. Inaction or delay in accessing abortion care may in some cases create a very real and grave risk to women's life and health. The Commissioner was concerned to learn that so many Polish women, whose number may reach tens of thousands per year according to some estimates, resort to clandestine abortions or travel abroad to obtain assistance in pregnancy termination and related care, or to access modern contraceptives. She was also concerned that there are areas in Poland where abortion care is either completely unavailable or very seriously limited due to refusals of care by health care professionals on the grounds of conscience. The Commissioner considers that women and girls who have the legal right to abortion should not be hindered in any way in obtaining such services and care in their own country.
85. The Commissioner therefore encourages the authorities to urgently adopt the necessary legislation to ensure the accessibility and availability of legal abortion services in practice. The exercise of freedom of conscience by health professionals must not jeopardise women's timely access to sexual and reproductive health care to which they are entitled, as required by the case-law of the European Court of Human Rights. In particular, in line with the [recommendations](#) of the Committee of Ministers, the Commissioner urges Poland to introduce clear and effective procedures, for example in the form of guidelines for all hospitals, ensuring that women are provided with adequate information on the steps they need to take to obtain a lawful abortion, including in the event of a refusal by the doctor to perform an abortion on grounds of conscience. She also urges the authorities to monitor and make public the number and geographical distribution of health professionals who refuse to perform sexual and reproductive health services on the grounds of conscience or religion.
86. The Commissioner was concerned by the repeated and ongoing attempts to further restrict Poland's already very restrictive legislation governing access to abortion. In particular, she notes that the bill currently pending in the Polish Parliament proposes to do away with the one among the three existing legal grounds of abortion (high probability of severe and irreversible damage to the foetus or an incurable life-threatening ailment), on the basis of which the overwhelming majority of all legally performed abortions in Poland are carried out. The Commissioner notes that the legislative initiative was accompanied by a petition made in June 2017 by a group of members of parliament to the Constitutional Tribunal, requesting it to rule on the constitutionality of that particular ground for legal abortion. She considers that adopting the bill would effectively amount to a near-total ban on abortions, putting Poland at variance with its obligations under international human rights law, in particular by endangering women's freedom from ill-treatment and violating the principle of non-retrogression, which prohibits measures that diminish existing rights in the field of health. The Commissioner calls on the Polish Parliament to reject this and any other legislative proposal that aims at eroding existing protections or seeks to roll back women's access to their sexual and reproductive rights.
87. The Commissioner takes note of the shifting general attitudes to the question of abortion and the increasing public support for a woman's right to terminate pregnancy for up to 12 weeks, as evidenced by recent opinion polls. Drawing on the recommendations of the 2017 "[Issue Paper on women's sexual and reproductive health and rights in Europe](#)", she invites Poland to consider guaranteeing access to safe and legal abortion care by ensuring that abortion is legal on a woman's request in early pregnancy, and thereafter throughout pregnancy to protect women's health and lives and ensure freedom from ill-treatment.
88. The Commissioner further recalls that the newly introduced requirement of a medical prescription for emergency contraception which was previously available over the counter goes against the recommendation of her predecessor's 2016 country visit [report](#), which urged the Polish authorities to remove barriers in access to contraception for all women in Poland. She notes that the reliance by some medical professionals on the

⁵³ The remedy and its prospects of success have been critically reviewed in more detail in paragraphs 185-6 of the Commissioner's previous country [report](#).

“conscience clause” to refuse performing of their statutory obligations towards patients, such as prescribing or delivering contraception, effectively amounts to such a barrier. The Commissioner considers that this situation has a particularly negative impact on certain categories of women, such as those in difficult economic situations, those living in remote areas, as well as minors, who need their legal guardians’ authorisation to see a gynaecologist. The Commissioner considers that the preferred solution would be to remove altogether the requirement of a prescription for emergency contraception for all women, including adolescents, throughout Poland. She invites the Polish authorities to give due attention to the recommendations of the aforementioned 2017 [issue paper](#) that deal with guarantees of affordable, available and accessible modern contraception, and to consider allowing minor girls to seek gynaecological consultations without prior authorisation of their legal guardian.

2.2 GENDER EQUALITY

89. Poland’s Constitution, the 2010 Act on Equal Treatment, as well as the Labour Law prohibit discrimination on the ground of sex and define various forms of gender-based discrimination. The country has relatively positive scores in various international gender equality indices. For example, in the World Economic Forum’s (WEF) 2018 Global Gender Gap report,⁵⁴ Poland ranked 42nd out of 149 countries, and 31st out of the 189 countries classified in the United Nations Development Programme’s 2017 Gender Inequality index.⁵⁵ Poland’s average gender pay gap of 7.2 is considered as one of the lowest in the EU, in comparison to the EU-wide 16%, according to 2017 Eurostat data.⁵⁶ However, the country ranked 18th in the 2017 Gender Equality Index compiled by the EU’s European Institute for Gender Equality (EIGE), with a score of 56.8 out of 100 (that represents full equality), i.e. below the EU-28 average score of 66.2.⁵⁷

2.2.1 WOMEN’S EMPLOYMENT AND CHILDCARE

90. Official figures of the Polish Ministry of Family, Labour and Social Policy estimate the gender pay gap to be anywhere between 7% and 18.5%, depending on the calculation method used. The gap is apparently higher in the private sector overall (16.1%) than in the public sector (2.8% in 2016); it is also higher in certain areas of the private sector, such as finance and insurance (30.4%) or manufacturing (20.7%),⁵⁸ as well as being higher among older people (45%).⁵⁹

91. While Poland’s current unemployment rate is at its historical lowest,⁶⁰ the overall professional activity rate of women (calculated by the national statistics office at about 48%) is significantly lower than that of men (ca. 65%). Research carried out in 2017 suggested that longer maternity leaves introduced by the previous government in 2014 or the “Rodzina 500+” (“Family 500+”) benefit, introduced by the current government in 2016, may have contributed to between 91,000 and 103,000 women leaving the labour market by mid-2017.⁶¹ Gender segregation in the labour market is also clearly visible, with almost 24% of women working in education, health and social work activities, as opposed to just 5% of men. The UN Independent expert group on the issue of discrimination against women in law and in practice observed that twice as many women (10.8%) are in part time jobs as men (4.7%).⁶² In addition, the above-mentioned Gender Equality index of EIGE noted that women in Poland performed the bulk of household chores and care duties. According to the Organisation for Economic Cooperation and Development (OECD), Polish women spend on average almost

⁵⁴ World Economic Forum. 2018 Global Gender Gap, available at http://www3.weforum.org/docs/WEF_GGGR_2018.pdf

⁵⁵ United Nations Development Programme. Human Development Reports: Gender Inequality Index, available at <http://hdr.undp.org/en/composite/GII>

⁵⁶ Eurostat. Gender pay gap statistics, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

⁵⁷ EIGE. Gender Equality Index 2017: Poland, available at https://eige.europa.eu/sites/default/files/documents/20181367_mh0218186enn_pdf_pl.pdf

⁵⁸ See https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Highest_gender_pay_gap_in_financial_and_insurance_activities

⁵⁹ EIGE. Gender Equality Index 2017: Poland, quoted above, on p. 2.

⁶⁰ Standing at 3.4% in March 2019 according to Eurostat, or just above 6% according to the domestic calculation method.

⁶¹ See „Rodzina 500+” – ocena programu i propozycje zmian”, report (in Polish), available at <https://for.org.pl/pl/d/8aac2498710dbf7b1626846048c1ca70>

⁶² OHCHR. UN Human Rights Council Independent expert group on the issue of discrimination against women in law and in practice. Statement, 13 December 2018, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24014&LangID=E>

two and a half hours per day more than men on unpaid work, and more than half of parents expect that the woman should be prepared to reduce her labour force participation to attend to care commitments.⁶³ The aforementioned WEF report estimated the proportion of unpaid work per day at 60 for women, but only over 34 for men.⁶⁴ As per OECD data, although about 38% Polish fathers took the two-week paid paternity leave in 2016, a mere 1.1% opted to follow on with voluntary parental leave.⁶⁵

92. The available public childcare facilities – as of 2017, 3,120 structures offering a total of 106,500 places⁶⁶ – provide services to approximately 10-11% of all children aged 0-3, and it has been reported that 71% of Polish municipalities do not have a single public nursery. Since 2017, the government has increased resources earmarked for childcare threefold (from ca. EUR 35 million in 2015/2016 to ca. EUR 105 million in 2018). Moreover, the government has recently announced that it would finance the creation of 24,500 new nursery places, including places for children with disabilities. The number of facilities offering care to children under the age of 3 rose by 410 from 2016 to 2017 and by another 656 in 2018; however, there are significant variations in their geographical distribution, with only 52 structures in Świętokrzyskie and as many as 592 in the Mazowieckie region. The government's goal is to include about 30% of all children in nurseries by 2030. At local level, the newly-elected mayor of Warsaw announced that from September 2019 all 8,300 places in public nurseries in the city would become free of charge for the city's residents, and that an additional 4,000 places in private nurseries would be secured. The stated aim is to provide Warsaw residents with a total of 27,000 places in the next four-year period.

2.2.2 WOMEN'S POLITICAL REPRESENTATION

93. The Polish Electoral Code, amended in 2011, foresees a mandatory minimum quota of 35% of candidates of either sex on political party lists for all elections. This has arguably contributed to the increase in the number of women standing as candidates, which reached the overall cross-party average of 42% in 2015; however, the numbers of women actually elected tend to trail behind, largely because women reportedly rarely make it to the first three places on candidate lists and are frequently relegated to lower positions.⁶⁷ In the last parliamentary elections in 2015, women took 125 out of 460 seats (27%, up from 21% in 2007); their number subsequently rose to 134 (29%). Some parties, however, were reported to have introduced internal regulations requiring them to include on their lists at least one woman among the first three candidates, or at least two in the first five, which has resulted in a higher ratio of female candidates actually elected. The above-mentioned quota of 35% does not apply to elections for the upper chamber of the Parliament, where candidates are elected in single mandate constituencies. Consequently, 86% of candidates to the Senate were men, and there are currently only 13 women among the 100 senators. In the most recent local elections, carried out in October 2018 and concerned by the 35% candidate gender quota, the ratio of women councillors has reached 30% (up from 24% in 2010), although only 12% of elected mayors of cities, towns and municipalities are women. Of note, women accounted for 46.6% of all 871 national candidates who stood for the European Parliament elections in Poland in May 2019.⁶⁸
94. In public administration, as of May 2019, there were six women cabinet members out of 23 (26%), including a Deputy Prime Minister and ministers of: National Education; Family, Labour and Social Policy; Finance; Entrepreneurship and Technology; as well as matters of humanitarian assistance. However, four of them were elected members of the European Parliament in the May 2019 elections, and at the time of writing of the present report their replacements were not yet known. Since 1989, Poland has had 3 women prime ministers and 3 vice-premiers. In the Foreign Service, the number of women in senior positions is low in comparison to

⁶³ OECD. "Closing the Gender Gap: Poland", available at

<http://www.oecd.org/gender/Closing%20the%20Gender%20Gap%20-%20Poland%20FINAL.pdf>

⁶⁴ World Economic Forum. 2018 Global Gender Gap, quoted above, on p. 226.

⁶⁵ The data set can be consulted at <http://www.oecd.org/els/family/PF2-2-Use-childbirth-leave.xlsx>

⁶⁶ "Social assistance, child and family services in 2017", Statistics Poland report, May 2019, available at

["https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5487/10/9/1/pomoc_spooleczna_i_opieka_nad_dzieckiem_i_rodzina_w_2017.pdf"](https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5487/10/9/1/pomoc_spooleczna_i_opieka_nad_dzieckiem_i_rodzina_w_2017.pdf)

⁶⁷ "Women in parliament: assessing the effectiveness of gender quotas in Poland", Gwiazda Anna, The Journal of Legislative Studies, 23:3, 326-347, <https://doi.org/10.1080/13572334.2017.1358981>

⁶⁸ Gazeta Wyborcza. Sonar. 16 May 2019, available (in Polish) at

<http://sonar.wyborcza.pl/sonar/7,156422,24790614,eurowyborzy-prawie-polowa-startujacych-to-kobiety-w-dwoch-wojewodztwach.html>

men, with the percentage of women ambassadors standing at just 15.6% in 2016 and 29.3% in 2018.⁶⁹ Whereas women are generally well-represented in the judiciary, this does not tend to be the case at the most senior levels.

2.2.3 POLICIES ON GENDER EQUALITY AT THE CENTRAL AND LOCAL LEVEL

95. At present, Poland formally has no national plan for gender equality, as the previous National Action Plan for Equal Treatment, which was adopted in December 2013 and covered the years 2013-2016,⁷⁰ has not yet been replaced by a new one. The Government Plenipotentiary for the Civil Society and Equal Treatment (“the Plenipotentiary”) informed the Commissioner that his office was currently engaged in the final stages of work on a new plan, which he hoped would cover a longer time-frame. Although it was not specified when the new plan would be ready or what its scope would be, the Plenipotentiary clarified that the old plan remained in force and continued to apply in spite of its expiry. It was acknowledged that despite the generally high level of education of women, their position in the labour market was often limited by maternity leaves and the resulting breaks in retirement contribution periods. While Poland does not currently have in place specific programmes aimed at improving the situation of women, the Plenipotentiary highlighted the government’s social policy measures such as the “Rodzina 500+” family benefits, as well as measures designed to improve active fatherhood and nursing care for children under the age of 3. Moreover, in 2018, the Ministry of Family, Labour and Social Policy developed a free-of-charge computer application named „Equal salaries” designed to allow companies to assess the gender pay gap against a number of factors with a view to helping them improve their pay policies and balance salary scales.
96. During her meetings with the municipal authorities in Gdańsk, the Commissioner learned in more detail about that city’s “Model for Equal Treatment”, a pioneering local government policy document containing 175 recommendations in six key areas. In the area of gender equality, the Model strives to promote the equal and active participation of women and men in public life and their equal treatment in all family, cultural, social and professional roles. It also introduces the principle of balanced representation in all municipal decision-making and advisory bodies, as well as the introduction of equal treatment and anti-discrimination clauses in the city’s public orders and contracts. The Model promotes motherhood and fatherhood equally, plans social campaigns combating the stereotype that care is the main task of women, and foresees increasing the availability of nursery places and funding for NGOs involved in the advancement of gender equality. Originally conceived by the city’s late mayor, the work on the Model has been coordinated by Gdańsk’s Equal Treatment Council with the participation of experts and representatives of over one hundred civil society organisations, schools, counselling services and institutions active in the areas of equal treatment, antidiscrimination, human rights and women’s rights. Developed in participatory fashion between September 2017 and May 2018, the Model was subjected to public consultations through on-line questionnaires, meetings and workshops held from April to June 2018, and voted through by the Gdańsk city council in June 2018. Although it has been legally challenged by the centrally-appointed regional governor (*wojewoda*), in December 2018 the local administrative court found that the Model had been lawfully adopted, specifying that the city was entitled to implement social policies which support equality and anti-discrimination. The court also dismissed similar legal challenges filed by two private individuals as well as the conservative institute “Ordo Iuris”. In addition to its Model, Gdańsk has also adopted a “Diversity charter”, a document binding on the city hall and the municipal welfare office, which will inform the city’s review of equality of pay, benefits, and other treatment.

2.2.4 CONCLUSIONS AND RECOMMENDATIONS

97. Though the situation varies depending on the sector, the Commissioner notes with satisfaction the fact that Poland’s average gender pay gap is among the lowest in the European Union and encourages the authorities to take steps towards its full elimination. The Commissioner took note of the authorities’ assertion that the national action plan on gender equality which expired in 2016 continued to apply in the absence of a new

⁶⁹ Council of Europe, Gender Equality Commission, “Balanced Participation of Men and Women in Decision Making, Analytical Report, 2016 Data”, September 2017, available at <https://rm.coe.int/analytical-report-data-2016-/1680751a3e>, p. 76. See also, OHCHR. UN Independent expert group quoted above, end of mission [statement](#).

⁷⁰ The text of the National Action Plan (in Polish) can be consulted at: https://eige.europa.eu/sites/default/files/documents/krajowy_program_dzialan_na_rzecz_rownego_traktowania_przyjety_na_rm_10.12.13.pdf

one. However, this may not be well-known throughout government entities and in the civil society. Therefore, she urges the Polish authorities to make public the evaluation of the old plan and to draw up, as a matter of priority, a new national action plan in close consultation with all relevant actors, including experienced women's rights organisations.

98. After a visit in Poland in December 2018, the United Nations Working Group on the issue of discrimination against women in law and in practice recommended addressing women's structural disadvantage through the adoption of specific measures, including temporary special measures.⁷¹ The Commissioner encourages the authorities to consider adopting dedicated programmes to further the advancement of women, which should be reflected in their representation at senior and mid-level positions in the public sector, as well as to facilitate women's access to, or reintegration in, the labour market. Moreover, she invites the Polish authorities to take measures to prevent and combat sexism and its manifestations in the public and private spheres, including by implementing legislation, policies and programmes, drawing on [Recommendation CM/Rec\(2019\)1](#) adopted by the Committee of Ministers of the Council of Europe on 27 March 2019 on Preventing and Combating Sexism.
99. The Commissioner welcomes the significant increases in government funding for public childcare in recent years, as well as in the number of places available in public childcare facilities. She encourages the authorities at central and local level to pursue this approach and to further increase the availability of public childcare while promoting the use of parental leave by fathers.
100. In terms of women's political participation, the Commissioner invites the Polish authorities to consider introducing a system of alternating women and men on electoral lists (via a so-called "slide" or "zip" system), as recommended by the CEDAW in 2014,⁷² or to supplement the current gender quota with additional regulations which would provide an incentive to political parties to accord higher places on party candidate lists to female candidates for all elections. Further, the Commissioner invites the authorities to promote female candidates in elections to the Senate.
101. During her visit to Gdańsk, the Commissioner was positively impressed with that city's "Model for Equal Treatment" and the specific measures and activities through which the city intends to further advance gender equality and combat gender discrimination and the gender pay gap. She considers the Model and the participatory and consultative way in which that policy has been developed to exemplify best practices which would be well worth applying by other authorities, both at the central and the local level.

2.3 VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

2.3.1 PREVALENCE

102. In 2018, the Polish police recorded 159,297 cases of domestic violence in Poland – 6,473 fewer than in 2017 – of which 75,555 concerned psychological violence and 57,580 physical violence. Statistics for the same year showed that 91.38% of the alleged perpetrators of domestic violence were men, whereas almost 88% of the alleged victims were women and children (73.82% and 14.07%, respectively). The police attributed the falling trend largely to successful preventive action, including internal training and information seminars for regional police coordinators and police schools – organised jointly with experienced NGOs – as well as a number of public social campaigns. However, according to estimates of a reputable women's rights NGO, up to 400-500 women still lose their life each year as a result of domestic violence, including cases of murder, manslaughter, beating resulting in the death of a person, and suicide.⁷³ More conservative estimates place the number of deaths related to domestic violence at 150 women and 40 children each year. The responses to one NGO's survey revealed that sexual violence affected more than 87% Polish women, and that only 9% of those surveyed aged 15 and more had never experienced any sexual violence.

⁷¹ OHCHR. UN Independent expert group quoted above, end of mission [statement](#). 13 December 2018.

⁷² UN Committee on the Elimination of Discrimination against Women (CEDAW), Concluding observations on the combined seventh and eighth periodic reports of Poland, 14 November 2014, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhss1YTn0qfX85YJz37palgUDMqiQVDHTiC1dPPiql%2btP03rJuzPkCAhCaOGs6XiC6Qi8FipDor8zstA3lnJkCCxG3c1wLsW6gLyUjEW%2fAwvF>

⁷³ Gazeta Wyborcza, 4 February 2019, available (in Polish) at <http://wyborcza.pl/duzyformat/7,127290,24419058,panstwo-chroni-swieta-rodzine-w-polsce-ginie-400-500-kobiet.html>

103. According to the violence against women survey conducted by the European Union's Fundamental Rights Agency (FRA), 19 % of Polish women aged 18-74 have experienced physical and/or sexual violence by an intimate partner or by another person since the age of 15.⁷⁴ Based on the survey results and Eurostat population statistics, this figure corresponds to over 2.7 million women who have at some point experienced physical or sexual violence. While it should be noted that this ratio appears low when compared, for instance, with the EU-wide 33 %, the survey findings should be further contextualised using the results of the 2016 Eurobarometer survey on gender-based violence, which showed that 21 % of respondents in Poland think that domestic violence is a private matter and should be handled within the family (as compared to 15 % in the EU-28 as a whole) and according to which 28 % of respondents in Poland think that violence against women is often provoked by the victim (compared to 17 % in the EU-28).⁷⁵ This can also partly be explained by other factors, such as a lack of readiness by women to report different forms of violence.
104. The obvious and irreparable consequence of domestic violence is the harm done to the victims' health or the loss of life, but its costs do not stop there. The European Union's EIGE assessed that domestic violence in Poland deprived the country of an estimated EUR 17 billion per year in terms of lost economic output, service utilisation, and pain and suffering of the victims.⁷⁶

2.3.2 POLAND'S LEGISLATIVE FRAMEWORK AND ITS PRACTICAL APPLICATION

105. The 2010 amendments to the 2005 Act on Counteracting Domestic Violence significantly improved the legal framework by creating inter-disciplinary expert teams comprising social workers, police and probation officers, tasked with drawing up individual assistance plans for victims. However, there seem to have been some downsides, as an evaluation report compiled by the Polish National Audit Chamber in 2013 found that the new legislation increased the average response time to an average of 2-3 months and in some cases even up to half a year.⁷⁷ The audit report also criticised the modalities for hearing victims before the inter-disciplinary teams, sometimes in the presence of up to a dozen persons, finding this practice to be often doubly traumatising for them. A follow up audit report released in 2016 estimated that about three-quarters of all victims of domestic violence refrained from seeking help.⁷⁸ The report highlighted further problems with the new arrangements and regretted the limited possibilities for isolating perpetrators of violence from victims. It also revealed a lack of effectiveness in ensuring that perpetrators cooperate with the inter-disciplinary teams.
106. Representatives of NGOs indicated to the Commissioner that despite guidelines recommending judicious use of mediation, law enforcement officials and courts continued to rely excessively on mediation efforts. NGOs further complained about a large proportion of proceedings concerning domestic violence being discontinued by the prosecution service and about inadequate punishment for perpetrators, with a clear majority of penalties being non-custodial or suspended sentences, as also acknowledged by the authorities in the context of the 2016 country visit of the Commissioner's predecessor.
107. According to the figures provided to the Commissioner by the Ministry of Justice, in 2018 the prosecution service conducted 48,473 investigations dealing with cases of domestic violence, filing 12,510 bills of indictment; it discontinued the proceedings in 14,740 cases, and decided not to open them in 13,983 cases. As regards court convictions under section 207 of the Polish Criminal Code, their numbers have been falling since 2004, reaching 10,031 in 2017 (down from 17,158 in 2004). Most custodial sentences pronounced have been, indeed, suspended (almost 69% of sentences in 2017). However, other types of penalty, such as community sentences (*ograniczenie wolności*) or fines, were almost never suspended (7% of cases in 2015 and just 0,1% in 2017).

⁷⁴ European Union's Fundamental Rights Agency. Violence against women: an EU-wide survey. Main results report, March 2014, available at <https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>

⁷⁵ Special Eurobarometer 449, November 2016, available at

<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/75837>

⁷⁶ Gender Equality Index 2017:Poland, European Institute for Gender Equality (EIGE),

https://eige.europa.eu/sites/default/files/documents/20181367_mh0218186enn_pdf_pl.pdf See also, "Estimating the costs of gender-based violence in the European Union", EIGE, Publications Office of the European Union, Luxembourg, 2014, p. 142, <http://eige.europa.eu/sites/default/files/documents/MH0414745EN2.pdf>

⁷⁷ The National Audit Chamber's 2013 report is available (in Polish) at <https://www.nik.gov.pl/plik/id,5094,vp,6609.pdf>

⁷⁸ Available (in Polish) at <https://www.nik.gov.pl/plik/id,10943,vp,13290.pdf>

108. Some experts and NGO representatives have expressed concerns that attempts had been made by some public officials to minimise the problem of domestic violence, presenting it as a feature of informal relationships rather than married couples. In a [letter](#) addressed in early 2018 to the new Polish Prime Minister, more than a hundred women's rights NGOs, experts and activists quoted from official government reports and academic research showing that about 50% of victims of domestic violence were in formal relationships as opposed to informal ones (14%).⁷⁹ The NGOs further pointed out to certain controversies surrounding the issue of the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention). In a public interview given in 2017, the President of the Republic was quoted as saying that the Istanbul Convention "*ought not to be applied*" in Poland, as he considered the existing regulations on domestic violence to be fully functional and that there was no need for Poland to undertake any further commitments in this regard. On this topic, the officials of the Chancellery of the President of the Republic stressed to the Commissioner that the Istanbul Convention was indeed being "implemented and operationalised". The officials further pointed out that the President's legislative initiatives had led to better access to free legal aid for persons in difficult economic situations, including many women, and also contributed to raising criminal penalties for crimes committed against minors or involving the abuse of positions of power.
109. The Commissioner's attention was drawn to the decision taken by local authorities in the town of Zakopane in southern Poland, to the effect that they would not apply some of the provisions of the Act on Counteracting Domestic Violence, and in particular not to convene an inter-disciplinary expert team required by that Act.⁸⁰ The Deputy Prime Minister (former Prime Minister) reportedly praised the authorities of Zakopane for their "courage" in a public speech delivered in May 2018. In their meeting with the Commissioner, the Undersecretary of State in the Ministry of Family, Labour and Social Policy and the Government Plenipotentiary for Civil Society and Equal Treatment confirmed that the local authorities in Zakopane had not yet established the body required by the Law on Counteracting Domestic Violence, despite repeated intercessions by their respective offices, but maintained that victims of domestic violence in the municipality were nonetheless adequately protected.
110. Since 2018, the Ministry of Family, Labour and Social Policy has undertaken further revision of the legislation on domestic violence. A preliminary draft published on 31 December 2018 on the government's draft legislation portal reportedly proposed to redefine domestic violence to exclude cases of first-time spousal abuse, to provide alleged perpetrators with easier access to the case files – including the victims' testimonies – and to make the initiation of criminal proceedings dependent on the victim's consent. Following protests by the civil society and in the social media, the bill was promptly withdrawn. The Ministry subsequently clarified that the draft had been published prematurely and denied plans to exclude survivors of first-time violence from the protection of the law. The Undersecretary of State in the Ministry of Family, Labour and Social Policy responsible for the controversial bill resigned.
111. In her meeting with the new Undersecretary of State in the Ministry of Family, Labour and Social Policy, the Commissioner was informed that no further legislation action would be undertaken until the parliamentary elections, scheduled for autumn 2019. Meanwhile, the authorities planned to continue working on the basis of existing legislation and Poland's current National Programme for Combating Domestic Violence for the years 2014-2020,⁸¹ including through preventive measures, research on the causes of the phenomenon, assistance projects, and awareness-raising. The Commissioner understands that the funding currently earmarked for the implementation of the activities of the plan has increased from PLN 18 926 000 in 2016 to PLN 23 356 000 (approx. EUR 5,450,000) in 2019.

⁷⁹ NGOs' letter to the Polish Prime Minister, 6 January 2018, available (in Polish) at <http://www.niebieskalinia.pl/attachments/article/6158/List-do-Pana-Premiera-Mateusza-Morawieckiego-dot.-przemocy-w-rodzynie.pdf>

⁸⁰ Most recently on 13 March 2019. See the Polish Ombudsman's reaction and the response of the Ministry of Family, Labour and Social Policy, promising an intercession with the regional governor, available (in Polish) at <https://www.rpo.gov.pl/pl/content/mrpips-chce-by-zakopane-chronilo-ofiary-przemocy-domowej-resort-odpowiada-rpo>

⁸¹ Available (in Polish) at https://www.ms.gov.pl/Data/Files/_public/ppwr/krajowy_program/krajowy-program-przeciwdzialania-przemocy-w-rodzynie-na-lata-2014-2020.pdf

2.3.3 SHELTERS FOR VICTIMS AND RESTRAINING ORDERS FOR ALLEGED PERPETRATORS

112. Thirty-six government-financed (but often NGO-operated) shelter homes specifically designed to offer assistance to victims of domestic violence currently exist in Poland; the opening of an additional shelter has been planned for 2019. In 2018, the shelters jointly provided assistance to 8,558 persons. The annual budget earmarked by the Ministry of Family, Labour and Social Policy for the activity of these structures amounts to PLN 14 million (ca. EUR 3,25 million). In terms of geographical distribution, Podkarpackie, with its four shelters, as well as Śląskie, Mazowieckie, and Warmińsko-Mazurskie (3 homes each) are the regions with the best availability of shelters for victims of domestic violence. In some other regions, however, shelters are scarce, and women may have to travel up to several hundred kilometres to the nearest shelter. Certain homes designed specifically for women fleeing situations of domestic violence are located away from urban areas, providing adequate protection but contributing to the residents' isolation by hampering their access to work or their children's schooling. In its 2016 concluding observations, the UN Human Rights Committee criticised Poland for the insufficient number of emergency shelters and specialised assistance centres.⁸² Some regions, e.g. Świętokrzyskie or Dolnośląskie, have just one or two shelters, and in 2017 some of them provided assistance to a very high number of people (1,570 in Świętokrzyskie and 1,490 in Dolnośląskie). For some victims, low or no earnings make it difficult to seek alternatives to shelters.
113. In addition to shelters dedicated specifically to victims of domestic violence, other kinds of institutions which provide some type of assistance exist at the communal and district (municipality) level. In 2017, these included 520 consultation points, 212 crisis intervention centres, 20 support centres and 13 homes for mothers with small children and pregnant women. However, these facilities are not tailored to the specific needs of victims of domestic violence, but are rather homes for victims of criminal acts in general (men and women alike) or provide accommodation to persons in difficult life situations.⁸³ Moreover, in 2017 roughly half of all regions lacked either a support centre⁸⁴ or a home for mothers with small children and pregnant women.⁸⁵
114. During her visit, the Commissioner visited a shelter for victims of domestic violence and their children, operated in Warsaw by an experienced non-governmental organisation which also offers counselling service and other assistance to victims. She met several women accommodated in the shelter, of different ages, backgrounds and walks of life, some with children. They had been exposed to a variety of situations of domestic or intimate-partner violence, of a psychological, physical or sexual nature. In one case, a young woman had been raped by a man in a position of authority, and was pregnant as a result. One woman was in the shelter for a second time after experiencing violence inflicted by a different partner. Although the people in the shelter had experienced different situations that were deeply traumatising, they were united in their praise for the support they were receiving and for the welcoming atmosphere provided by the NGO and its members. The Commissioner found that the women displayed great resilience in the face of their plight, and considerable strength in recovering from abuse and getting on a path towards self-reliance.
115. While the 2005 Act on Countering Domestic Violence had introduced court-issued restraining orders, in his [2007 memorandum](#), the then Commissioner noted NGOs' concerns about the relatively rare application of such orders. Restraining orders can also be imposed by the prosecutor after the formal opening of criminal proceedings. Despite later amendments of the law and the requirement introduced by Article 53 of the Istanbul Convention, Polish legislation currently does not foresee the possibility for the intervening police to issue an immediate, temporary restraining order which would be available irrespective of legal proceedings, enjoining the alleged perpetrator to stay away and refrain from approaching the victim. In her meeting with the police, the Commissioner was told that the standard police practice with regard to cases of domestic violence was to isolate the alleged perpetrator whenever justified by the circumstances and to request the prosecution service to issue a restraining order, or to petition the court to have the individual detained on

⁸² Human Rights Committee, Concluding observations, 2016, quoted above, in paras 19-20.

⁸³ See paragraphs 156-7 of the Commissioner's 2016 [report](#) on Poland, which noted that many such structures could not constitute solutions adapted to the specific assistance and protection needs of women traumatised by domestic violence, and were often unfit for this purpose because of short limits on the duration of stay, their remote location, or the lack of accessible medical assistance.

⁸⁴ For instance, in 2017 the regions of Kujawsko-Pomorskie, Lubelskie, Lubuskie, Małopolskie, Podlaskie, and Świętokrzyskie had no support centres (*ośrodki wsparcia*).

⁸⁵ For instance, in 2017 the regions of Dolnośląskie, Kujawsko-Pomorskie, Lubelskie, Małopolskie, Opolskie, Podlaskie, and Wielkopolskie had no homes for mothers with small children and pregnant women.

remand. However, the number of such arrests made by the police in 2018 was 16,915, which represented less than 23% of all alleged perpetrators. The Commissioner notes that the maximum duration of such temporary arrest by the police is 48 hours (before bringing the alleged perpetrator to a court), with an additional 24 hours for the court to rule on the person's detention on remand or their release. It would appear that the number of restraining orders issued by the prosecution service in cases of domestic violence – in the form of a prosecutor's injunction forbidding a person to approach a victim, subject to police oversight – has been rising steadily in recent years, from 2,633 in 2014 to 4,403 in 2018. In the course of any criminal proceedings instituted, the victim is also entitled to request a court to issue a restraining order; however, according to the estimate of the Polish Ombudsman's Office,⁸⁶ the average waiting time for the examination of such a request by the court amounts to 153 days, during which time there is a risk of repeated victimisation. In cases where a victim chooses not to have criminal proceedings initiated against the perpetrator, the protective measures available in law are even more limited.

116. The Ministry of Justice informed the Commissioner that draft amendments to the Polish Civil Procedure Code have recently been drawn up with the aim of increasing the efficiency and speed of proceedings in cases involving injunctions ordering alleged perpetrators of violence to vacate accommodation occupied jointly with the victims and refrain from approaching the premises and their immediate surroundings. The draft legislation also would introduce time limits for the court to rule on the victim's request, make the court order immediately enforceable, simplify certain elements of the procedure and exempt victims from court fees. Another proposed provision would authorise the police to issue an immediate injunction ordering an alleged perpetrator to vacate jointly occupied accommodation and banning them from approaching the premises and its immediate surroundings. Non-compliance with police or court-ordered injunctions would be penalised as a minor offence. The Commissioner recalls that similar proposals had been put forward by the Polish Ombudsman in December 2015.

2.3.4 WITHDRAWAL OF FUNDING FROM AND POLICE SEARCHES OF WOMEN'S RIGHTS ORGANISATIONS

117. Several experienced organisations helping victims of domestic violence informed the Commissioner that they were no longer able to access central government funding or had seen that funding significantly reduced in recent years. According to them, such refusals of funding began in early 2016 and had at first been justified by the supposedly "discriminatory" approach of the NGOs concerned, in that they offered counselling and shelter services solely, or predominantly, to women. Although this justification apparently no longer accompanied refusals of funding, experienced women's rights NGOs complained to the Commissioner that their applications for public funding routinely failed to qualify for funding made available through official tenders, and that such funding tended to be awarded to less experienced – and often recently created – NGOs. Although in some cases, local governments, like Gdańsk or Warsaw, have stepped in to fill - at least partly - this funding gap, alternative funding was often project-based, and short-term and unstable as a result.⁸⁷
118. At their meeting with the Commissioner, Ministry of Justice officials dismissed the above reports, although they confirmed that some NGOs may have been successful in obtaining Ministry funding in a given year but not in another. Regarding central government funding, the Ministry's current plans are to replace the current annual grant funding mechanism by longer, three-year plans, which they argue would allow for longer-term and more reliable funding, as well as to increase the means available to victims through the Ministry's "Justice Fund" (formerly known as the "Fund for Assistance to Victims and Post-Penitentiary Assistance").
119. In early October 2017, the police searched the offices of several non-governmental organisations providing assistance to victims of domestic violence in four Polish cities, confiscating their computers and documentation containing private information about the victims. The Commissioner was told that the searches had been dictated by the need to recover information about the funding previously granted to those NGOs by the Ministry of Justice. The searches were widely mediatised, in a manner which cast aspersions on the integrity and professionalism of the organisations concerned. The Polish Ombudsman warned of a

⁸⁶ Available (in Polish) at <https://www.rpo.gov.pl/pl/content/rpo-do-premiera-propozycje-zmian-przemoc-w-rodzinie>

⁸⁷ A detailed account of the various cases of withdrawal of public funding can be found in: Human Rights Watch, "The Breath of the Government on My Back. Attacks on Women's Rights in Poland", report, February 2019, on pp. 37-53, available at <https://www.hrw.org/report/2019/02/06/breath-government-my-back/attacks-womens-rights-poland>

possible ‘chilling effect’ of those measures; moreover, it is unclear what has been the outcome of those proceedings or whether any charges have been brought in this connection.

2.3.5 CONCLUSIONS AND RECOMMENDATIONS

120. The Commissioner welcomes the Polish authorities’ stated commitment to combating domestic violence, including as expressed by the Prime Minister when proclaiming his government’s priorities. She also commends Poland for having ratified the Istanbul Convention in April 2015.
121. The Commissioner notes that in ratifying the Convention, Poland declared that it would apply its provisions in accordance with the principles and provisions of its Constitution. She notes that this has led to a number of objections from several other member States, which interpreted the declaration to constitute a reservation potentially limiting the Convention’s application.⁸⁸ Noting that this has raised doubts as to Poland’s commitment to the object and purpose of the Convention and recalling that the Convention, in principle, does not allow reservations, the Commissioner invites Poland to consider withdrawing its declaration.
122. The Commissioner urges the Polish authorities to take steps towards the practical and effective application of the Istanbul Convention. In light of reports that one of Poland’s municipalities continues not to apply certain provisions of the country’s legislation on combating domestic violence, despite repeated interventions from the central government, the Commissioner encourages the authorities to ensure the coherent application of the existing legislation on domestic violence across the entire country, so that all victims can effectively access the same level of assistance and protection that they are entitled to by law in every territorial entity.
123. The Commissioner encourages the authorities to take further steps to increase the availability of shelters for women victims of domestic violence. The Istanbul Convention calls for safe accommodation in specialised women’s shelters to be made available in every region, recommending one family place per 10,000 inhabitants.⁸⁹ The Commissioner also recommends that the authorities ensure the sufficient availability and quality of shelter places specifically designed to house women victims of violence and their children in locations that facilitate their continued access to the labour market and education while ensuring their safety.
124. The Commissioner notes with satisfaction the increase in the number of restraining orders imposed by the prosecution service on alleged perpetrators of domestic violence in recent years. She encourages the authorities to ensure the prompt examination by courts of victims’ requests for restraining orders, and to introduce in law and in practice the possibility for the police to issue immediately enforceable injunctions ordering alleged perpetrators of domestic violence to vacate jointly occupied accommodation and prevent them from approaching the victim as well as the accommodation and its immediate surroundings.
125. The Commissioner is concerned that the abrupt and/or unexplained interruption of access to central government funding which affected several well established and reputable women’s rights organisations has led these to limit the scope of their activities, close offices, increase reliance on volunteer or *pro bono* work, and increase the average waiting time for victims to obtain counselling or therapeutic support. She is also concerned by police searches of the premises of several women’s rights NGOs carried out in October 2017, and the confiscation of their equipment. The Commissioner stresses that civil society organisations are often the main – if not the sole – providers of assistance to victims of domestic violence, and she would like to pay tribute to their commitment and dedication. She calls on the Polish authorities to create and maintain safe and favourable conditions for the activities of such organisations, as well as to ensure their unhindered and stable access to public funding.
126. The Commissioner recalls that domestic violence is a phenomenon that affects people of all walks of life. She invites the authorities to take steps to increase public awareness about domestic violence and to do more to identify and promote champions of women’s rights and gender equality. She also encourages all politicians and opinion-makers to give vocal support to the advancement of women’s rights, gender equality, and the fight against domestic violence.

⁸⁸ See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=GtypQ6L4

⁸⁹ [Explanatory Report](#) to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 2011, paragraph 135.