



Resolution 2316 (2020)¹

The functioning of democratic institutions in Poland

Parliamentary Assembly

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

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

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

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

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

6. The constitutional crisis that ensued over the composition of the Constitutional Court remains of concern and should be resolved. No democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court. The full and unconditional implementation of all Constitutional Court decisions by the authorities, including with regard to the composition

1. *Assembly debate* on 28 January 2020 (3rd and 4th Sitzings) (see [Doc. 15025](#) and [addendum](#), report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Ms Azadeh Rojhan Gustafsson and Mr Pieter Omtzigt). *Text adopted by the Assembly* on 28 January 2020 (4th Sitting).



of the Constitutional Court itself, should be the cornerstone of the resolution of the crisis. The restoration of the legality of the composition of the Constitutional Court, in line with European standards, is essential and should be a priority. The Assembly is especially concerned about the potential impact of the Constitutional Court's apparently illegal composition on Poland's obligations under the European Convention on Human Rights (ETS No. 5).

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

7.1. the reform of the Public Prosecutor's Office, the Assembly considers that the merger of the posts of Minister of Justice and Prosecutor General in the same person, and the extensive discretionary powers over the prosecution service and the actual prosecution of individual cases given to the Minister of Justice, undermine the impartiality and independence of the prosecution service and make it vulnerable to politicisation and abuse. The Assembly considers that these two functions need to be separated urgently and that sufficient safeguards against abuse and politicisation of the prosecution service need to be introduced in the law. It calls upon the Polish authorities to do so as a matter of priority;

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

7.3. the reform of the common courts, the Assembly is deeply concerned about the excessive and discretionary powers over the justice system and judiciary conferred on the Minister of Justice, including with regard to the appointment and dismissal of court presidents, disciplinary proceedings against judges and the internal organisation of the courts. This is compounded by the equally excessive powers given to the Minister of Justice as Prosecutor General and the absence of a counterbalance by a genuinely independent National Council of the Judiciary. These powers need to be reduced and proper legal checks and balances need to be introduced in the relevant legislation;

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

8. The Assembly takes note of the ruling by the Polish Supreme Court of 5 December 2019, issued on the basis of the guidelines contained in the judgment of the Court of Justice of the European Union of 19 November 2019, that the National Council of the Judiciary cannot be considered an impartial and independent body, and that the new disciplinary chamber of the Supreme Court cannot be considered to be a court within the meaning of European and Polish law. The Assembly also takes note of the Supreme Court's resolution of 23 January 2020, which states that any judges appointed by the National Council of the Judiciary are not authorised to adjudicate. The Assembly is deeply concerned by the Polish Government's reaction to

the resolution, which it considers to be unlawful. It calls upon the Polish authorities to fully abide by the judgment and resolution and to address without further delay these fundamental shortcomings in the Polish legal system.

9. The Assembly expresses its deep concern about the draft amendments to the Law on the Common Courts, the Law on the Supreme Court and some other laws of the Republic of Poland, as adopted by the Sejm on 23 January 2020, despite their rejection by the Polish Senate on 17 January 2020 and the very critical assessment of these amendments by the Venice Commission. It regrets that these amendments were considered under an accelerated procedure without any consultation with the main stakeholders or civil society. The Assembly welcomes and supports the opinion of the Venice Commission on these amendments. The Assembly considers that adoption of these amendments further deteriorates the independence of the judiciary and respect for the rule of law in Poland and runs counter to the country's obligations under international law, including its obligations deriving from membership of the Council of Europe. In addition, these amendments are at odds with Articles 6 and 10 of the European Convention on Human Rights. The Assembly therefore urges President Duda not to sign these amendments into law and calls upon the authorities to fully respect the judgment of the Polish Supreme Court of 23 January 2020, as well as judgments of the international tribunals they are party to, including those of the Court of Justice of the European Union. The Assembly further calls upon the Polish authorities to promptly address the shortcomings and deficiencies of the justice system highlighted in, *inter alia*, this Resolution.

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

11. The Assembly deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland. It reiterates its concern that the political control of the Minister of Justice over the initiation and conduct of these proceedings does not provide the required safeguard against their abuse. The very high number of investigations opened against judges and prosecutors, on subjective grounds, which are subsequently neither formally ended nor result in the start of formal proceedings, deprive the judges and prosecutors concerned of their right to defence and have a chilling effect on the judiciary. This therefore undermines its independence. The credible reports that disciplinary investigations have been opened against judges and prosecutors solely for being critical of the justice reforms, and the fact that disciplinary investigations have been opened against judges as a result of decisions they have taken when adjudicating cases in their courts, needs to be condemned. In this context, the credible reports that a politically motivated smear campaign was organised against members of the judiciary by, and with the involvement of, high ranking officials in the Ministry of Justice and National Council of the Judiciary, are both deplorable and concerning; this undermines both the independence of, and the public trust in, the judiciary. The organisation of these smear campaigns needs to be fully investigated and those responsible identified. It is clear that an investigation by the prosecution service under direct control of the Minister of Justice, which is also a potential party to the investigation, would lack the required independence and credibility. The Assembly therefore calls upon the Polish authorities to establish, at the earliest opportunity, but no later than 31 March 2020, an independent public inquiry into these smear campaigns and those responsible for them.

12. The Assembly notes that the concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, directly affect Europe as a whole. These questions about the independence of the justice system and the respect for the rule of law are therefore not to be considered as internal issues for Poland. The Assembly calls upon all Council of Europe member States to ensure that the courts under their jurisdiction ascertain, in all relevant criminal cases – including with regard to European arrest warrants – as well as in relevant civil cases, whether fair legal proceedings, in the sense of Article 6 of the European Convention on Human Rights, can be guaranteed for defendants in Poland.

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

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

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

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

17. The legal reforms and their detrimental effects on the rule of law in Poland have an overall negative effect on the effective functioning of democratic institutions in Poland. Regrettably, there are no indications that this issue will soon be resolved. The Assembly therefore resolves to continue to closely follow the developments with regard to the functioning of democratic institutions and the rule of law in Poland. The Assembly therefore decides to open the monitoring procedure in the respect of Poland until the above-mentioned concerns are addressed in a satisfactory manner.